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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 25 and 195

[Docket ID OCC–2011–0027]

RIN 1557–AD60

FEDERAL RESERVE SYSTEM

12 CFR Part 228
[Regulation BB; Docket No. R–1437]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 345

RIN 3064–AD90

Community Reinvestment Act Regulations

AGENCIES: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

ACTION: Joint final rule; technical amendment.

SUMMARY: The OCC, the Board, and the FDIC (collectively, the ''agencies'') are amending their Community Reinvestment Act (CRA) regulations to adjust the asset-size thresholds used to define ''small bank'' or ''small savings association'' and ''intermediate small bank'' or ''intermediate small savings association.'' As required by the CRA regulations, the adjustment to the threshold amount is based on the annual percentage change in the Consumer Price Index.

DATES: *Effective Date:* January 1, 2012.

FOR FURTHER INFORMATION CONTACT:

OCC: Margaret Hesse, Special Counsel, Community and Consumer Law Division, (202) 874–5750; or Brian Borkowicz, National Bank Examiner, Compliance Policy Division, (202) 874–4428, Office of the Comptroller of the Currency, 250 E Street SW., Washington, DC 20219.

Board: Celeste Anderson, Senior Supervisory Consumer Financial Services Analyst, (202) 452–2677; or Nikita Pastor, Counsel, (202) 452–3667, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

FDIC: Janet R. Gordon, Senior Policy Analyst, Division of Depositor and Consumer Protection, Supervisory Policy Branch, (202) 898–3850; or Susan van den Toorn, Counsel, Legal Division, (202) 898–8707, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Background and Description of the Joint Final Rule

The agencies' CRA regulations establish CRA performance standards for small and intermediate small banks and savings associations. The regulations define small and intermediate small institutions by reference to asset-size criteria expressed in dollar amounts, and they further require the agencies to publish annual adjustments to these dollar figures based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPIW), not seasonally adjusted, for each twelve-month period ending in November, with rounding to the nearest million. 12 CFR 25.12(u)(2), 195.12(u)(2), 228.12(u)(2), and 345.12(u)(2). This adjustment formula was first adopted for CRA purposes by the OCC, Board, and FDIC on August 2, 2005, effective September 1, 2005. 70 FR 44256 (Aug. 2, 2005). As explained in the **SUPPLEMENTARY INFORMATION** section of these agencies' proposed rule, this particular index is used in other federal lending regulations such as the Home Mortgage Disclosure Act (HMDA). 70 FR 12148 (Mar. 22, 2007). See 12 U.S.C. 2808; 12 CFR 203.2(e)(1). On March 22, 2007, and effective July 1, 2007, the Office of Thrift Supervision (OTS), the agency responsible for regulating savings associations, adopted an annual adjustment formula consistent with that of the other federal banking agencies in its CRA rule set forth at 12 CFR 563e. 72 FR 13429. Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[1] and effective July 21, 2011, rulemaking authority for federal and state savings associations was transferred from the OTS to OCC, and the OCC subsequently republished, at 12 CFR 195, the CRA regulations applicable to those institutions.[2] In addition, the Dodd-Frank Act transferred responsibility for supervision of savings and loan holding companies and their non-depository subsidiaries from the OTS to the Board, and the Board subsequently amended its CRA regulation to reflect this transfer of supervision authority.[3]

The threshold for small banks and small savings associations was revised most recently effective January 1, 2011 (75 FR 82217 (Dec. 30, 2010)). The CRA regulations, effective January 1, 2011, provide that banks and savings associations that, as of December 31 of either of the prior two calendar years, had assets of less than $1.122 billion are ''small banks'' or ''small savings associations.'' Small banks and small savings associations with assets of at least $280 million as of December 31 of both of the prior two calendar years and less than $1.122 billion as of December 31 of either of the prior two calendar years are ''intermediate small banks'' or ''intermediate small savings associations.'' 12 CFR 25.12(u)(1), 195.12(u)(1), 228.12(u)(1), and 345.12(u)(1). This joint final rule further revises these thresholds.

During the period ending November 2011, the CPIW increased by 3.43 percent. As a result, the agencies are revising 12 CFR 25.12(u)(1), 195.12(u)(1), 228.12(u)(1), and 345.12(u)(1) to make this annual adjustment. Beginning January 1, 2012, banks and savings associations that, as of December 31 of either of the prior two calendar years, had assets of less than $1.160 billion are ''small banks'' or ''small savings associations.'' Small banks or small savings associations with assets of at least $290 million as of December 31 of both of the prior two calendar years and less than $1.160 billion as of December 31 of either of the

[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] *See* OCC interim final rule, 76 FR 48950 (Aug. 9, 2011).

[3] *See* Board interim final rule, 76 FR 56508 (Sept. 13, 2011).

prior two calendar years are ''intermediate small banks'' or ''intermediate small savings associations.'' The agencies also publish current and historical asset-size thresholds on the Web site of the Federal Financial Institutions Examination Council at *http://www.ffiec.gov/cra/*.

Administrative Procedure Act and Effective Date

Under 5 U.S.C. 553(b)(B) of the Administrative Procedure Act (APA), an agency may, for good cause, find (and incorporate the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

The amendments to the regulations to adjust the asset-size thresholds for small and intermediate small banks and savings associations result from the application of a formula established by a provision in the CRA regulations that the agencies previously published for comment. *See* 70 FR 12148 (Mar. 11, 2005), 70 FR 44256 (Aug. 2, 2005), 71 FR 67826 (Nov. 24, 2006), and 72 FR 13429 (Mar. 22, 2007). Sections 25.12(u)(1), 195.12(u)(1), 228.12(u)(1), and 345.12(u)(1) are amended by adjusting the asset-size thresholds as provided for in §§ 25.12(u)(2), 195.12(u)(2), 228.12(u)(2), and 345.12(u)(2).

Accordingly, since the agencies' rules provide no discretion as to the computation or timing of the revisions to the asset-size criteria, the agencies have determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary.

The effective date of this joint final rule is January 1, 2012. Under 5 U.S.C. 553(d)(3) of the APA, the required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except, among other things, as provided by the agency for good cause found and published with the rule. Because this rule adjusts asset-size thresholds consistent with the procedural requirements of the CRA rules, the agencies conclude that it is not substantive within the meaning of the APA's delayed effective date provision. Moreover, the agencies find that there is good cause for dispensing with the delayed effective date requirement, even if it applied, because their current rules already provide notice that the small and intermediate asset-size thresholds will be adjusted as of December 31 based on twelve-month data as of the end of November each year.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking where a general notice of proposed rulemaking is not required. 5 U.S.C. 603 and 604. As noted previously, the agencies have determined that it is unnecessary to publish a general notice of proposed rulemaking for this joint final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

Paperwork Reduction Act of 1995

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320), the agencies reviewed this final rule. No collections of information pursuant to the Paperwork Reduction Act are contained in the final rule.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that an agency must prepare a budgetary impact statement before promulgating any final rule for which a general notice of proposed rulemaking was published. As discussed above, the agencies have determined that the publication of a general notice of proposed rulemaking is unnecessary. Accordingly, this joint final rule is not subject to section 202 of the Unfunded Mandates Act.

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12 CFR Part 25

Community development, Credit, Investments, National banks, Reporting and recordkeeping requirements.

12 CFR Part 195

Community development, Credit, Investments, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 228

Banks, banking, Community development, Credit, Investments, Reporting and recordkeeping requirements.

12 CFR Part 345

Banks, banking, Community development, Credit, Investments, Reporting and recordkeeping requirements.

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Chapter I

For the reasons discussed in the **SUPPLEMENTARY INFORMATION** section, 12 CFR parts 25 and 195 are amended as follows:

PART 25—COMMUNITY REINVESTMENT ACT AND INTERSTATE DEPOSIT PRODUCTION REGULATIONS

■ 1. The authority citation for part 25 continues to read as follows:

Authority: 12 U.S.C. 21, 22, 26, 27, 30, 36, 93a, 161, 215, 215a, 481, 1814, 1816, 1828(c), 1835a, 2901 through 2908, and 3101 through 3111.

■ 2. Revise § 25.12(u)(1) to read as follows:

§ 25.12 Definitions.

* * * * *

(u) *Small bank*—(1) *Definition. Small bank* means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than $1.160 billion. *Intermediate small bank* means a small bank with assets of at least $290 million as of December 31 of both of the prior two calendar years and less than $1.160 billion as of December 31 of either of the prior two calendar years.

* * * * *

PART 195—COMMUNITY REINVESTMENT

■ 3. The authority citation for part 195 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1814, 1816, 1828(c), 2901 through 2908, and 5412(b)(2)(B).

■ 4. Revise § 195.12(u)(1) to read as follows:

§ 195.12 Definitions.

* * * * *

(u) *Small savings association*—(1) *Definition. Small savings association* means a savings association that, as of December 31 of either of the prior two calendar years, had assets of less than $1.160 billion. *Intermediate small savings association* means a small savings association with assets of at least $290 million as of December 31 of both of the prior two calendar years and less than $1.160 billion as of December 31 of either of the prior two calendar years.

* * * * *

Federal Reserve System

12 CFR Chapter II

For the reasons set forth in the **SUPPLEMENTARY INFORMATION** section, the Board of Governors of the Federal Reserve System amends part 228 of chapter II of title 12 of the Code of Federal Regulations as follows:

PART 228—COMMUNITY REINVESTMENT (REGULATION BB)

■ 1. The authority citation for part 228 continues to read as follows:

Authority: 12 U.S.C. 321, 325, 1828(c), 1842, 1843, 1844, and 2901 *et seq.*

■ 2. Revise § 228.12(u)(1) to read as follows:

§ 228.12 Definitions.

* * * * *

(u) *Small bank*—(1) *Definition. Small bank* means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than $1.160 billion. *Intermediate small bank* means a small bank with assets of at least $290 million as of December 31 of both of the prior two calendar years and less than $1.160 billion as of December 31 of either of the prior two calendar years.

* * * * *

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the **SUPPLEMENTARY INFORMATION** section, the Board of Directors of the Federal Deposit Insurance Corporation amends part 345 of chapter III of title 12 of the Code of Federal Regulations to read as follows:

PART 345—COMMUNITY REINVESTMENT

■ 1. The authority citation for part 345 continues to read as follows:

Authority: 12 U.S.C. 1814–1817, 1819–1820, 1828, 1831u and 2901–2907, 3103–3104, and 3108(a).

2. Revise § 345.12(u)(1) to read as follows:

§ 345.12 Definitions.

* * * * *

(u) *Small bank*—(1) *Definition. Small bank* means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than $1.160 billion. *Intermediate small bank* means a small bank with assets of at least $290 million as of December 31 of both of the prior two calendar years and less than $1.160 billion as of December 31 of either of the prior two calendar years.

* * * * *

Dated: December 13, 2011.

Julie L. Williams,

First Senior Deputy Comptroller and Chief Counsel.

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority, December 16, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

By order of the Board of Directors.

Dated at Washington, DC, this 13th day of December, 2011.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2011–32727 Filed 12–21–11; 8:45 am]

BILLING CODE 4810–33–6210–01–6714–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 704

RIN 3133–AD95

Corporate Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is issuing final amendments to its rule governing corporate credit unions (corporates). The final amendments make technical corrections to and clarify certain provisions of the rule. The amendments: delete the definition of ''daily average net risk-weighted assets''; revise the definition of ''net assets'' to exclude Central Liquidity Facility (CLF) stock subscriptions; clarify certain requirements regarding investment action plans; clarify the weighted average life (WAL) tests; revise the consequences of WAL violations; substitute the term ''core capital'' for the phrase ''the sum of retained earnings and paid-in capital''; correct a section heading; and correct a model form instruction.

DATES: This rule is effective January 23, 2012.

FOR FURTHER INFORMATION CONTACT: Lisa Henderson, Staff Attorney, Office of General Counsel, at (703) 518–6540; or David Shetler, Deputy Director, Office of Corporate Credit Unions, at (703) 518–6640. You may also contact them at the National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION:

A. Background and Specific Amendments
B. Regulatory Procedures

A. Background and Specific Amendments

Why is NCUA adopting this rule?

On August 29, 2011, the NCUA Board (Board) issued a Notice of Proposed Rulemaking (NPRM) containing several amendments to its corporate rule at 12 CFR part 704. 76 FR 54991 (Sept. 6, 2011). NCUA received seven comments on the NPRM, most of which favored the proposed changes. For the reasons discussed below, the NCUA Board is adopting the amendments almost exactly as proposed.

Section 704.2 Definition of ''daily average net risk-weighted assets''

The term ''daily average net risk-weighted assets'' was used in a 2009 proposal to revise part 704, 74 FR 65210, 65261 (Dec. 9, 2009), but not in the 2010 final rule, 75 FR 64786, 64831 (Oct. 20, 2010). The term was mistakenly left in the part 704 definitions section, and the Board proposed deleting it in the NPRM. All of the commenters who addressed the proposed change supported it. Accordingly, the Board is deleting the definition of ''daily average net risk-weighted assets'' from § 704.2.

Section 704.2 Definition of ''net assets''

Section 704.2 defines ''net assets,'' in relevant part, as ''total assets less loans guaranteed by the NCUSIF and member reverse repurchase transactions.'' The NPRM amended the definition to also exclude CLF stock subscriptions, based on the asset's negligible credit risk and to facilitate corporate support of the CLF. Corporate support is essential to the CLF remaining a back-up liquidity provider for natural person credit unions.

One commenter objected to the proposed change, arguing that it would artificially inflate the leverage ratio for corporates. The Board disagrees. CLF stock is in the nature of a pass-through account, and including it in net assets incorrectly overstates a corporate's balance sheet. The commenter also argued that credit unions do not need to obtain liquidity through the CLF, as they can become members of the Federal Home Loan Bank (FHLB) system or access the Federal Reserve System's Discount Window (Discount Window). The Board believes that the CLF provides a critical dimension of additional liquidity coverage for credit unions. Presently, only 4.5 percent of federally insured credit unions report having filed an application to borrow

from the Discount Window, and of those, only 3.3 percent have pre-pledged collateral. Also, many smaller credit unions do not have mortgage assets and would be unlikely to rely on the FHLB system to meet wholesale funding or contingent liquidity needs. The Board therefore adopts in the final rule the revised definition of net assets as proposed.

Section 704.6 Requirements for Investment Action Plans

Sections 704.6(c)(3) and (f)(4) trigger consequences, set forth in § 704.10, for violations of certain concentration limits and credit rating requirements. To clarify the applicability of these triggering provisions, the Board proposed moving them to a new § 704.6(h). Under proposed § 704.6(h), an investment would be subject to the requirements of § 704.10 if it violated any of the concentration limits or credit rating requirements of § 704.6.

The NPRM noted that § 704.6(f)(4)(i) provides that an investment is subject to the requirements of § 704.10 if its credit rating is downgraded, after purchase, ''below the minimum rating requirements of this part.'' It further noted that, pursuant to section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[1] the NCUA Board issued a proposed rule recodifying § 704.6(f)(4)(i) at § 704.6(f)(3)(i) and revising it to state than an investment is subject to § 704.10 if ''[t]here is reason to believe that the obligor no longer has a very strong capacity to meet its financial obligations for the remaining projected life of the security.'' 76 FR 11164, 11171 (Mar. 1, 2011). The NPRM included this proposed language at new § 704.6(h)(1) even though the language was not yet final.

Three commenters objected to including language from the proposed credit ratings rule in this rulemaking. They urged NCUA to wait until the credit ratings rule was final before amending § 704.6(f)(4)(i) as discussed above. The Board agrees. The Board had anticipated that the credit ratings rule would be final by now, but that rule has been delayed. Accordingly, the final rule retains the reference to ''minimum ratings requirement.'' Since no commenters objected to moving the triggering provisions, the Board moves § 704.6(c)(3) and (f)(4) to new § 704.6(h) in the final rule as proposed.

[1] 15 U.S.C. 78o–7 (requiring federal agencies, including NCUA, to review their regulations for any references to using credit ratings to assess the creditworthiness of an investment, remove those references, and substitute other standards of creditworthiness).

Section 704.8 Clarifying the WAL Tests

Sections 704.8(f) and 704.8(g) establish certain WAL limits for corporate loan and investment portfolios. They also require each corporate to test those assets periodically for compliance. NCUA intended to allow corporates to include cash in the WAL calculation and clarified that intent in the NPRM by replacing the phrase ''loan and investment portfolio'' in paragraphs (f) and (g) with the phrase ''financial assets, consisting of cash, investments, and loans.'' All of the commenters who addressed this proposed change supported it, and therefore the Board adopts it in the final rule.

Section 704.8 Consequences of WAL Violations

Section 704.8(j) provides consequences for a corporate's violation of the interest rate sensitivity and WAL conditions of § 704.8(d), (f), and (g). These consequences can include reporting requirements, preparation of a written action plan, and capital category reclassification under § 704.4. To reduce regulatory burden, the Board determined that violations of WAL conditions should not be subject to capital category reclassification and, in the NPRM, proposed exempting such violations from the requirements of § 704.8(j)(2)(ii) and (iii). All of the commenters who addressed this proposed change supported it, and therefore the Board adopts it in the final rule. The Board notes that persistent WAL violations may still trigger the reporting and action plan requirements of § 704.8(j)(1) and (2)(i).

Section 704.18 Fidelity Bond Maximum Deductible

Section 704.18(e)(1) provides a table for corporates to calculate the maximum deductible allowed for fidelity bonds purchased for employees and officials. The maximum deductible is based on a corporate's core capital ratio and a percentage of the sum of its retained earnings and paid-in capital. The 2010 revision to part 704 changed the term ''paid-in capital'' to ''perpetual contributed capital'' but neglected to change the reference in § 704.18. *See* 75 FR 64786 (Oct. 20, 2010).

In the NPRM, the Board proposed changing the phrase ''the sum of its retained earnings and paid-in capital'' to the term ''core capital.'' Section 704.2 defines ''core capital'' primarily as ''the sum of: (1) Retained earnings; (2) Perpetual contributed capital; (3) The retained earnings of any acquired credit union, or of an integrated set of activities and assets, calculated at the point of acquisition, if the acquisition was a mutual combination; and (4) Minority interests in the equity accounts of CUSOs that are fully consolidated.'' The Board proposed this substitution, rather than simply replacing ''paid-in capital'' with ''perpetual contributed capital,'' because the table already requires the calculation of core capital in deriving the core capital ratio. Two commenters stated that ''perpetual contributed capital'' should be the replacement term and that NCUA had not provided enough justification for adding the two additional components of ''core capital.'' The Board notes that adding additional components to the number from which the maximum deductible is derived ultimately raises the maximum deductible, which relieves regulatory burden. Accordingly, the Board adopts the proposed change in the final rule.

Section 704.19 Correction to Section Heading

The 2009 proposed revisions to part 704 added new § 704.19, ''Disclosure of executive and director compensation.'' 74 FR 65210, 65252 (Dec. 9, 2009). The proposal would have required corporates to disclose the compensation of each senior executive officer and director annually. *Id.* at 65275. The 2010 final rule removed the reference to directors in the text of § 704.19, but failed to do so in the heading. *See* 75 FR 64786 (Oct. 20, 2010). In the NPRM, the Board proposed harmonizing the two by removing the words ''and director'' from the heading. All of the commenters who addressed this proposed change supported it, and therefore the Board adopts it in the final rule.

Appendix A, Model Form D

The 2010 final rule included an incorrect date instruction on Model Form D in Appendix A. *Id.* at 64851. Model Form D included introductory text indicating that the form was for use before October 20, 2011, when it should have stated that the form is for use after that date. The Board replaced the word ''before'' with the phrase ''on and after'' in the NPRM. All of the commenters who addressed this proposed change supported it, and therefore the Board adopts it in the final rule.

B. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any proposed regulation may have on a substantial number of small

entities (those under $10 million in assets). This final rule applies only to corporate credit unions, all of which have assets well in excess of $10 million. Accordingly, the final rule will not have a significant economic impact on a substantial number of small credit unions, and a regulatory flexibility analysis is not required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. 44 U.S.C. 3507(d); 5 CFR part 1320. For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. This final rule does not impose any new paperwork burden.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order.

The final rule would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

NCUA has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (1998).

List of Subjects in 12 CFR Part 704

Credit unions, Corporate credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on December 15, 2011.

Mary F. Rupp,

Secretary of the Board.

For the reasons stated above, the National Credit Union Administration amends 12 CFR part 704 as set forth below:

PART 704—CORPORATE CREDIT UNIONS

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

Authority: 12 U.S.C. 1762, 1766(a), 1772a, 1781, 1789, and 1795e.

■ 2. Amend § 704.2 by removing the definition of ''daily average net risk-weighted assets'' and revising the definition of ''net assets'' to read as follows:

§ 704.2 Definitions.

* * * * *

Net assets means total assets less Central Liquidity Facility (CLF) stock subscriptions, loans guaranteed by the NCUSIF, and member reverse repurchase transactions. For its own account, a corporate credit union's payables under reverse repurchase agreements and receivables under repurchase agreements may be netted out if the GAAP conditions for offsetting are met. Also, any amounts deducted from core capital in calculating adjusted core capital are also deducted from net assets.

* * * * *

■ 3. Amend § 704.6 by removing paragraphs (c)(3) and (f)(4) and adding paragraph (h) to read as follows:

§ 704.6 Credit risk management.

* * * * *

(h) Requirements for investment action plans. An investment is subject to the requirements of § 704.10 of this part if:

(1) An NRSRO that rates the investment downgrades that rating, after purchase, below the minimum rating requirements of this part; or

(2) The investment is part of an asset class or group of investments that exceeds the issuer, sector, or subsector concentration limits of this section. For purposes of measurement, each new credit transaction must be evaluated in terms of the corporate credit union's capital at the time of the transaction. An investment that fails a requirement of this section because of a subsequent reduction in capital will be deemed nonconforming. A corporate credit union is required to exercise reasonable efforts to bring nonconforming investments into conformity within 90 calendar days. Investments that remain nonconforming for more than 90 calendar days will be deemed to fail a requirement of this section and the corporate credit union will have to comply with § 704.10 of this part.

■ 4. Amend § 704.8 by:

■ a. Revising the first two sentences in paragraphs (f) and (g); and

■ b. Revising (j)(2)(ii) and (iii).

The revisions read as follows:

§ 704.8 Asset and liability management.

* * * * *

(f) * * * The weighted average life (WAL) of a corporate credit union's financial assets, consisting of cash, investments, and loans, but excluding derivative contracts and equity investments, may not exceed 2 years. A corporate credit union must test its financial assets at least quarterly, including once on the last day of the calendar quarter, for compliance with this WAL limitation. * * *

(g) * * * The weighted average life (WAL) of a corporate credit union's financial assets, consisting of cash, investments, and loans, but excluding derivative contracts and equity investments, may not exceed 2.25 years when prepayment speeds are reduced by 50 percent. A corporate credit union must test its financial assets at least quarterly, including once on the last day of the calendar quarter, for compliance with this WAL limitation. * * *

* * * * *

(j) * * *

(2) * * *

(ii) If presently categorized as adequately capitalized or well capitalized for prompt corrective action purposes, and the violation was of paragraph (d) of this section, immediately be recategorized as undercapitalized until the violation is corrected, and

(iii) If presently categorized as less than adequately capitalized, and the violation was of paragraph (d) of this section, immediately be downgraded one additional capital category.

* * * * *

■ 5. Amend § 704.18 by revising the table in paragraph (e)(1) to read as follows:

§ 704.18 Fidelity bond coverage.

* * * * *

(e) * * *

(1) * * *

Core capital ratio	Maximum deductible
Less than 1.0 percent	7.5 percent of core capital.
1.0–1.74 percent	10.0 percent of core capital.
1.75–2.24 percent	12.0 percent of core capital.
Greater than 2.25 percent.	15.0 percent of core capital.

* * * * *

■ 6. Amend § 704.19 by revising the section heading to read as follows:

§ 704.19 Disclosure of executive compensation.

* * * * *

■ 7. Revise the introductory note in Model Form D, Appendix A to Part 704, to read as follows:

Appendix A to Part 704—Capital Prioritization and Model Forms

* * * * *

Model Form D

* * * * *

Note: This form is for use on and after October 20, 2011, in the circumstances where the corporate credit union has determined that it will give newly issued capital priority over older capital as described in Part I of this Appendix.

* * * * *

[FR Doc. 2011–32721 Filed 12–21–11; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0698]

RIN 1625–AA09

Drawbridge Operation Regulation; New Jersey Intracoastal Waterway (NJICW), Atlantic City, NJ

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is changing the regulations that govern the operations of two New Jersey Department of Transportation (NJDOT) bridges: The Route 30/Absecon Boulevard Bridge across Beach Thorofare, NJICW mile 67.2 and the US 40–322 (Albany Avenue) Bridge across Inside Thorofare, NJICW mile 70.0, both at Atlantic City, NJ. The change will alter the dates that these bridges are allowed to have delayed openings or remain in the closed position to accommodate heavy volumes of vehicular traffic due to the annual July 4th fireworks shows and the annual Air Show at Bader Field.

DATES: This rule is effective January 23, 2012.

ADDRESSES: Comments and related materials received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2011–0698 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0698 in the ''Keyword'' box, and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Regulatory Information

On August 12, 2011, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulation; New Jersey Intracoastal Waterway (NJICW), Atlantic City, NJ in the **Federal Register** (76 FR 50161). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Basis and Purpose

NJDOT has requested a change in the operating regulations of the Route 30/Absecon Boulevard Bridge across Beach Thorofare, NJICW mile 67.2 and the US 40–322 (Albany Avenue) Bridge across Inside Thorofare, NJICW mile 70.0, both at Atlantic City, NJ. The two Atlantic City July 4th fireworks shows and the Air Show at Bader Field are annual events held at Atlantic City and heavy volumes of vehicular traffic transit across both bridges to attend them. This rule allows the above mentioned bridges to remain in the closed position from 9:40 p.m. through 11:15 p.m. on July 4th or on July 5th should inclement weather prevent the fireworks event from taking place as planned. This rule also allows the above mentioned bridges to open every two hours on the hour from 10 a.m. through 4 p.m. and to remain in the closed position from 4 p.m. through 8 p.m. on the third or fourth Wednesday of every August during the annual Air Show at Bader Field. The exact dates of the closures will be published locally in the Local Notice to Mariners and Broadcast Notice to Mariners.

The Route 30/Absecon Boulevard Bridge is a bascule drawbridge with a vertical clearance of 20 feet above mean high water in the closed position and unlimited in the open position. The current operating schedule for the bridge is set out in 33 CFR 117.733(e) and was last amended in April 2009. The operating regulation states that the bridge shall open on signal if at least four hours of notice has been given, except that from April 1 through October 31 the bridge need only open on the hour from 7 a.m. to 11 p.m. The US 40–322 (Albany Avenue Bridge) is a bascule drawbridge with a vertical clearance of 10 feet above mean high water in the closed position and unlimited in the open position. The current operating schedule for the bridge is set out in 33 CFR 117.733(f) and was last amended in April 2009. The current operating regulation states that year-round from 11 p.m. to 7 a.m.; and from November 1 through March 31 from 3 p.m. to 11 p.m. the draw need only open if at least four hours notice is given. In addition from June 1 through September 30 the draw of the bridge need only open on the hour and half hour from 9 a.m. to 4 p.m. and from 6 p.m. to 9 p.m.; and from 4 p.m. to 6 p.m. the draw need not open.

Discussion of Comments and Changes

No comments were received on the proposed rule and no changes were made to the proposed rule.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866. The Office of Management and Budget has not reviewed it under that Order.

The changes are expected to have minimal impacts on mariners due to the short duration that the drawbridges will be maintained in the closed position and have delayed openings. Both events have been observed in past years with little to no impact on marine traffic. Maintaining the bridges in the closed position for these short time periods is also a necessary measure to facilitate public safety that allows for the orderly movement of vehicular traffic before, during, and after the events.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and

governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This action will not have a significant impact on a substantial number of small entities because the rule adds minimal restrictions to the movement of navigation and mariners who plan their transits in accordance with the scheduled bridge closures can minimize delay. Vessels that can safely transit under the bridges may do so at any time.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the NPRM (SNPRM) we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction.

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 117.733, revise paragraph (e) and add paragraphs (f)(3) and (4) to read as follows:

§ 117.733 New Jersey Intracoastal Waterway

* * * * *

(e) The draw of the Route 30 Bridge across Beach Thorofare, mile 67.2 at Atlantic City, shall open on signal if at least four hours of notice is given; except that:

(1) From April 1 through October 31, from 7 a.m. to 11 p.m. the draw need only open on the hour.

(2) On July 4, the draw need not open from 9:40 p.m. until 11:15 p.m. to accommodate the annual July 4th fireworks show. Should inclement weather prevent the fireworks event from taking place as planned, the draw need not open from 9:40 p.m. until 11:15 p.m. on July 5th to accommodate the annual July 4th fireworks show.

(3) On the third or fourth Wednesday of August the draw will open every two hours on the hour from 10 a.m. until 4 p.m. and need not open from 4 p.m. until 8 p.m. to accommodate the annual Air Show.

(f) * * *

(3) On July 4, the draw need not open from 9:40 p.m. until 11:15 p.m. to

accommodate the annual July 4th fireworks show. Should inclement weather prevent the fireworks event from taking place as planned, the draw need not open from 9:40 p.m. until 11:15 p.m. on July 5th to accommodate the annual July 4th fireworks show.

(4) On the third or fourth Wednesday of August, the draw will open every two hours on the hour from 10 a.m. until 4 p.m. and need not open from 4 p.m. until 8 p.m. to accommodate the annual Air Show.

* * * * *

Dated: November 24, 2011.

William D. Lee,

Rear Admiral, United States Coast Guard, Commander, Fifth Coast Guard District.

[FR Doc. 2011–32735 Filed 12–21–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0489]

RIN 1625–AA87

Security Zones; Captain of the Port Lake Michigan; Technical Amendment

AGENCY: Coast Guard, DHS

ACTION: Final rule.

SUMMARY: The Coast Guard is revising the contact information for Security Zones in Sector Lake Michigan. This action is necessary because the telephone number is incorrect as well as the frequency of VHF Channel 16. These corrections will ensure the ability of persons or vessels that wish to request permission to transit these areas.

DATES: This rule is effective December 22, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0489 and are available online by going to *www.regulations.gov*, inserting USCG–2011–0489 in the ''Keyword'' box, and then clicking ''search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, contact or email CWO Jon Grob, U.S. Coast Guard Sector Lake Michigan, at (414) 747–7188 or *Jon.K.Grob@uscg.mil*. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because notice and comment is unnecessary. This rule is minor and merely technical in nature in that it simply amends a telephone number and a radio frequency used for contacting the Captain of the Port Lake Michigan.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register.** Good cause exists because delaying the effective date is unnecessary. This rule is minor and merely technical in nature in that it simply amends a telephone number and a radio frequency that is used for contacting the Captain of the Port Lake Michigan.

Background and Purpose

The Captain of the Port Lake Michigan has previously established a listing of security zones in the Chicago area. These security zones exist in 33 CFR 165.910. Persons desiring to transit the areas of these security zones must contact the Captain of the Port Lake Michigan by either telephone number or via VHF Channel 16. Currently, 33 CFR 165.910 provides an incorrect telephone number as well as an incorrect radio frequency for VHF Channel 16.

Discussion of Rule

The Captain of the Port Lake Michigan is publishing this final rule to correct the telephone number and radio frequency currently published in 33 CFR 165.910 for the Captain of the Port Lake Michigan. This correction is necessary so that the public may contact the appropriate Coast Guard office to receive permission to transit the security zones listed in 33 CFR 165.910.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

The Coast Guard determined that this rule is not a significant regulatory action because it is only a correction of the contact information in the previous rule, not a substantive change of the regulation.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will have no effect on small entities because it is purely minor and technical in nature in that it merely corrects the telephone number and radio frequency for the point of contact for the Captain of the Port Lake Michigan.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by

employees of the Coast Guard, call 1–888–REG–FAIR (1–(888) 734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(a), of the Instruction. This rule involves an editorial revision to a regulation in that it updates a telephone number and a radio frequency, and thus, paragraph (34)(a), of the Instruction applies. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 165.910, revise paragraph (b)(3) to read as follows:

§ 165.910 Security Zones; Captain of the Port Lake Michigan.

* * * * *

(b) * * *

(3) Persons who would like to transit through a security zone in this section must contact the Captain of the Port Lake Michigan at telephone number (414) 747–7182 or on VHF channel 16 (156.8 MHz) to seek permission to transit the area. If permission is granted, all persons and vessels shall comply with the instructions of the Captain of the Port Lake Michigan or his or her designated representative.

* * * * *

Dated: December 2, 2011.

C.W. Tenney,

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

[FR Doc. 2011–32860 Filed 12–21–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0721; FRL–9609–2]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Adhesives and Sealants Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Delaware. The revision adds section 4.0, under Regulation 1141, relating to the control of emissions of volatile organic compounds (VOC) from the manufacture, sale, use, or application of adhesives, sealants, primers, and solvents. EPA is approving this SIP revision to meet the requirements of a reasonably available control technology (RACT) rule for the miscellaneous industrial adhesives control techniques guideline (CTG) category in accordance with the requirements of the Clean Air Act (CAA).

DATES: *Effective date:* This final rule is effective on January 23, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2011–0721. All documents in the docket are listed in the *www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, *i.e.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19901.

FOR FURTHER INFORMATION CONTACT: Gregory Becoat, (215) 814–2036, or by email at *becoat.gregory@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On September 23, 2011 (76 FR 59087), EPA published a notice of proposed rulemaking (NPR) for the State of Delaware. The NPR proposed approval of the Delaware SIP revision that adds section 4.0—Adhesives and Sealants under Regulation 1141—Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products in order to reduce VOCs from commercially-used adhesive and sealant products. The revision is part of Delaware's strategy to achieve and maintain the 8-hour ozone national ambient air quality standard (NAAQS) throughout the State. EPA received no comments on the NPR to approve Delaware's SIP revision. The formal SIP revision was submitted by the State of Delaware on June 9, 2009.

II. Summary of SIP Revision

The new section 4.0 adds regulations that: (1) Set standards for the application of adhesives, sealants, adhesive primers, and sealant primers by providing options for appliers either to use a product with a VOC content equal to or less than a specified limit or to use add-on controls; (2) add definitions and terms for new product categories; (3) establish that any person may not use or apply at the facility an adhesive, sealant, adhesive primer or sealant primer that exceeds the VOC content limits; (4) specify requirements for person of a facility that uses or applies a surface preparation solvent or cleanup solvent or removes an adhesive, sealant, adhesive primer, and sealant primer from the parts of spray application equipment; (5) provide for an alternative add-on control system requirement of at least 85 percent overall control efficiency (capture and destruction), by weight; (6) specify requirements for proper storage and disposal, work practices, surface preparation, and cleanup solvent composition; and (7) specify exemptions, as well as registration and product labeling requirements, recordkeeping requirements, and test methods and compliance procedures. These SIP revisions meet the requirement to adopt a RACT for the miscellaneous industrial adhesives CTG category. Other specific requirements and the rationale for EPA's proposed action are explained in the Technical Support Document (TSD) prepared for the September 23, 2011 proposed rulemaking action which is available on-line at *www.regulations.gov,* Docket number EPA–R03–OAR–2011–0721. No public comments were received on the NPR.

III. Final Action

EPA is approving the Delaware SIP revision that adds section 4.0—Adhesives and Sealants to Regulation 1141—Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products.

IV. Statutory and Executive Order Reviews

A. General Requirements

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement

Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 21, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action approving Delaware's control of VOCs from adhesives and sealants may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: December 8, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart I—Delaware

■ 2. In § 52.420, the table in paragraph (c) is amended by adding an entry for Regulation 1141, Section 4.0 to read as follows:

§ 52.420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE DELAWARE SIP

State regulation (7 DNREC 1100)	Title/subject	State effective date	EPA approval date	Additional explanation
* *	*	*	*	* *
1141	Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products			
* *	*	*	*	* *
Section 4.0	Adhesives & Sealants	4/11/09	*12/22/11 [Insert page number where the document begins].*	Addition of VOC limits for adhesive and sealant products, including 25 adhesives, 4 adhesive primers, 5 sealants, and 3 sealant primers.
* *	*	*	*	* *

* * * * *

[FR Doc. 2011–32646 Filed 12–21–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FDMS Docket No. EPA–R03–OAR–2011–0511; FRL–9609–1]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Revised Motor Vehicle Emission Budgets for the Charleston, Huntington, Parkersburg, Weirton, and Wheeling 8-Hour Ozone Maintenance Areas; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule; correcting amendment.

SUMMARY: This document corrects an error in the rule language of a direct final rule pertaining to EPA's approval of the revised motor vehicle emissions budgets for the Charleston, Huntington, Parkersburg, Weirton, and Wheeling 8-hour ozone maintenance areas. The previous rulemaking amended the maintenance plans' 2009 and 2018 motor vehicle emissions budgets (MVEBs) submitted by the State of West Virginia.

DATES: *Effective date:* December 22, 2011.

FOR FURTHER INFORMATION CONTACT: Martin Kotsch, (215) 814–3335 or by email at *kotsch.martin@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' are used we mean EPA. On September 15, 2011 (76 FR 56795), we published a final rulemaking action announcing our approval of revised mobile emissions budgets for the Charleston, Huntington, Parkersburg, Weirton, and Wheeling 8-hour ozone maintenance areas. In this document, in 40 CFR 52.2532, we inadvertently approved incorrect emissions budgets for the Charleston and Wheeling maintenance areas. The intent of the rule is to correct those emissions budgets. This action corrects the erroneous language.

In rule document 2011–23261, published in the **Federal Register** on September 15, 2011 in 76 FR 56795 on page 56981, paragraphs 52.2532(a) and 52.2532(e) are corrected to read as follows:

(a) EPA approves the following revised 2009 and 2018 motor vehicle emissions budgets (MVEBs) for the Charleston, West Virginia 8-hour ozone maintenance area submitted by the Secretary of the Department of Environmental Protection on March 14, 2011:

Applicable geographic area	Year	Tons per day (TPD) VOC	Tons per day (TPD) NO_X
Charleston Area (Kanawha and Putnam Counties)	2009	16.7	38.9
Charleston Area (Kanawha and Putnam Counties)	2018	13.5	17.1

(e) EPA approves the following revised 2009 and 2018 motor vehicle emissions budgets (MVEBs) for the Wheeling, West Virginia 8-hour ozone maintenance area submitted by the Secretary of the Department of Environmental Protection on March 14, 2011:

Applicable geographic area	Year	Tons per day (TPD) VOC	Tons per day (TPD) NO_X
Wheeling Area (Marshall and Ohio Counties)	2009	10.4	9.1
Wheeling Area (Marshall and Ohio Counties)	2018	7.7	3.1

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is good cause for making today's rule final without prior proposal and opportunity for comment because we are merely correcting an incorrect citation in a previous action. Thus, notice and public procedure are unnecessary. We find that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

Statutory and Executive Order Reviews

Under Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993), this action is not a significant regulatory action and is therefore not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)). Because the agency has made a good cause finding that this action is not subject to notice-and-comment requirements under the Administrative Procedures Act or any other statute as indicated in the **SUPPLEMENTARY INFORMATION** section above, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate, as described in sections 203 and 204 of UMRA. This rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of governments, as specified by Executive Order 13132 (64 FR 43255, August 10, 1999). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

This technical correction action does not involve technical standards; thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. The rule also does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). In issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct, as required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996). EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1998) by examining the takings implications of the rule in accordance with the Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings issued under the executive order. This rule does not impose an information collection burden under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq*).

The Congressional Review Act (5 U.S.C. 801 *et seq.*), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA had made such a good cause finding, including the reasons therefore, and established an effective date of [insert effective date]. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This correction to 40 CFR 52.2532 for West Virginia is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Dated: December 02, 2011.

W.C. Early,

Acting Regional Administrator, EPA Region III.

40 CFR Part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart XX—West Virginia

■ 2. In § 52.2532 is amended by revising paragraphs (a) and (e) to read as follows:

§ 52.2532 Motor vehicle emissions budgets.

(a) EPA approves the following revised 2009 and 2018 motor vehicle emissions budgets (MVEBs) for the Charleston, West Virginia 8-hour ozone maintenance area submitted by the Secretary of the Department of

Environmental Protection on March 14, 2011:

Applicable geographic area	Year	Tons per day (TPD) VOC	Tons per day (TPD) NO_X
Charleston Area (Kanawha and Putnam Counties)	2009	16.7	38.9
Charleston Area (Kanawha and Putnam Counties)	2018	13.5	17.1

* * * * *

(e) EPA approves the following revised 2009 and 2018 motor vehicle emissions budgets (MVEBs) for the Wheeling, West Virginia 8-hour ozone maintenance area submitted by the Secretary of the Department of Environmental Protection on March 14, 2011:

Applicable geographic area	Year	Tons per day (TPD) VOC	Tons per day (TPD) NO_X
Wheeling Area (Marshall and Ohio Counties)	2009	10.4	9.1
Wheeling Area (Marshall and Ohio Counties)	2018	7.7	3.1

[FR Doc. 2011–32647 Filed 12–21–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2011–0081; FRL–9609–4]

RIN 2060–AQ69

Revisions to Final Response to Petition From New Jersey Regarding SO_2 Emissions From the Portland Generating Station

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is taking direct final action to amend the preamble and rule text to the *Final Response to Petition From New Jersey Regarding SO_2 Emissions From the Portland Generating Station* (Portland) published November 7, 2011, to revise minor misstatements. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour sulfur dioxide (SO_2) national ambient air quality standard (NAAQS) in the State of New Jersey, and not in specific counties within the state. These revisions have no impact on any other provisions of the rule.

DATES: The direct final rule is effective on March 21, 2012 without further notice, unless the EPA receives adverse comment by February 21, 2012. If the EPA receives an adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2011–0081, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Attention Docket ID No. EPA–HQ–OAR–2011–0081.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2011–0081.
- *Mail:* EPA Docket Center, EPA West (Air Docket), Attention Docket ID No. EPA–HQ–OAR–2011–0081, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center (Air Docket), Attention Docket ID No. EPA–HQ–OAR–2011–0081, Environmental Protection Agency, 1301 Constitution Avenue NW., Room 3334, Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2011–0081. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters and any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Todd Hawes (919) 541–5591, *hawes.todd@epa.gov,* or Ms. Gobeail McKinley

(919) 541–5246, *mckinley.gobeail@epa.gov,* Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail Code C539–04, Research Triangle Park, NC 27711.

SUPPLEMENTARY INFORMATION:

I. Why is the EPA using a direct final rule?
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J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act
L. Judicial Review

I. Why is the EPA using a direct final rule?

The EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment since the changes will not affect the emission limits, increments of progress, compliance schedules, or the reporting provisions specified in the November 7, 2011, final rule. However, in the ''Proposed Rules'' section of today's **Federal Register,** we are publishing a separate document that will serve as the proposed rule to amend the preamble and regulatory text to the *Final Response to Petition From New Jersey Regarding SO_2 Emissions From the Portland Generating Station* if adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If the EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

II. Specific Revisions

The preamble and rule text to the *Final Response to Petition From New Jersey Regarding SO_2 Emissions From the Portland Generating Station* (*See* FR 76 69052) contain minor misstatements that the EPA is revising in this action. In the preamble section IV.A, Summary of the Modeling for the Proposed Rule, the EPA inadvertently referred to four specific counties in New Jersey when discussing violations of the 1-hour SO_2 NAAQS. The statement reads, ''The EPA also modeled the emissions from Portland using the AERMOD dispersion model and determined that the modeled concentrations from Portland, when combined with the relatively low background concentrations, cause violations of the 1-hour SO_2 NAAQS in Morris, Sussex, Warren and Hunterdon Counties in New Jersey.'' This conclusion is not correctly stated as the EPA's modeling did not separately examine air quality in each of the four counties identified. A more accurate description of the EPA's conclusion was presented in the April 7, 2011, proposal which did not refer to those counties in our explanations of the modeling results. Furthermore, between proposal and promulgation, the EPA did not separately examine each of the four counties identified, so in the final rule there was no reason to change this proposed description to specifically list counties. Therefore, we are now revising the statement in the November 7, 2011, final rule preamble to be consistent with the description in the April 7, 2011, proposal by removing the references to Morris, Sussex, Warren, and Hunterdon Counties. The statement will now read, ''The EPA also modeled the emissions from Portland using the AERMOD dispersion model and determined that the modeled concentrations from Portland, when combined with the relatively low background concentrations, cause violations of the 1-hour SO_2 NAAQS in New Jersey.''

Similarly, in the rule text, Part 52—[Amended], Subpart NN–Pennsylvania, section 52.2039 in 40 CFR part 52, of the final rule, the EPA inadvertently referred to those same four counties in describing the finding of significant contribution to nonattainment and interference with maintenance of the 1-hour SO_2 NAAQS. The provision reads, ''The EPA has made a finding pursuant to section 126 of the Clean Air Act (the Act) that emissions of sulfur dioxide (SO_2) from the Portland Generating Station in Northampton County, Upper Mount Bethel Township, Pennsylvania (Portland) significantly contribute to nonattainment and interfere with maintenance of the 1-hour SO_2 national ambient air quality standard (NAAQS) in Morris, Sussex, Warren, and Hunterdon Counties in New Jersey.'' We are revising the rule text so that it now reads, ''The EPA has made a finding pursuant to section 126 of the Clean Air Act (the Act) that emissions of sulfur dioxide (SO_2) from the Portland Generating Station in Northampton County, Upper Mount Bethel Township, Pennsylvania (Portland) significantly contribute to nonattainment and interfere with maintenance of the 1-hour SO_2 national ambient air quality standard (NAAQS) in New Jersey.''

Although the New Jersey Department of Environmental Protection (NJDEP) modeling analysis submitted with the September 2010 petition identified NAAQS violations at receptors in certain counties, the purpose of the EPA modeling was not to identify or corroborate the entire geographic footprint of the violations in New Jersey. The EPA modeling analysis was conducted for the purpose of corroborating the existence of NAAQS violations in New Jersey caused by Portland and for determining the remedy needed to eliminate all NAAQS violations caused by Portland. The EPA modeling thus focused upon identifying only the area where the maximum concentration was expected to occur. We used the same receptor grid for the final rule as for the proposed rule, which was focused on the area of maximum impacts occurring in Warren County, New Jersey. The remedy was determined by assessing the emission reduction needed to eliminate the maximum modeled violation in New Jersey, which occurs in close proximity to Portland in Warren County. There was no need to make an assessment of impacts at all locations within New Jersey since eliminating the NAAQS violations at the highest impacted receptor provided the basis for the remedy which, by its nature, would eliminate all modeled violations caused by Portland in the entire state. Therefore, the EPA finding pursuant to section 126 of the Clean Air Act (the Act) applies to New Jersey generally. The revision finalized in this rule is consistent with NJDEP's request for a finding that emissions from Portland significantly contribute to nonattainment or interfere with maintenance of the 1-hour SO_2 NAAQS in New Jersey. The revision is also consistent with the language in sections 110 and 126 of the Act which is phrased such that the petitioner can request a finding that a source in one state is significantly contributing to

nonattainment or interfering with maintenance of the NAAQS in another state. The addition of the counties was neither necessary nor intentional and did not arise from a request from the petitioner or any other commenter.

The revision finalized in this rule will not affect the emission limits, increments of progress, compliance schedules, or the reporting provisions specified in the November 7, 2011, final rule. No adjustments to the existing modeling or other technical analyses and no new analyses were necessary to make the revisions. Accordingly, we are publishing this direct final rule because we view this as a noncontroversial action and anticipate no adverse comment. The revisions do not change the conclusions that the EPA made in the final rule. Therefore, the EPA is not revising any other aspect of the rule published on November 7, 2011.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action simply revises minor wording errors in the November 7, 2011 rule. This action corrects a response to a petition that is narrow in scope and affects a single facility. This type of action is exempt from review under Executive Orders12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.,* because this rule under section 126 of the CAA will not in-and-of itself create any new information collection burdens but simply revises minor wording errors in the November 7, 2011, rule. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The revisions in this notice do not impose any new requirements on small entities. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state.

D. Unfunded Mandates Reform Act

This action does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any 1 year. This action includes minor wording revisions to the November 7, 2011, final rule in this notice that are not expected to exceed $100 million or more for state, local, and tribal governments, in aggregate, or the private sector in any 1 year. This action simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. Again, this action simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The November 2011 rule primarily affects private industry, and does not impose significant economic costs on state or local governments. This action simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have a substantial direct effect on tribal governments, on the relationship between the federal government and Indian tribes, or the distribution of power and responsibilities between the federal government and Indian Tribes. This action simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

This rulemaking does not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994), establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). The EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability. Nonetheless, this action will be effective March 21, 2012.

L. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit Court within 60 days from the date the final action is published in the **Federal Register**. Filing a petition for review by the Administrator of this final action does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review must be final, and shall not postpone the effectiveness of such action.

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedures, Air pollution control, Incorporation by reference, Intergovernmental relations, and Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: December 14, 2011.

Lisa P. Jackson,

Administrator.

For the reasons set forth in the preamble part 52 of chapter I of title 40 of the Code of Federal regulations are amended as follows:

PART 52—[AMENDED]

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

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

Subpart NN—Pennsylvania [Amended]

■ 2. Section 52.2039 is amended by revising the introductory text to read as follows:

§ 52.2039 Interstate transport.

The EPA has made a finding pursuant to section 126 of the Clean Air Act (the Act) that emissions of sulfur dioxide (SO_2) from the Portland Generating Station in Northampton County, Upper Mount Bethel Township, Pennsylvania (Portland) significantly contribute to nonattainment and interfere with maintenance of the 1-hour SO_2 national ambient air quality standard (NAAQS) in New Jersey. The owners and operators of Portland shall comply with the requirements in paragraphs (a) through (d) of this section.

* * * * *

[FR Doc. 2011–32652 Filed 12–21–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Parts 10, 11, 12, and 15

[Docket No. USCG–2011–0465]

Processing of Merchant Mariner Credentials for Those Mariners Not Requiring a Transportation Worker Identification Credential

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability.

SUMMARY: The Coast Guard announces the availability of Policy Letter 11–15, which describes steps the Coast Guard is taking to implement a statutory change in mariner credentialing requirements. This policy letter details how the Coast Guard is relaxing its Transportation Worker Identification Credential (TWIC) enforcement posture for mariners who serve on board vessels that are not required to have a vessel security plan. It also describes policy changes to allow these mariners to acquire and renew a Merchant Mariner Credential (MMC) without holding a valid TWIC.

DATES: This policy is effective upon publication of this notice.

ADDRESSES: This notice and the policy are available in the docket and can be viewed by going to *http://www.regulations.gov,* inserting USCG–2011–0465 in the ''Keyword'' box, and then clicking ''Search.'' This material is also available for inspection or copying at the Docket management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays. This policy is also available at *http://homeport.uscg.mil* by clicking the ''Library'' tab > Policy > Policy letters (inspection); CG–543 Policy Letter 11–15.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Mr. Luke Harden, Office of Vessel Activities (CG–543), (202) 372–1206, email *Luke.B.Harden@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Background and Purpose

Coast Guard regulations require every applicant for an original or renewal of a Merchant Mariner Credential (MMC) obtain a Transportation Worker Identification Credential (TWIC) (see 46 CFR part 10). These Coast Guard regulations implement 46 U.S.C. 70105(b)(2)(B) and (D), which originally mandated that all mariners required to hold an MMC also obtain and hold a valid TWIC. On October 15, 2010, the President signed into law the Coast Guard Authorization Act of 2010 (the Act) (Pub. L. 111–281), which amended Sec. 70105(b)(2) by exempting certain mariners from the requirement to obtain and hold a valid TWIC (See Section 809 of the Act).

While Section 809 did not exclude any specific group of credentialed mariners from the requirement to possess a TWIC, it gave the Coast Guard discretion to exclude any mariner, who does not require unescorted access to a secure area of a vessel or facility, from that requirement (see 46 U.S.C. 70105). The Coast Guard has determined that, under Section 809 of the Act, mariners who do not need unescorted access to a secure area designated by a vessel security plan in accordance with reference (c), no longer require a TWIC.

Although full implementation of Section 809 of the Act may require regulatory changes, the Coast Guard is issuing Policy Letter 11–15 to implement two policy mechanisms that uses Coast Guard resources and capabilities to lessen the impact while working on a regulatory solution that will address the full scope of Section 809. First, because the Coast Guard enforces its regulations by checking the validity of TWICs while conducting inspections of vessels where the credentials of mariners are checked, the Coast Guard is altering its enforcement posture: excluded mariners will not be required to present a valid TWIC during Coast Guard inspections. Second, we are implementing policies that would make it easier for certain excluded mariners to renew or acquire an MMC, without having to show proof of holding a valid TWIC. Policy Letter 11–15 details procedures by which excluded mariners do not need to obtain a physical TWIC in order to receive an MMC, and mariners can renew an existing MMC even if their TWIC has expired.

We recognize that even after these policy changes many excluded mariners will continue to need or choose to go through the TWIC enrollment process. This is because the current MMC credentialing process requires inputs from the TWIC enrollment process. The Coast Guard relies on biometric and biographic information collected as part of the TWIC enrollment process, in the security, safety, and suitability evaluation component of Coast Guard's MMC credentialing process. It is not possible, at this time, to issue new MMCs without mariners going through the TWIC enrollment process. Separating the two processes would require a significant credentialing process and administration restructuring that is not feasible on a short timeline.

These policy changes, however, will help to reduce the fees mariners pay to obtain or renew a MMC, as well as reduce the burden of having to make multiple trips to a TWIC enrollment center to apply for and collect a TWIC. While we recognize that some mariners, particularly those applying for their original MMC, will still have to pay the TWIC enrollment fee, we believe that these policy changes will substantially reduce the regulatory burden on excluded mariners. The Coast Guard is exploring the possibility of a regulatory change to waive some fees associated with the MMC for excluded mariners, to further reduce the burdens in the future.

List of Excluded Mariners

The list of excluded mariners subject to the adjusted enforcement and credentialing policies detailed in Policy Letter 11–15 is limited to those mariners who function solely in the following roles:

1. Mariners serving on uninspected passenger vessels of less than 100 gross register tons (GRT);
2. Mariners serving on vessels inspected under subchapter T of Title 46 Code of Federal Regulations, except those on international voyages;
3. Mariners serving on towing vessels not involved in towing barges inspected under 46 CFR subchapters D, I or O;
4. Mariners serving on towing vessels involved in fleeting, docking, or ship assist as excepted in Title 33 CFR, Section 104.105(a)(11); and
5. Mariners who are inactive, or not operating under the authority of their credential for long periods of time.

This notice is issued under authority of 46 U.S.C. 70105, 33 CFR parts 104 and 105, 46 CFR parts 10, 11, and 15, 5 U.S.C. 552(a).

Dated: December 19, 2011.

Paul F. Thomas,

Captain, U.S. Coast Guard, Acting Director of Prevention Policy.

[FR Doc. 2011–32852 Filed 12–20–11; 11:15 am]

BILLING CODE 9110–04–P

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

48 CFR Parts 9901 and 9903

Cost Accounting Standards: Change to the CAS Applicability Threshold for the Inflation Adjustment to the Truth in Negotiations Act Threshold

AGENCY: Office of Management and Budget (OMB), Office of Federal Procurement Policy, Cost Accounting Standards Board.

ACTION: Final rule.

SUMMARY: The Office of Federal Procurement Policy (OFPP), Cost Accounting Standards (CAS) Board (Board), has adopted, without change from the interim rule, a final rule revising the threshold for the application of CAS from ''$650,000'' to ''the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation.'' The change is being made because the CAS applicability threshold is statutorily tied to TINA threshold. The TINA threshold for obtaining cost or pricing data was recently adjusted for inflation to $700,000 in the Federal Acquisition Regulation (FAR), as required by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Until the interim change for this final rule, the CAS applicability threshold was a stated dollar amount ($650,000) in the Code of

Federal Regulations. This wording change effectively revised the CAS threshold to $700,000 and will cause future changes to the CAS applicability threshold to self-execute upon any changes to the TINA threshold as they are implemented in the FAR.

DATES: *Effective Date:* December 22, 2011.

FOR FURTHER INFORMATION CONTACT: Raymond J. M. Wong, Director, Cost Accounting Standards Board (telephone: (202) 395–6805; email: *Raymond_wong@omb.eop.gov*).

SUPPLEMENTARY INFORMATION:

A. Background and Summary

On July 12, 2011, the Cost Accounting Standards Board (Board) published an interim rule with a request for comment (76 FR 40817) for the purpose of revising the Cost Accounting Standards (CAS) applicability threshold in 48 CFR Chapter 99 from ''$650,000'' to ''the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908) and (41 U.S.C. 1502(b)(1)(B))''. This was done because of a recent increase to $700,000 in the FAR to the Truth in Negotiations Act (TINA) threshold for the submission of cost or pricing data, as adjusted for inflation by section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375), as incorporated into Federal Acquisition Regulation (FAR) 15.403–4(a)(1) by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council on August 30, 2010 (at 75 FR 53129). By revising the CAS applicability threshold so that it directly referenced the FAR TINA threshold for the submission of cost or pricing data (rather than referencing a stated dollar amount), any future changes to the FAR TINA threshold will automatically apply to the CAS applicability threshold (thereby eliminating the need to revise this regulation to specify a different dollar amount).

Statutory Requirement for Inflation Adjustment of TINA Thresholds

Section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375) requires a periodic adjustment for inflation every five years to the acquisition related thresholds using the Consumer Price Index (CPI) for all urban consumers, except for the Davis-Bacon Act, Service Contract Act, and trade agreement thresholds. The threshold in TINA (10 U.S.C. 2306a(a)(1)(A)(i)) for the submission of cost or pricing data is one of the acquisition related thresholds adjusted for inflation by section 807. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) published a final rule in the **Federal Register** on August 30, 2010 (75 FR 53129) amending the FAR to implement section 807, including the TINA threshold at FAR 15.403–4, Requiring cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 3502 [formerly, 41 U.S.C. 254b]). This FAR final rule was effective October 1, 2010, and revised the FAR TINA threshold from $650,000 to $700,000.

Statutory Requirement for Threshold for CAS Applicability

Section 26(f)(2(A) of the OFPP Act (41 U.S.C. 1502(b)(1)(B) [formerly, 41 U.S.C. 422(f)(2)(A)]) addresses the CAS applicability threshold. Section 822 of the 2006 National Defense Authorization Act (Pub. L. 109–163) amended 41 U.S.C. 1502(b)(1)(B) [formerly, 41 U.S.C. 422(f)(2)(A)] to tie the statutory CAS threshold to the threshold for compliance with the TINA requirement to submit cost or pricing data, as set forth in section 2306a(a)(1)(A)(i) of title 10, United States Code. The recent changes to the TINA threshold described above require identical changes to the CAS applicability threshold (i.e., from $650,000 to $700,000). Until the interim rule for this final rule, the CAS applicability threshold has been identified in the CAS Board rules as a stated dollar amount. To avoid repeated rulemakings in the future that would update the stated dollar amount, in order to keep the CAS applicability threshold tied to the FAR TINA threshold, the Board revised the CAS applicability threshold from a stated dollar amount (which has been ''$650,000'') to ''the Truth in Negotiations Act (TINA) threshold, as adjusted for inflation (41 U.S.C. 1908 and 41 U.S.C. 1502(b)(1)(B)).'' This revision made any future changes to the CAS applicability threshold self-executing upon any changes that the FAR makes to the FAR TINA threshold. Thus, because the FAR's TINA threshold is now $700,000, the CAS applicability threshold under this final rule will be $700,000.

B. Public Comments

The Board received two sets of public comments in response to the Interim Rule.

1. Future changes to the FAR TINA threshold automatically applied to the CAS applicability threshold.

Comment: One respondent agreed with the interim rule stating ''[t]his is a good step in streamlining the process (i.e., deleting the requirements for future interim and final CAS rules for TINA changes).'' However, another respondent disagreed and thought that as a matter of policy, the CAS Board ''should issue its own dollar applicability threshold(s)'' because ''effectively delegating the authority to establish the CAS contract applicability threshold'' was ''yet another weakening of the CAS Board's basic authority.''

Response: The CAS Board agrees with the comment that supports the interim rule and disagrees with the comment to the contrary. The CAS Board does not see making this change as a weakening of the CAS Board's authority. The change is consistent with the CAS statutory authority at 41 U.S.C. 1502(b)(1)(B) which provides that CAS ''are mandatory for use by all executive agencies and by contractors and subcontractors * * * concerning, all negotiated prime contract and subcontract procurements with the Federal Government in excess of the amount set forth in section 2306a(a)(1)(A)(i) of title 10 [i.e., the Truth in Negotiations Act (TINA)] as the amount is adjusted in accordance with applicable requirements of law.'' 41 U.S.C. 1908 provides for the inflation adjustment of acquisition-related dollar, including TINA, by the Federal Acquisition Regulatory Council.

2. The phrase ''as adjusted for inflation'' is unnecessary.

Comment: One respondent opined that the phrase ''as adjusted for inflation'' ''is both unnecessary and redundant.''

Response: The CAS Board does not agree. The text is consistent with the CAS statutory authority at 41 U.S.C. 1502(b)(1)(B). See the Response to Comment 1.

3. Changes to FAR Parts 30 and 52 required to be made for the changes to the CAS applicability threshold.

Comment: One respondent noted that ''FAR Part 30 and the [CAS] clauses at FAR 52.230 [et seq.] continue to reference the $650,000 which is now outdated.'' The respondent acknowledged that the FAR is the responsibility of the FAR Council, rather than the CAS Board.

Response: The changes to the FAR to reflect the CAS Board's interim and final rules are beyond the authority of the CAS Board as acknowledged by the respondent. The comments have been sent to the OFPP Administrator, the Chair of the FAR Council, for implementation in the FAR.

C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35, Subtitle I) does not apply to this rulemaking because this rule imposes no additional paperwork burden on offerors, affected contractors and subcontractors, or members of the public which requires the approval of OMB under 44 U.S.C. 3501, et seq. The records required by this final rule are those normally maintained by contractors and subcontractors who claim reimbursement of costs under government contracts.

D. Executive Order 12866, the Congressional Review Act, and the Regulatory Flexibility Act

Because the affected contractors and subcontractors are those who are already subject to CAS but for the increase in the CAS applicability threshold, the economic impact of this final rule on contractors and subcontractors is expected to be minor. As a result, the Board has determined that this final rule will not result in the promulgation of an ''economically significant rule'' under the provisions of Executive Order 12866, and that a regulatory impact analysis will not be required. For the same reason, the Administrator of the Office of Information and Regulatory Affairs has determined that this final rule is not a ''major rule'' under the Congressional Review Act, 5 U.S.C. Chapter 8. Finally, this final rule does not have a significant effect on a substantial number of small entities because small businesses are exempt from the application of the Cost Accounting Standards. Therefore, this final rule does not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980, 5 U.S.C. Chapter 6.

List of Subjects in 48 CFR Parts 9901 and 9903

Government procurement, Cost accounting standards.

Daniel I. Gordon,

Chair, Cost Accounting Standards Board.

48 CFR PARTS 9901 and 9903—[AMENDED]

■ For the reasons set forth in this preamble, the interim rule published at 76 FR 40817, July 12, 2011, amending Chapter 99 of Title 48 of the Code of Federal Regulations, is adopted as final without change.

[FR Doc. 2011–32726 Filed 12–21–11; 8:45 am]

BILLING CODE P

Proposed Rules

Federal Register
Vol. 76, No. 246
Thursday, December 22, 2011

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

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701 and 741

RIN 3133–AE00

Loan Participations; Purchase, Sale and Pledge of Eligible Obligations; Purchase of Assets and Assumption of Liabilities

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule with request for comments.

SUMMARY: The NCUA Board (Board) requests public comment on its proposal to amend its loan participation regulation and relevant provisions in the eligible obligations rule and the rule governing the purchase of assets and assumption of liabilities. NCUA has received many questions about the loan participation rule, indicating confusion about its application and its relationship to these other rules. The proposed rule reorganizes the current rule and directs its regulatory provisions to the purchase of a loan participation. It aims to improve understanding of the transactions covered under the rule, as well as the requirements for purchase and ongoing monitoring and the applicability of related provisions. The proposed rule also expands loan participation requirements to federally insured, state-chartered credit unions (FISCUs).

DATES: Send your comments to reach us on or before February 21, 2012. We may not consider comments received after the above date in making our decision on the proposed rule.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: Address to regcomments@ncua.gov.* Include ''[Your name] Comments on ''Proposed Rule on Loan Participations'' in the email subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for email.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.
- *Public Inspection:* You can view all public comments on NCUA's Web site at *http://www.ncua.gov/Resources/RegulationsOpinionsLaws/ProposedRegulations.aspx* as submitted, except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. You may inspect paper copies of comments in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an email to *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Dent, Staff Attorney, Office of General Counsel, (703) 518–6540; Vincent Vieten, Member Business Loan Program Officer, Office of Examination and Insurance, (703) 518–6618.

SUPPLEMENTARY INFORMATION:

I. Background
II. The Rule as Proposed
III. Section-by-Section Analysis
IV. Regulatory Procedures

I. Background [1]

Why is NCUA proposing this rule?

The Board believes that involvement in loan participations strengthens the credit union industry. Loan participations are a useful way for federally insured credit unions to diversify their loan portfolios, improve earnings, generate loan growth and manage their balance sheets and comply with regulatory requirements. Credit unions also use excess liquidity through the sale of participations to increase the availability of credit to small businesses and consumers. The Board recognizes, however, that loan participations also create more systemic risk to the share insurance fund (NCUSIF) due to the resulting interconnection between participants. For example, large volumes of participated loans in the system tied to a single originator, borrower, or industry or serviced by a single entity have the potential to impact multiple credit unions if a problem arises. Additionally, as both federal credit unions (FCUs) and federally insured state-chartered credit unions (FISCUs) actively engage in loan participations, it is important to the safety and soundness of the NCUSIF that *all* federally insured credit unions (FICUs) adhere to the same minimum standards for engaging in loan participations. The Board believes such standards are necessary to ensure the NCUSIF consistently recognizes and accounts for the risks associated with the purchase of loan participations. Finally, during examinations and other FICU contacts, the agency has encountered confusion concerning the application of the current loan participation rule regarding the entities and transactions subject to the rule. For these reasons, NCUA proposes to amend § 701.22, as well as relevant provisions in § 701.23 and § 741.8. Interpretive Ruling and Policy Statement (IRPS) 87–2, Developing and Reviewing Government Regulations, 52 FR 35231 (Sept. 18, 1987), as amended by IRPS 03–2, 68 FR 31949 (May 29, 2003).

II. The Rule as Proposed

a. How would the proposed rule change the loan participation rule?

NCUA proposes to change the rule to address only the requirements for a FICU purchasing a loan participation. The proposed rule also would better detail regulatory expectations regarding key aspects of a loan participation purchase: the loan participation policy, the loan participation agreement, and ongoing monitoring of the loan participation.

b. Does this rule create greater restrictions than the current rule?

Yes, the proposed rule prescribes certain concentration limits and encourages a FICU to establish others. The proposed rule also requires that a loan participation agreement include certain provisions to assist the purchasing FICU in conducting its due

[1] President Obama signed the Plain Writing Act of 2010 (Pub. L. 111–274) into law on October 13, 2010 ''to improve the effectiveness and accountability of federal agencies to the public by promoting clear Government communication that the public can understand and use.'' This preamble is written to meet plain writing objectives.

diligence. The Board is proposing these actions to ensure that loan participation activity is conducted in a safe and sound manner.

III. Section-by-Section Analysis

a. § 701.22—Introductory Text

The Board believes the addition of introductory text to the rule clarifies the scope of the rule and helps distinguish a participation loan from an eligible obligation under § 701.23. As proposed, the introductory text clarifies that the rule applies to a natural person federal credit union's purchase of a loan participation where the borrower is *not* a member of that credit union. An FCU's purchase of its member's loan, in whole or in part, is covered by NCUA's eligible obligations rule at § 701.23. Additionally, by a cross-reference to Part 741, the Board proposes to apply the rule to natural person FISCUs. Corporate credit unions are subject to the loan participation requirements set forth in Part 704 and, therefore, are not subject to § 701.22.

b. § 701.22(a)—Definitions

The Board proposes to revise the definitions for ''originating lender'' and ''participation loan'' to clarify that the originating lender must participate in the loan throughout the life of the loan. The Board also proposes to add a definition of associated borrower. The proposed definition is self-explanatory and is used in the provision on concentration limits in § 701.22(b) below. Additionally, the Board proposes to change the paragraph's format by listing the definitions in alphabetical order and removing the numeric designations. These changes are consistent with the format recommended by the Federal Register.

c. § 701.22(b)—Requirements for Loan Participation Purchases

The Board proposes to revise this paragraph by reorganizing and revising the requirements for a loan participation included in paragraphs (b), (c) and (d) of the current rule. In the proposed rule, information from these paragraphs is organized into a revised paragraph (b), with specific details added to improve clarity and to address safety and soundness concerns.

Revised paragraph (b) provides that a FICU may only purchase a loan participation if the seller is an eligible organization and if the loan is one the FICU is empowered to grant under regulation and its loan policies. Empowered to grant means a FICU's authority to make the type of loan permitted by the Federal Credit Union Act or applicable state law, NCUA regulations, and its bylaws and own internal policies. Accordingly, the Board proposes to remove the current exception in § 701.22(c)(4), which permits an FCU to purchase a loan participation that was originated with different underwriting standards than its own. Removing this provision prevents a FICU from purchasing a loan participation originated with less stringent underwriting standards than the FICU uses in making its own loans. The proposed rule, however, does not prevent a FICU from purchasing a loan participation with more stringent underwriting standards than it uses in originating its own loans.

Other requirements for purchasing a loan participation include a written loan participation agreement, a continuing participation interest by the originating lender of at least 10 percent for the loan's duration, and the borrower's membership in a participating FICU before the purchase occurs. While the proposed rule continues to require a written loan participation policy, the Board proposes to require specific provisions to include in such policy. For example, provisions would be added to the rule addressing the maximum limit on loan participations outstanding and various concentration limits. The Board recognizes there may be other factors based on a credit union's size, complexity of operations, and lending experience that should be considered in formulating a loan participation policy. The Board expects a FICU to consider these factors in establishing its policy. For example, a FICU purchasing a loan participation pool might perform statistical sampling in evaluating the underwriting standards of the pool. Conversely, a large purchase representing a significant portion of the FICU's net worth should require a full review of the loan documentation before approval. The Board expects a FICU to establish the parameters for review, including a periodic review for appropriateness, and adhere to such parameters.

1. Concentration Limits on Loan Participations

In establishing appropriate concentration limits for loan participations, the Board is seeking to mitigate risk without discouraging continued growth. The Board proposes to use net worth, rather than unimpaired capital and surplus, as the means for striking this balance. Net worth cushions fluctuations in earnings, supports growth, and provides protection against insolvency. As such, the Board believes establishing limits tied to this measure is appropriate.

The Board also recognizes the need for FICUs to identify and manage various concentrations on their balance sheet. Key among these are concentrations involving the same originator, one borrower or a group of associated borrowers, and types of loans, for example, by industry or loan product. The Board proposes to limit loan participation purchases involving a single originator to a maximum of 25 percent of a FICU's net worth. No waiver provision is proposed for the 25 percent limitation. It also proposes to limit loan participation purchases involving one borrower or a group of associated borrowers to 15 percent of a FICU's net worth, unless the appropriate regional director grants a waiver. These limits consider that a FICU purchasing a loan participation generally does not directly manage the risks associated with the loan relationship, including borrower contact and collection control. The 15 percent limitation is consistent with the 15 percent limitation on member business loans to one member or group of associated members set forth in § 723.8 of the member business loan rule. Part 723 allows members to apply for a waiver from the 15 percent limitation (as well as other regulatory limitations). Waiver procedures are set forth in § 723.11. It has come to NCUA's attention that many credit unions believe the waiver process in Part 723 is not working efficiently and is often not a viable, practical option. NCUA seeks comment as to how the waiver process in this regulation can be structured to satisfy credit unions' practical concerns while ensuring prudent loan participation practices.

The Board expects to grandfather credit unions that exceed the 25 percent and 15 percent concentration limits at the percentage rates of concentration on the effective date of a final rule. The grandfathered rates will diminish down to the approved regulatory rates set as participations are paid off or sold. The Board is not establishing specific limits for other concentrations identified within a FICU's loan participation policy. It is important, however, for a FICU to identify such concentrations and apply a reasonable, supportable concentration limit. Consistent with agency guidance on the evaluation of concentration risk, concentration limits must be established commensurate with net worth levels.[2]

The Board is particularly interested in receiving comments on how these caps should be structured, the

[2] Letter to Credit Unions 10–CU–03 (Mar. 2010).

appropriateness of these caps, and suggested alternative approaches to mitigating the inherent risks of loan participations.

d. § 701.22(c)—Minimum Requirements for a Loan Participation Agreement

The proposed rule revises current § 701.22(b)(2), which requires loan participation agreements to be in writing, and moves requirements for the agreement to revised paragraph § 701.22(c). The Board recognizes that a successful participated loan relationship depends, in large part, on the quality and completeness of the participation agreement. A well-written agreement can minimize inter-creditor conflicts during the life of the loan, especially if the loan becomes delinquent and needs to be worked out. The Board also believes that any participation agreement must clearly delineate the roles, duties, and obligations of the originating lender, servicer, and participants.

As proposed, revised paragraph (c) establishes minimum provisions that any loan participation agreement must address. For example, the loan participation agreement must include a provision requiring the originating lender to retain at least a ten percent interest in the loan throughout its duration. This requirement mirrors the current statutory requirement for FCUs. Other provisions require the agreement to identify each participated loan, enumerate servicing responsibilities for the loan, and include notice and disclosure requirements regarding the ongoing financial condition of the loan, the borrower, and the servicer.

The Board is proposing these minimum provisions to emphasize the need for adequate documentation and due diligence from the time of purchase throughout the life of the participation. Additionally, under proposed § 701.22(c)(1), a loan participation agreement must specify the loan or loans in which a credit union is purchasing an interest. Where a participation agreement involves multiple loans, the documentation, for example, can be as simple as an addendum or schedule for identifying each loan and a participant's interest in that loan. This provision clarifies the existing prohibition against an FCU purchasing a participation certificate in a pool of loans.

e. § 701.22(d)—Remove and Reserve

The Board proposes to address the contents of this paragraph in other portions of the rule.

f. Related Regulatory Provisions

1. § 701.23—Purchase, Sale, and Pledge of Eligible Obligations

The Board proposes to add introductory text to this section to clarify the rule's scope and to distinguish it from transactions covered by § 701.22.

2. § 741.8—Purchase of Assets and Assumption of Liabilities

Section 741.8 is a safety and soundness provision requiring supervisory approval before a federally insured credit union may purchase a loan from an entity that is not insured by the NCUSIF. No approval is necessary, however, for the following transactions:

- An FCU's purchase of student loans or real estate secured loans pursuant to § 701.23(b)(iii) or (iv);
- An FCU's purchase of its member loans pursuant to § 701.23(b)(i); or
- A FISCU's purchase of its member loans under state law comparable to the provisions in § 701.23.

Currently, there are no exclusions under § 741.8 for loan participation purchases. In practice, however, as long as an FCU's purchase complies with § 701.22 requirements the FCU is not required to obtain separate regional director approval for the transaction. The Board proposes to add language to § 741.8 to specifically state that Regional Director approval is not required for a loan participation purchase that complies with § 701.22 requirements. The exclusion would apply to both FCUs and FISCUs.

3. § 741.225—Loan Participations

Section 201 of the Federal Credit Union Act states the Board is authorized to insure the member accounts of state-chartered credit unions that have applied to, and been approved by, NCUA for federal insurance coverage. Credit unions receiving federal insurance must agree to comply with the requirements of Title II and any regulations prescribed by the Board pursuant to this title. Pursuant to this authority, the Board proposes to amend Part 741 by adding a new § 741.225 to extend the participation rule's coverage to federally insured, state-chartered credit unions. Since 2007, FISCU-participated loan balances have increased 27 percent, from $5.7 billion in 2007 to $7.2 billion in 2010 and have consistently accounted for the majority of outstanding loan participations. Similarly, since 2007, FISCUs- overall experienced a higher delinquency rate in their loan participation portfolios. At year-end 2010, the delinquency rate for the FISCU-participated portfolio was 4.11 percent, compared to 3.74 percent for all FICUs.

Based on June 30, 2011, Call Report data, FISCUs hold 56 percent of outstanding loan participations and are responsible for approximately 55 percent of participation loans purchased and 68 percent of participation loans sold. Among the 20 FICUs with the highest amount of outstanding participation loans, 16 are FISCUs. The June 30 data also indicates that FISCUs continue to have a higher delinquency rate in their loan participation portfolios, 3.97 percent compared to 3.59 percent for all FICUs and 3.09 percent for FCUs. Of the 123 credit unions reporting over 10 percent delinquency on participation loans, 68, or 56 percent, are FISCUs.

With regard to actual losses, charge-off data for the last few years indicates FISCUs have experienced a higher level of losses in participation loans than FCUs, with the FISCU charge-off ratio steadily increasing from year to year. For example, the 2008 FISCU net charge-off ratio increased 71 percent from 2007 with an average increase of 31 percent in both 2009 and 2010. As of June 30, 2011, the year-to-year average remained 31 percent. Over these same periods, FCUs experienced an average increase of 2 percent, with a 28 percent spike in 2009 and decreases in net charge-offs for all other years. As of June 30, 2011, annualized net charge offs for FCUs show an annualized decrease of 10 percent.

The Board notes that, despite the indications of risk to the NCUSIF from FISCUs' loan participation activity, FISCU involvement in loan participations currently is subject only to state law. State regulatory requirements for loan participation transactions may vary from NCUA regulation and from state to state. The Board believes certain requirements should be consistent among all FICUs to minimize systemic risk. Increasing numbers and balances in loan participation portfolios, among both federal credit unions and FISCUs, indicate such a regulatory approach is warranted.

IV. Regulatory Procedures

a. Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities. 5 U.S.C. 603(a). For purposes of this analysis, NCUA considers credit unions having under $10 million in assets small

entities. Interpretive Ruling and Policy Statement 03–2, 68 FR 31949 (May 29, 2003). As of June 30, 2011, of approximately 7,200 federally insured credit unions, approximately 2,700 had less than $10 million in assets.

NCUA does not believe the proposed rule, if adopted, would have a significant impact on a substantial number of small credit unions. Loan participations are a means for institutions to diversify risk and to employ excess lending capacity. Generally, smaller credit unions are not actively involved in loan participation transactions.

b. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden. 44 U.S.C. 3507(d); 5 CFR part 1320. For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections.

The proposed rule contains an information collection in the form of a written policy requirement and a transaction documentation requirement. Any federally insured credit union purchasing loan participations must have a written loan participation policy. In addition, before purchasing a loan participation, it must enter into a written loan participation agreement that specifically identifies the subject loan(s) and other material information. As required by the PRA, NCUA is submitting a copy of this proposed rule to OMB for its review and approval. Persons interested in submitting comments with respect to the information collection aspects of the proposed IRPS should submit them to OMB at the address noted below.

Based on NCUA's experience, credit unions generally maintain written loan participation policies and enter into written agreements when purchasing loan participations. As such, they will only need to modify their practices to comply with the proposed rule. It is, therefore, NCUA's view that maintaining a written loan participation policy and executing written participation purchase agreements are not burdens created by this regulation. Rather, they are usual and customary operating practices of a prudent financial institution. Based on the current volume of federally insured credit unions reporting loan participation activity, NCUA estimates approximately 2,000 federally insured credit unions will need to modify a written loan participation policy. NCUA further estimates it should take a credit union an average of 4 hours to modify its loan participation policy. The total annual burden imposed is approximately 8,000 hours. With regard to executing a written loan participation agreement, NCUA estimates the regulation will cause no additional burden.

NCUA considers comments by the public on this proposed collection of information in:

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the NCUA, including whether the information will have a practical use;
- Evaluating the accuracy of the NCUA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of collection of information on those who are required to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

The Paperwork Reduction Act requires OMB to make a decision concerning the collection of information contained in the proposed regulation between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to NCUA on the proposed regulation.

Comments on the proposed information collection requirements should be sent to: Office of Information and Regulatory Affairs, OMB, New Executive Office Building, 725 17th Street, NW., Washington, DC 20503; *Attention:* NCUA Desk Officer, with a copy to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

c. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the Executive Order. The proposed rule, if adopted, will also apply to federally insured, state-chartered credit unions. By law, these institutions are already subject to numerous provisions of NCUA's rules, based on the agency's role as the insurer of member share accounts and the significant interest NCUA has in the safety and soundness of their operations. The proposed rule may have an occasional direct effect on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The proposed rule may supersede provisions of state law, regulation, or approvals. The proposed rule could lead to conflicts between the NCUA and state financial institution regulators on occasion, so NCUA requests comments on ways to eliminate, or at least minimize, potential conflicts in this area. Commenters may wish to provide recommendations on the potential use of delegated authority, cooperative decision-making responsibilities, certification processes of federal standards, adoption of comparable programs by states requesting an exemption for their regulated institutions, or other ways of meeting the intent of the Executive Order.

d. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

List of Subjects

12 CFR Part 701

Credit unions, Fair housing, Individuals with disabilities, Insurance, Marital status discrimination, Mortgages, Religious discrimination, Reporting and recordkeeping requirements, Sex discrimination, Signs and symbols, Surety bonds.

12 CFR Part 741

Credit, Credit unions, Reporting and recordkeeping requirements, Share insurance.

By the National Credit Union Administration Board, on December 15, 2011.

Mary F. Rupp,

Secretary of the Board.

For the reasons stated above, NCUA proposes to amend 12 CFR parts 701 and 741 as follows:

PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

1. The authority for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1786, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 et seq.; 42 U.S.C. 1981 and 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

2. Revise § 701.22 to read as follows:

§ 701.22 Loan participations.

This section applies only to loan participations as defined in paragraph (a). It does not include the purchase of an investment interest in a pool of loans. This section establishes the requirements a federally insured credit union must satisfy in order to purchase a participation in a loan. This section applies only to a federally insured credit union's purchase of a loan participation where the borrower is not a member of that credit union. Generally, a federally insured credit union's purchase of all or part of a loan made to one of its own members, where no continuing contractual obligation between the seller and purchaser is contemplated, is governed by section § 701.23 of this chapter. Federally insured, state-chartered credit unions must comply with these loan participation requirements as provided in § 741.225 of this chapter. This section does not apply to corporate credit unions.

(a) For purposes of this section, the following definitions apply:

Associated borrower means any borrower with a shared ownership, investment, or other pecuniary interest in a business or commercial endeavor with the borrower. This includes guarantors, co-signors, major stakeholders, owners, investors, affiliates and other parties who have influence on the management, control, or operations of the borrower.

Credit union means any Federal or State-chartered credit union.

Credit union organization means any credit union service organization meeting the requirements of part 712 of this chapter. This term does not include trade associations or membership organizations principally composed of credit unions.

Eligible organizations means a credit union, credit union organization, or financial organization.

Financial organization means any federally-chartered or federally insured financial institution; and any state or federal government agency and its subdivisions.

Loan participation means a loan where one or more eligible organizations participate pursuant to a written agreement with the originating lender, and the written agreement requires the originating lender's continuing participation throughout the life of the loan.

Originating lender means the participant with which the member initially or originally contracts for a loan and who, thereafter or concurrently with the funding of the loan, sells participations to other lenders.

(b) A credit union may purchase a loan participation from an eligible organization only if the loan is one the credit union is empowered to grant and the following conditions are satisfied:

(1) The purchase complies with all regulations to the same extent as if the credit union had originated the loan, including, for example, the loans-to-one-borrower rule in § 701.21(c)(5) of this chapter for federal credit unions and the member business loan rule in part 723 of this chapter for all federally insured credit unions;

(2) The credit union has executed a written loan participation agreement with the originating lender and the agreement meets the minimum requirements for a loan participation agreement as described in this section;

(3) The originating lender retains at least a 10 percent interest in the outstanding balance of the loan through the life of the loan;

(4) The borrower is a member of a participating credit union before the credit union purchases a loan participation; and,

(5) The purchase complies with the credit union's written loan participation policy, which, among its provisions, must:

(i) Establish underwriting standards for loan participations which, at a minimum, meet the same underwriting standards the credit union uses when it originates a loan;

(ii) Establish a limit on the aggregate amount of loan participations that may be purchased from any one originating lender, not to exceed 25 percent of the credit union's net worth;

(iii) Establish limits on the amount of loan participations that may be purchased by each loan type, not to exceed a specified percentage of the credit union's net worth; and

(iv) Establish a limit on the aggregate amount of loan participations that may be purchased with respect to a single borrower, or group of associated borrowers, not to exceed 15 percent of the credit union's net worth, unless granted a waiver by its Regional Director.

(c) A loan participation agreement must:

(1) Be properly executed;

(2) Be acted on by the credit union's board of directors or, if the board has so delegated in its policy, a designated committee or senior management official(s);

(3) Be retained in the credit union's office; and

(4) Include provisions addressing the following:

(i) Prior to purchase, the identification, either directly in the agreement or through a document which is incorporated by reference into the agreement, of the specific loan participation(s) being purchased;

(ii) The percent of the loan participation retained by the originating lender throughout the life of the loan, which must be at least 10 percent;

(iii) The location and custodian for original loan documents;

(iv) Access to periodic financial and other performance information about the loan, the borrower, and the servicer so participants can monitor the loan;

(v) Enumerated duties and responsibilities of the originating lender, servicer, and participants in respect of servicing, default, foreclosure, collection, and other matters involving the ongoing administration of the loan; and

(vi) Circumstances and conditions under which participants may replace the servicer.

3. Amend § 701.23 to add introductory text before paragraph (a) as follows:

§ 701.23 Purchase, sale, and pledge of eligible obligations.

This section governs a federal credit union's purchase, sale, or pledge of all or part of a loan to one of its own members, where no continuing contractual obligation between the seller and purchaser is contemplated. For purchases of eligible obligations, the borrower must be a member of the purchasing federal credit union before the purchase is made. A federal credit union may not purchase a non-member loan to hold in its portfolio.

* * * * *

PART 741—REQUIREMENTS FOR INSURANCE

Subpart A—Regulations That Apply to Both Federal Credit Unions and Federally Insured State-Chartered Credit Unions and That Are Not Codified Elsewhere in NCUA's Regulations

4. The authority citation for part 741 continues to read as follows:

Authority: 12 U.S.C. 1757, 1766(a), 1781–1790, and 1790d; 31 U.S.C. 3717.

5. Add paragraph (b)(4) to § 741.8 to read as follows:

§ 741.8 Purchase of assets and assumption of liabilities.

* * * * *

(b) * * *

* * * * *

(4) Purchases of loan participations as defined in and meeting the requirements of § 701.22 of this chapter.

* * * * *

6. Add new § 741.225 to read as follows:

§ 741.225 Loan participations.

Any credit union that is insured pursuant to Title II of the Act must adhere to the requirements stated in § 701.22 of this chapter with the exception of § 701.22(b)(4).

[FR Doc. 2011–32719 Filed 12–21–11; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 741

RIN 3133–AD96

Maintaining Access to Emergency Liquidity

AGENCY: National Credit Union Administration (NCUA).

ACTION: Advance notice of proposed rulemaking with request for comment (ANPR).

SUMMARY: The NCUA Board (Board) requests public comment on the scope and requirements of a regulation to require federally insured credit unions (FICUs) to have access to backup federal liquidity sources for use in times of financial emergency and distressed economic circumstances. The Board also seeks comment on how such a regulation could be implemented to maximize economic benefit while minimizing regulatory burden on credit unions.

DATES: Send your comments to reach us on or before February 21, 2012. We may not consider comments received after the above date in making our decision on the ANPR.

ADDRESSES: You may submit comments by any one of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email:* Address to *regcomments@ncua.gov.* Include ''[Your name]—Comments on Advance Notice of Proposed Rulemaking for Part 741, Maintaining Access to Emergency Liquidity'' in the email subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for email.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Public Inspection: You can view all public comments on NCUA's Web site at *http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx* as submitted, except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. You may inspect paper copies of comments in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an email to *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Lisa Henderson, Staff Attorney, Office of General Counsel, at the address above or telephone (703) 518–6540; or J. Owen Cole, Jr., Director, Division of Capital Markets, Office of Examination and Insurance, at the address above or telephone (703) 518–6620.

SUPPLEMENTARY INFORMATION:

I. Background
II. General Discussion
III. Potential Regulatory Requirement
IV. Request for Comment

I. Background

a. Why may a rule be necessary?

The recent financial crisis and lingering economic uncertainties require NCUA and credit unions to closely examine the adequacy of risk management programs and practices in FICUs, including liquidity. One of the vital lessons learned from recent events is that institutions, both financial and otherwise, need to have an inviolable liquidity backstop that is over and above primary sources of funding such as tapping market sources of credit or selling highly liquid assets. Absent a reliable backstop, institutions can suddenly be affected by unforeseen systemic liquidity events that render them incapable of funding normal daily operations and facing a rapidly accelerating risk of operational disruption and even failure. With the advent of corporate credit union (corporate) system reforms resulting from the crisis, the Board sees the changing role of corporates as a major impetus to revisit the manner in which emergency liquidity for the credit union system is maintained and accessed.

Currently, virtually all FICUs have access to the Central Liquidity Facility (CLF or facility) by belonging to a corporate credit union that is in turn part of the agent group headed by U.S. Central Bridge Corporate Federal Credit Union (USC Bridge).[1] USC Bridge temporarily holds CLF stock on behalf of the whole agent group, but USC Bridge will soon be winding down and closing.[2] In the absence of an alternative arrangement, when USC Bridge redeems the CLF stock as part of its closure process, the majority of credit unions that enjoyed access to CLF through this agent relationship will no longer have the CLF as a source of backup liquidity. The corresponding reduction in the CLF's borrowing capacity would also reduce the credit union system's capacity to address a systemic liquidity event.

Based on June 30, 2011, Call Report data, most FICUs have no emergency liquidity source beyond indirect CLF membership by virtue of being a member of a corporate and USC Bridge holding the CLF capital stock. Only 1.3 percent of FICUs have direct membership in CLF, and only 4.5 percent of FICUs are set up to access the Federal Reserve Discount Window (Discount Window). While 14.6 percent of FICUs report being members of a Federal Home Loan Bank (FHLB), 27 percent do not hold any mortgage assets and would be unlikely to be able to rely upon the FHLB for wholesale funding or liquidity needs. More troubling, over 90 percent of FICUs do not currently hold any U.S. Treasury obligations. Shorter

[1] NCUA established USC Bridge to provide an orderly transition in resolving the failure of U.S. Central Corporate Federal Credit Union, which had historically held the CLF capital stock on behalf of the majority of the credit union system.

[2] The closure of USC Bridge and corresponding redemption of CLF stock is expected to occur sometime in 2012. Though member institutions did contemplate creating a successor to USC Bridge, the plans for a potential successor never included holding the CLF stock and these plans are no longer being pursued.

duration Treasury obligations are a key alternative source of contingent liquidity as they are readily marketable, even in times of widespread economic distress. For these reasons, the Board believes it is important to explore avenues for preserving credit unions' access to the CLF when USC Bridge can no longer serve as the primary agent, credit unions choose providers other than agent corporates of correspondent services, or continuing corporates do not take up CLF capital stock subscriptions on behalf of their members.

The following information on FICUs relates to sources of contingent liquidity, other than CLF access, as of June 30, 2011.

Credit union cohort	Number	Percent of all FICUs	Average assets	Median assets	Percent of total FICU assets	Average,U.S. government obligations/ total assets	Average, investments < 1 year maturity/ total assets (percent)
All FICUs	7,239	100.0	$130.2M	$18.6M	100.0	0.3	13.7
No Federal Reserve (Fed) Relationship	6,916	95.5	86.4M	17.0M	63.4	0.3	14.0
Neither Fed nor FHLBank Relationship	6,109	84.4	44.4M	13.1M	28.8	0.3	14.9
No U.S. Government Investments	6,622	91.5	90.1M	16.2M	63.3	0.0	14.0
Application Filed to Borrow from Fed	323	4.5	1,068.8M	393.3M	36.6	0.7	7.6
Collateral Pre-pledged with Fed	238	3.3	1,224.0M	387.7M	30.9	0.6	7.2
FHLBank Member	1,060	14.6	607.9M	238.2M	68.4	0.5	7.1
No Real Estate Loans	1,990	27.5	4.8M	2.6M	1.0	0.3	17.8
No Investments							
< 1 Year in Maturity	658	9.1	21.9M	2.1M	1.5	0.1	0.0
Direct CLF Member*	95	1.3	333.6M	86.3M	3.4	0.6	12.2

*As of December 9, 2011, the Central Liquidity Facility (CLF) had 98 direct members; 95 of these were federally insured. For consistency, non federally insured credit unions were excluded from this analysis.

b. How has NCUA addressed liquidity risk in the past?

In March 2010, NCUA and the federal banking regulators (agencies), in conjunction with the Conference of State Bank Supervisors, issued a Federal Financial Institutions Examination Council Interagency Policy Statement on Funding and Liquidity Risk Management (Policy Statement).[3] The Policy Statement summarized the principles of sound liquidity risk management. It emphasized the importance of cash flow projections, diversified funding sources, stress testing, cushions of liquid assets, and formal, well-developed contingency funding plans as primary tools for measuring and managing liquidity risk. The agencies, including NCUA, expect each financial institution to manage funding and liquidity risk using processes and systems commensurate with the institution's complexity, risk profile, and scope of operations.

In August 2010, the Board issued Letter to Credit Unions No. 10–CU–14 disseminating the Policy Statement and re-emphasizing NCUA's expectation that FICUs manage liquidity risk using processes and systems commensurate with their own credit union's complexity, risk profile, and scope of operations. This new guidance supplements existing guidance the Board provided in an earlier Letter to Credit Unions No. 02–CU–05, Examination Program Liquidity Questionnaire, issued in March 2002.

II. General Discussion

a. What is liquidity?

Liquidity is a credit union's capacity to meet its cash and collateral obligations at a reasonable cost. Maintaining an adequate level of liquidity depends on the credit union's ability to efficiently meet both expected and unexpected cash flow and collateral needs without adversely affecting either daily operations or the financial condition of the credit union.

b. What is liquidity risk?

Liquidity risk is the risk that a credit union's financial condition or overall safety and soundness is adversely affected by an inability, or perceived inability, to meet its obligations. A credit union's obligations, and the funding sources used to meet them, depend significantly on its business mix, balance sheet structure, and the cash flow profiles of its on- and off-balance sheet obligations. In managing their cash flows, credit unions confront various situations that can give rise to increased liquidity risk. These include funding mismatches, market constraints on the ability to convert assets into cash or in accessing sources of funds (i.e., market liquidity), and contingent liquidity events. Changes in economic conditions or exposure to credit, market, operation, legal, and reputation risks also can affect an institution's liquidity risk profile and should be considered in the assessment of liquidity and asset/liability management.

c. How can liquidity risk be managed?

Credit unions can manage liquidity risk by maintaining:

- Adequate levels of highly liquid marketable securities that can be used to meet liquidity needs in stressful situations;
- An appropriately diverse mix of existing and potential future funding sources; and
- Access to a contingent liquidity provider (i.e., a specialized liquidity provider that serves as a backup to market sources).

Failure in any of these factors may result in an unsafe and unsound liquidity condition. As noted in the Policy Statement:

> Recent events illustrate that liquidity risk management at many financial institutions is in need of improvement. Deficiencies include insufficient holdings of liquid assets, funding risky or illiquid asset portfolios with potentially volatile short-term liabilities, and a lack of meaningful cash flow projections and *liquidity contingency plans.*

75 FR 13656, 13660 (Mar. 22, 2010) (emphasis added).

d. Why should a credit union have a liquidity contingency plan?

Credit unions need to have access to sources of emergency liquidity from

[3] 75 FR 13656 (Mar. 22, 2010).

both their own balance sheets and through credit facilities. The recent financial crisis has underscored the paramount importance of liquidity access during times of extreme financial instability. It has also emphasized the essential role played by specialized liquidity facilities like CLF and the Discount Window when those facilities may be the only entities willing and capable of providing liquidity loans to destabilized institutions, that is, when no other market sources of funds are available. When a depository institution exhibits liquidity problems and its credit providers have uncertainty about its true financial condition, that institution's ability to obtain credit can rapidly diminish or cease altogether. The inability of a depository institution to fund its business-as-usual operations by borrowing can, in turn, cause its ultimate insolvency and failure if, for example, it were forced to sell assets at distressed prices to raise necessary funds. In the recent financial crisis, even institutions that were healthy used emergency liquidity facilities when risk aversion reduced the availability of even short-term liquidity and funding costs became prohibitively high. Without access to governmental liquidity facilities, it is clear that the scope of the financial crisis and damage to the economy would have been much more severe.

Governmental liquidity facilities were created by Congress to provide a stability mechanism and thereby preempt illiquidity situations before they lead to unnecessary insolvencies or cause systemic disruptions to the depository industry. This is because depository institutions are a key element of financial services and the overall economy. Federal entities that exist to provide liquidity assistance are unique in their capacity to obtain funding in times of crisis and this is based on their backing by the full faith and credit of the U.S. government. These liquidity facilities are viewed as the ultimate backstop for institutions seeking emergency liquidity in time of need and have proven to be a critical component of the U.S. government's contingency management during times of widespread instability.

By way of example, CLF figured prominently in NCUA's contingency plans during the recent financial crisis. Through various contingency programs, such as the Credit Union System Investment Program, the Credit Union Homeowners Affordability Relief Program, and loans to the National Credit Union Share Insurance Fund (NCUSIF), CLF facilitated access to billions of dollars of external liquidity through its borrowing arrangements with the Federal Financing Bank. These programs totaled approximately $18.4 billion and were orchestrated during the period between December 2008 and March 2009. Total CLF activity during the height of the crisis reached as much as $20.5 billion, including approximately $2.1 billion in liquidity-need loans outstanding. By having ready access to contingent liquidity through CLF, NCUA was in a position to inject a critical amount of emergency liquidity into the credit union system. These liquidity injections helped stabilize confidence and gave NCUA time to work through the financial difficulties arising from the failure of the system's largest corporate credit unions. They, combined with other actions taken by the Board, were instrumental in maintaining the continuity of vital credit union services and helped avert higher potential losses to the system.

The level of CLF membership (subscribed capital stock) has a major impact on the facility's capacity to meet systemic liquidity demands. CLF's legal maximum borrowing amount, and in turn the maximum amount it can lend to its members or NCUSIF, is based on the amount of its total subscribed capital stock and surplus. By statute, the facility can borrow $12 for every $1 dollar of subscribed capital stock and surplus; so, any declines in capital stock have a corresponding 12–1 deleveraging effect on CLF's ability to borrow. Throughout the recent crisis, CLF was essentially fully subscribed because the agent group arrangement covers almost all natural person credit unions that are not direct members.

The table below shows the calculation of CLF's current maximum legal borrowing authority based on October 31, 2011, financial data. It compares that amount to the borrowing authority without the agent stock currently held by USC Bridge.

CLF borrowing is limited to a total face value of twelve times the subscribed capital stock and surplus of the facility. 12 U.S.C. 1795f(a)(4)(A).	Current legal borrowing authority based on total subscribed capital stock and surplus As of 10/31/2011	Estimated legal borrowing authority with no agent member stock (all else constant)
Regular member Paid-In Capital	76,052,908.00	76,052,908.00
Agent member* Paid-In Capital	1,995,670,340.00	-
Total Paid-In Capital	2,071,723,248.00	76,052,908.00
Regular member On-Call Capital	76,052,908.00	76,052,908.00
Agent member On-Call Capital	1,995,670,340.00	-
Total On-Call Capital	2,071,723,248.00	76,052,908.00
Total subscribed capital stock (Paid-In plus On-Call)	4,143,446,496.00	152,105,816.00
Retained earnings prior year	22,005,970.47	22,005,970.47
Appropriated RE current year	4,345,089.36	4,345,089.36
Total Retained Earnings (surplus)	26,351,059.83	26,351,059.83
Total subscribed capital stock and surplus	4,169,797,555.83	178,456,875.83
Limit: 12 times total subscribed stock and surplus	50,037,570,669.96	2,141,482,509.96

*USC Bridge agent group covers 6,981 natural person credit unions

III. Potential Regulatory Requirement

a. How would a rule work?

The Board is intending to issue a regulation that would require federally insured credit unions, as part of their contingency funding plans, to have access to backup federal liquidity sources for use in times of financial emergency and distressed economic circumstances. The Board is contemplating requiring this access be demonstrated by a credit union in one of four ways: (1) Becoming a member in good standing of CLF directly; (2) becoming a member in good standing of CLF through a corporate credit union; (3) obtaining and maintaining demonstrated access to the Discount Window; or (4) maintaining a certain percentage of assets in highly liquid Treasury securities. If promulgated, the regulation would be added to NCUA's regulation on Requirements for Insurance in 12 CFR part 741 so as to apply uniformly to both federal and state-chartered credit unions.

b. What does the CLF do and how does it operate?

CLF is available to help credit unions meet their liquidity needs. CLF has served as the credit union system's backup liquidity source since its creation in 1979.[4] Essentially, CLF provides a form of liquidity insurance to its member credit unions through its ability to make liquidity advances to member credit unions funded with matched borrowings from the Federal Financing Bank.[5] As of October 31, 2011, CLF is permitted to lend up to its statutory limit, currently approximately $50 billion.[6]

Nearly all federally insured and some non-federally insured credit unions currently qualify as members of CLF indirectly through USC Bridge, as agent group representative. A credit union must belong to CLF and primarily serve natural persons (i.e., not a corporate) to be eligible for a liquidity-need advance. A credit union primarily serving natural persons may become a ''regular'' member of the facility by subscribing to the capital stock of the facility. The stock subscription amount for a regular member is equal to one-half of one percent of the credit union's paid-in and unimpaired capital and surplus. 12 U.S.C. 1795c(a); 12 CFR 725.3. There are 96 regular members of CLF. A credit union or group of credit unions primarily serving other credit unions may become an agent member of the facility by obtaining approval from the Board and subscribing to the capital stock of the facility on behalf of credit unions in its membership that are not regular members.[7] Currently, there is one agent group representative and 23 agent members within that group. The agent stock amount is adjusted no less

[4] National Credit Union Central Liquidity Facility Act, subchapter III of the Federal Credit Union Act, 12 U.S.C. 1795–1795k. The regulations implementing the CLF Act appear at 12 CFR part 725.

[5] The Federal Financing Bank (FFB) is a government corporation, created by Congress in 1973 under the general supervision of the Secretary of the Treasury. The FFB was established to centralize and reduce the cost of federal borrowing, as well as federally-assisted borrowing from the public. 87 STAT. 937, 12 U.S.C. 2281.

[6] CLF may borrow from any source, provided that the total face value of these obligations shall not exceed twelve times the subscribed capital stock and surplus of the facility ($4,169,797,555.83 as of October 31, 2011). 12 U.S.C. 1795(a)(4)(A).

[7] The stock subscription amount for agent members is equal to one-half of one percent of the paid-in and unimpaired capital and surplus of all those credit unions primarily serving natural persons, which are members of the corporates within the agent group, but which are not regular members of CLF. 12 U.S.C. 1795c(b)(2); 12 CFR 725.4.

often than annually to reflect changes in the underlying balance sheets of member natural person credit unions.[8]

Historically, the vast majority of natural person credit unions have not elected to become regular members. Instead, they have qualified for membership in CLF by joining a corporate credit union that was in turn a CLF agent and part of the agent group headed by USC Bridge. As the agent group representative, USC Bridge subscribed to, and absorbed the costs of, capital stock on behalf of all underlying natural person credit unions represented by the respective corporates in USC Bridge's agent group. While there is not an explicit charge to natural person credit unions that are covered by the agent group, credit unions have supported the cost of the stock through ownership of corporate credit unions, which in turn own USC Bridge. The cost of supporting CLF ownership is embedded in the investment returns and services extended by USC Bridge to the corporates, which provide returns and services to the very natural person credit unions that are conferred CLF access by this arrangement.

The credit unions that join CLF directly (regular members) subscribe to capital stock in an amount of one half of the required capital subscription (which equals one half of one percent of the credit union's unimpaired capital and surplus) to CLF. The CLF capital stock is held as an asset on the subscribing credit union's books and receives quarterly dividend distributions at rates determined by the Board.[9] When circumstances require that all or a portion of a member's stock be redeemed by the facility, the Board is required by statute to return an amount equal to what the subscribing credit union originally paid for the stock less any amount owed by the member to the facility.[10] A member of the facility whose capital stock subscription constitutes less than 5 percent of stock outstanding may withdraw from membership six months after notifying the Board of its intention to do so.[11]

In order to obtain a liquidity advance, a member must meet two conditions: (1) It must have a valid liquidity need; and (2) it must meet minimum creditworthiness standards at the time of its request.[12] ''Liquidity needs'' means the needs of a credit union primarily serving natural persons for:

(1) Short-term adjustment credit available to assist in meeting temporary requirements for funds or to cushion more persistent outflows of funds pending an orderly adjustment of credit union assets and liabilities;

(2) Seasonal credit available for longer periods to assist in meeting seasonal needs for funds arising from a combination of expected patterns of movement in share and deposit accounts and loans; and

(3) Protracted adjustment credit available in the event of unusual or emergency circumstances of a longer term nature resulting from national, regional, or local difficulties.[13]

By law, credit unions cannot use CLF loans to expand their portfolio of loans or investments.[14]

c. Why is credit union access to the CLF changing?

The operating status of USC Bridge is temporary and as part of its orderly resolution, it will soon discontinue its role as CLF agent group representative in conjunction with the wind down of its operations. Accordingly, the existing agent group arrangement will also terminate. When that occurs, the vast majority of natural person credit unions that are not regular members of CLF will need to take the necessary steps to establish new membership arrangements, as either a regular member or with a new agent, such as another corporate, if they intend to utilize CLF as their contingent liquidity source.

NCUA is working with CLF agents (corporates) to allow for the orderly transfer of the corresponding portion of CLF capital stock now held by USC Bridge to any retail corporates that elect to buy stock as agents on behalf of their natural person credit union members. A credit union continues to have a choice of obtaining access to CLF by either becoming a regular (direct) member or by belonging to an agent member that has purchased CLF stock on its members' behalf.

d. Can credit unions use the Discount Window?

The Discount Window is an alternative source for meeting credit unions' contingent liquidity needs. Only depository institutions that maintain reservable transaction accounts (share draft accounts for credit unions) or nonpersonal time deposits (share certificates or money market share accounts held by a depositor other than an individual) may establish borrowing privileges at the Discount Window. Eligibility to borrow is not dependent on or related to the use of Federal Reserve priced services.

The Discount Window helps to relieve liquidity strains for individual depository institutions and for the banking system as a whole by providing a source of funding in time of need. There are three credit programs: (1) Primary, (2) secondary, both discussed below, and (3) seasonal.[15] Discount Window loans must be secured by collateral acceptable to the lending Federal Reserve Bank. Much of the statutory framework that governs Discount Window lending is contained in section 10B of the Federal Reserve Act, as amended, 12 U.S.C. 461. The program and policies that implement the statutory framework are set forth in Regulation A, 12 CFR part 201.

The primary credit program is the principal safety valve for ensuring adequate liquidity in the banking system and a backup source of short-term funds for generally sound depository institutions. Primary credit is available on a very short-term basis, typically overnight, at a rate above the Federal Open Market Committee's target rate for federal funds. Normally, primary credit will be granted on a ''no-questions-asked,'' minimally administered basis. There is no restriction on a borrower's use of primary credit.

Priced slightly higher, secondary credit is available to meet backup funding needs of depository institutions that do not qualify for primary credit. It may be used as a backup source of funding on a very short-term basis, usually overnight, or to facilitate an orderly resolution of serious financial difficulties. It entails a higher level of administration. Regulation A publishes a table of the interest rates for primary and secondary credit available from each Federal Reserve District Bank. 12 CFR 201.51.

While the CLF is a special liquidity facility for the credit union industry, the Discount Window serves all depository institutions that meet eligibility requirements established by Federal Reserve regulations. To gain access to the discount window, the Federal

[8] 12 U.S.C. 1795c(c); 12 CFR 725.5(b).

[9] *See* 12 CFR 725.5(e).

[10] 12 U.S.C. 1795d(c).

[11] 12 U.S.C. 1795c(e)(1); 12 CFR 725.6(a).

[12] A credit union generally is creditworthy if the credit union is viable and not in danger of failing. 12 CFR 725.18. The regulations also require that each advance must be secured by a first priority security interest in assets of the borrowing credit union. Such assets must have a net book value of at least 110% of all amounts due under the applicable CLF advance. 12 CFR 725.19.

[13] 12 U.S.C. 1795a(1); 12 CFR 725.2(i). CLF Operating Circulars 99–1 and 99–2 provide information on lending procedures and the application forms.

[14] 12 U.S.C. 1795e(a)(1).

[15] Seasonal credit is available to depository institutions that can demonstrate a clear pattern of recurring intra-yearly swings in funding needs.

Reserve requires specific agreements to be executed. Information regarding these agreements, as set forth in Operating Circular No. 10, and Discount Window operation can be found at *www.frbdiscountwindow.org.* These agreements include arrangements for the pledging of collateral to secure advances. All extensions of credit must be secured to the satisfaction of the lending Federal Reserve Bank by collateral that is acceptable for that purpose. Depository institutions that do not envision using the Discount Window in the ordinary course of events are encouraged to execute the necessary documents because a need for Discount Window credit could arise suddenly and unexpectedly.

IV. Request for Comment

This is a crucial time for depository institutions, including credit unions, to reflect on the recent financial crisis and ongoing economic events and address potential deficiencies in their funding and liquidity risk management capabilities. Access to a contingent liquidity provider that can back up market sources of liquidity is an essential component of these capabilities that must be met. Credit unions can use membership in CLF or access with a Discount Window facility (and/or a combination of the two) to meet this need. Since USC Bridge will need to discontinue its role as a CLF agent member intermediary, a credit union currently covered under an agent membership (i.e, by belonging to a retail corporate credit union) will lose access to CLF unless it takes action to become a regular member or join a new agent member that acquires CLF membership stock on the credit union's behalf.

The Board invites comment on the issues raised in this ANPR. To facilitate consideration of the public's views, please address your comments to the questions set forth below on each issue, and organize and identify them by corresponding question number so that each question is addressed separately. To maximize the value of public input on each issue, it is also important that commenters provide and explain the reasons that support each of their opinions. There will be a further opportunity to comment on these issues should the Board issue a proposed rule.

(1) What are the standards and provisions, along with associated considerations, that should accompany a requirement for federally insured credit unions to maintain access to backup federal liquidity sources for use in times of financial emergency and distressed economic circumstances? Should an NCUA requirement to maintain access to backup federal liquidity sources contain an exemption for credit unions under a certain asset threshold, and if so, what should that threshold be?

(2) Are there other sources of credit beyond the CLF and Discount Window the Board should consider as acceptable to satisfy the need for a backup federal liquidity source? For example, would a credit union's maintenance of a certain percentage of its assets in highly liquid (maturity of 90 days or less) Treasury securities satisfy the need? If so, what is the appropriate percentage? Also, how should NCUA ensure that these securities are available to be pledged or sold?

(3) How can CLF best play a role in the immediate term upon USC Bridge's wind down and over the long term in satisfying a credit union's need for a contingency liquidity source? How should that role be executed? Are changes to the CLF statute to modernize the way the CLF functions over the long term warranted, and if so what changes should be pursued? For example, should the CLF function more like the Discount Window?

(4) What is the best way for credit unions to access CLF (e.g., either directly or through an agent)? Should corporate credit unions continue to play a role and, if so, to what extent should they be encouraged to purchase CLF stock as agents for natural person credit unions?

The Board also seeks comment on how a proposed rule could be implemented to maximize economic benefit while minimizing regulatory burden on credit unions. Please comment on any other relevant issues the Board has not considered.

By the National Credit Union Administration Board on December 15, 2011.

Mary F. Rupp,

Secretary of the Board.

[FR Doc. 2011–32720 Filed 12–21–11; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1324; Directorate Identifier 2011–NM–104–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Airbus Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model C4–605R Variant F airplanes (collectively called A300–600 series airplanes), and Model A310 series airplanes. This proposed AD was prompted by a report of a crack in the forward cargo door selector valve pipe located in the avionics bay opposite to line replaceable unit racking. This proposed AD would require replacing a certain aluminum high pressure pipe with a new corrosion resistant stainless steel pipe. We are proposing this AD to prevent cracking in the forward cargo door selector valve pipe which could impact the 90 VU avionics line replaceable unit, and could result in multiple computer failures, affecting flight safety.

DATES: We must receive comments on this proposed AD by February 6, 2012.

ADDRESSES: You may send comments by any of the following methods:

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

For service information identified in this proposed AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email: *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the

regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1324; Directorate Identifier 2011–NM–104–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2011–0085, dated May 12, 2011 (corrected May 31, 2011) (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> An A300–600 operator has reported a hydraulic leak at the forward cargo door area. After further investigation, the forward cargo door selector valve pipe Part Number (P/N) A5231006100300, located in the avionics bay opposite to Line Replaceable Unit (LRU) racking, was found cracked.
>
> This condition, if not detected and corrected, can impact the 90 VU avionics LRU, which could result in multiple computer failures, affecting flight safety.
>
> For the reasons described above, this AD requires the replacement of the aluminum pipe P/N A5231006100300 with a stainless steel pipe P/N A5231007000600.
>
> This [EASA] AD has been corrected to make clear that the use of Airbus SB A310–52–2067 and Airbus SB A300–52–6065 at original issue is acceptable to comply with paragraph (1) of this [EASA] AD, unless, inadvertently, the high pressure pipe P/N A5231007000600 has been replaced in service, after original issue of the SB's accomplishment, with P/N A5231006100300.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued Mandatory Service Bulletins A300–52–6065, Revision 01, dated July 5, 2010; and A310–52–2067, Revision 01, dated July 5, 2010. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

This AD differs from the MCAI and/or service information as follows: The MCAI specifies that installation of P/N A5231006100300 is not allowed after modification. However, this AD does not allow installation of P/N A5231006100300 as of the effective date of this AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 152 products of U.S. registry. We also estimate that it would take about 4 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $51,680, or $340 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Airbus: Docket No. FAA–2012–1324; Directorate Identifier 2011–NM–104–AD.

(a) Comments Due Date

We must receive comments by February 6, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A300 B4–601, B4–603, B4–620, B4–622, B4–605R, B4–622R, F4–605R, F4–622R, and C4–605R Variant F airplanes; and Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes; certificated in any category; all certificated models, all manufacturer serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 52: Doors.

(e) Reason

This AD was prompted by a report of a crack in the forward cargo door selector valve pipe located in the avionics bay opposite to line replaceable unit racking. We are issuing this AD to prevent cracking in the forward cargo door selector valve pipe which could impact the 90 VU avionics line replaceable unit, and could result in multiple computer failures, affecting flight safety.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Replacement

Except as provided by paragraph (h) of this AD: Within 30 months or 6,000 flight hours after the effective date of this AD, whichever occurs first, replace the aluminum high pressure pipe having part number (P/N) A5231006100300 with a new pipe made of corrosion resistant stainless steel having P/N A5231007000600, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–52–6065, Revision 01, dated July 5, 2010 (for Model A300 B4–600 series airplanes); or A310–52–2067, Revision 01, dated July 5, 2010 (for Model A310 series airplanes).

(h) Exception

Any airplane that has incorporated Airbus Modification 12464 in production has the new P/N A5231007000600 installed and is therefore compliant with the requirements of paragraph (g) of this AD. If the high pressure pipe has been replaced with P/N A5231006100300 in service after delivery of the airplane, replace the high pressure pipe in accordance with paragraph (g) of this AD within the times specified in paragraph (g) of this AD.

(i) Parts Installation

As of the effective date of this AD, no person may install an aluminum high pressure pipe having P/N A5231006100300, on any airplane.

(j) Credit for Actions Accomplished in Accordance With Previous Service Information

Replacements done before the effective date of this AD in accordance with Airbus Mandatory Service Bulletins A300–52–6065, dated July 9, 2002 (for Model A300–600 series airplanes); and A310–52–2067, dated July 9, 2002 (for Model A310 series airplanes); are acceptable for compliance with the requirements of paragraph (g) of this AD.

(k) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(l) Related Information

Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2011–0085, dated May 12, 2011 (corrected May 31, 2011); Airbus Mandatory Service Bulletin A300–52–6065, Revision 01, dated July 5, 2010; and Airbus Mandatory Service Bulletin A310–52–2067, Revision 01, dated July 5, 2010; for related information.

Issued in Renton, Washington, on December 14, 2011.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–32844 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1323; Directorate Identifier 2010–NM–212–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Model A330–200 and –300 series airplanes; Model A330–223F and –243F airplanes; and Model A340–200, –300, –500, and –600 series airplanes. This proposed AD was prompted by a report that during the evaluation of specific engine failure cases at take-off on Airbus flight simulators. It has been shown that with flight control primary computer (FCPC)1 inoperative, in worst case scenario, when FCPC2 and FCPC3 resets occur during rotation at take off, a transient loss of elevator control associated with a temporary incorrect flight control law reconfiguration could occur. This proposed AD would require revising the Limitations section of the applicable airplane flight manual. We are proposing this AD to prevent movement of the elevators to zero position, which could result in inducing a pitch down movement instead of a pitch up movement needed for lift off, resulting in loss of controllability of the airplane.

DATES: We must receive comments on this proposed AD by February 6, 2012.

ADDRESSES: You may send comments by any of the following methods:

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://*

www.regulations.gov; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1323; Directorate Identifier 2010–NM–212–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0109, dated June 28, 2010 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> On A330/A340 aeroplanes, the Flight Control Primary Computer 2 (FCPC2) and FCPC3 are supplied with power from the 2PP bus bar. Electrical transients on the 2PP bus bar occur, in particular during engine n.2 failure on A330 aeroplanes or engine n.3 failure on A340 aeroplanes. Such electrical transients lead to a FCPC2 reset. FCPC3 reset does not occur thanks to the introduction of second electrical power supply to FCPC3 from 1PP bus bar associated to the Electrical Contactor Management Unit (ECMU) standard 5.
>
> During the evaluation of specific engine failure cases at take-off on Airbus flight simulators, it has been evidenced that with FCPC1 inoperative, in the worst case, when FCPC2 and FCPC3 resets occur during rotation at take off, a transient loss of elevator control associated with a temporary incorrect flight control law reconfiguration could occur. This condition leads to a movement of the elevators to the zero position, which induces a pitch down movement instead of a pitch up movement needed to lift off. In addition, it leads to a limitation of the pilot control on pitch axis and limits the pilot capacity to counter the pitch down movement during this flight phase, which constitutes an unsafe condition.
>
> To prevent such condition, [EASA] Emergency Airworthiness Directive (EAD) 2008–0010–E was issued to prohibit aeroplanes dispatch with FCPC1 inoperative (from GO to NO–GO) for certain aeroplane configurations. For other configurations, dispatch is allowed when the integrity of the FCPC3 second electrical power supply is ensured.
>
> EASA AD 2008–0010R1 was issued to:
>
> —For A340–500/–600, alleviate the dispatch restriction on aeroplanes fitted with new FCPC Standard W11 (part number (P/N) LA2K2B100GA0000)
>
> and
>
> —For A330 and A340–200/–300, to take into account the possibility to embody in service a new FCPC3 second electrical power supply equivalent to the production one.
>
> This [EASA] AD, which supersedes EASA AD 2008–0010R1 retaining its requirements, is issued to extend the applicability to the newly certified models A330–223F and A330–243F.

The FAA did not issue corresponding ADs for EASA Airworthiness Directive 2008–0010–E and EASA Airworthiness Directive 2008–0010R1 since it was determined at that time that the FAA Master Minimum Equipment List (MMEL) was an acceptable method for controlling exposure of the U.S. fleet to the safety issue addressed in the EASA ADs. Since that decision was made, the FAA determined that an AD is needed to control dispatch restrictions. In addition, EASA Airworthiness Directive 2010–0109 added two new Airbus models in the applicability and we are proceeding with this FAA AD in order to address the identified unsafe condition for the U.S. fleet. You may obtain further information by examining the MCAI in the AD docket.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 55 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $4,675, or $85 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Airbus: Docket No. FAA–2011–1323; Directorate Identifier 2010–NM–212–AD.

(a) Comments Due Date

We must receive comments by February 6, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A330–201, –202, –203, –223, –223F, –243, –243F, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes; and Model A340–211, –212, –213, –311, –312, –313, –541, and –642 airplanes; certificated in any category; all serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 27: Flight Controls.

(e) Reason

This AD was prompted by a report that during the evaluation of specific engine failure cases at take-off on Airbus flight simulators. It has been shown that with flight control primary computer (FCPC)1 inoperative, in worst case scenario, when FCPC2 and FCPC3 resets occur during rotation at take off, a transient loss of elevator control associated with a temporary incorrect flight control law reconfiguration could occur. We are issuing this AD to prevent movement of the elevators to zero position, which could result in inducing a pitch down movement instead of a pitch up movement needed for lift off, resulting in loss of controllability of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Airplane Flight Manual (AFM) Revision for Certain Airplanes

For airplanes identified in paragraph (c) of this AD, except for airplanes identified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD: Within 30 days after the effective date of this AD, revise the Limitations section of the applicable AFM to include the following statement. This may be done by inserting a copy of this AD into the AFM.

''Dispatch with the FCPC ''PRIM 1'' inoperative is prohibited.''

(1) Model A330–223F and –243F airplanes.

(2) Model A330–200 and –300 series airplanes, and Model A340–200 and –300 series airplanes, on which Airbus modification 44385 has been embodied either in production or in service by Airbus Service Bulletin A330–27–3159 or Airbus Service Bulletin A340–27–4158; and on which Airbus modification 44431 has been embodied either in production or in service by Airbus Service Bulletin A330–24–3011 or Airbus Service Bulletin A340–24–4019.

(3) Model A340–500 and –600 series airplanes on which Airbus modification 57698 has been embodied either in production or in service by Airbus Service Bulletin A340–27–5046.

Note 1: When a statement identical to that in paragraph (g) of this AD has been included in the general revisions of the AFM, the general revisions may be inserted into the AFM, and the copy of this AD may be removed from the AFM.

Note 2: This dispatch restriction applies notably to Model A330–200 and –300 series airplanes, and Model A340–200 and –300 series airplanes, which have embodied Airbus Service Bulletin A330–27–3040 or Airbus Service Bulletin A340–27–4046 in service.

(h) AFM Revision for Certain Other Airplanes

For Model A330–200 and –300 series airplanes, and Model A340–200 and –300 series airplanes, on which Airbus modification 44385 has been embodied either in production or in service by Airbus Service Bulletin A330–27–3159 or Airbus Service Bulletin A340–27–4158; and Airbus modification 44431 has been embodied either in production or in service by Airbus Service Bulletin A330–24–3011 or Airbus Service Bulletin A340–24–4019: Within 30 days after the effective date of this AD, revise the Limitations section of the applicable AFM to include the following statement. This may be done by inserting a copy of this AD into the AFM.

''Dispatch with the FCPC ''PRIM 1'' inoperative is allowed provided that the operational test of the FCPC3 second electrical power supply is successfully performed, in accordance with the instructions of Airbus AOT A330–27A3158, or AOT A340–27A4157, as applicable, before the first flight of the MMEL interval.

If the test is not successful, repair in accordance with the instructions of Airbus AOT A330–27A3158 or AOT A340–27A4157, as applicable, before dispatch with FCPC ''PRIM 1'' inoperative.''

Note 3: Model A330–223F and –243F airplanes are not affected by paragraph (h) of this AD.

Note 4: When a statement identical to that in paragraph (h) of this AD has been included in the general revisions of the AFM, the general revisions may be inserted into the AFM, and the copy of this AD may be removed from the AFM.

(i) AFM Revision for Model A330–223F and A330–243F Airplanes

For Model A330–223F and A330–243F airplanes: Within 30 days after the effective date of this AD, revise the Limitations section of the AFM to include the following statement. This may be done by inserting a copy of this AD into the AFM.

''Dispatch with the FCPC ''PRIM 1'' inoperative is allowed provided that the operational test of the FCPC3 second electrical power supply is successfully performed in accordance with the instructions of Airbus AOT A330–27A3158, before the first flight of the MMEL interval.

If the test is not successful, repair in accordance with the instructions of Airbus AOT A330–27A3158, before dispatch with FCPC ''PRIM 1'' inoperative.''

Note 5: When a statement identical to that in paragraph (i) of this AD has been included in the general revisions of the AFM, the general revisions may be inserted into the AFM, and the copy of this AD may be removed from the AFM.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov*. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(k) Related Information

Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2010–0109, dated June 28, 2010, for related information.

Issued in Renton, Washington, on December 14, 2011.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–32845 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–1192; Airspace Docket No. 11–ANM–22]

Proposed Amendment of Class E Airspace; Sheridan, WY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace at Sheridan County Airport, Sheridan, WY. Decommissioning of the Sheridan Tactical Air Navigation System (TACAN) has made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Comments must be received on or before February 6, 2012.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 366–9826. You must identify FAA Docket No. FAA–2011–1192; Airspace Docket No. 11–ANM–22, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2011–1192 and Airspace Docket No. 11–ANM–22) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2011–1192 and Airspace Docket No. 11–ANM–22''. The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

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

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E surface airspace at Sheridan County Airport, Sheridan, WY. Airspace reconfiguration is necessary due to the decommissioning of the Sheridan TACAN. Controlled airspace is necessary for the safety and management of IFR operations at the airport.

Class E airspace designations are published in paragraph 6002, of FAA Order 7400.9V, dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend this proposal for controlled airspace at Sheridan County Airport, Sheridan, WY.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, and effective September 15, 2011 is amended as follows:

Paragraph 6002 Class E airspace designated as surface areas.

* * * * *

ANM WY E2 Sheridan WY [Amended]

Sheridan County Airport, WY
(Lat. 44°46′09″ N., long. 106°58′49″ W.)

That airspace extending upward from the surface within a 4.5-mile radius of the Sheridan County Airport, and within 4.5 miles each side of the 157° bearing of the airport, extending from the 4.5-mile radius to 17.6 miles southeast of the airport, and within 3.5 miles each side of the Sheridan County Airport 316° bearing extending from the 4.5-mile radius to 15.5 miles northwest of the airport, and within 3.5 miles each side of the Sheridan County Airport 325° bearing extending from the 4.5-mile radius to 16 miles northwest of the airport, and 4 miles each side of the 336° bearing of the Sheridan County Airport extending from the 4.5-mile radius to 15.4 miles northwest of the airport, and within 3.5 miles each side of the Sheridan County Airport 140° bearing extending from the 4.5-mile radius to 15.5 miles southeast of the airport.

Issued in Seattle, Washington, on December 13, 2011.

John Warner,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2011–32801 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–1337; Airspace Docket No. 11–AEA–23]

Proposed Establishment of Class E Airspace; Bellefonte, PA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E Airspace at Bellefonte, PA, to accommodate the Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures at Bellefonte Airport. This action would enhance the safety and airspace management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Comments must be received on or before February 6, 2012. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA, Order 7400.9 and publication of conforming amendments.

ADDRESSES: Send comments on this rule to: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE., Washington, DC 20590–0001; Telephone: 1 (800) 647–5527; Fax: (202) 493–2251. You must identify the Docket Number FAA–2011–1337; Airspace Docket No. 11–AEA–23, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment on this rule by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2011–1337; Airspace Docket No. 11–AEA–23) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2011–1337; Airspace Docket No. 11–AEA–23.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

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

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

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory circular No. 11–2A, Notice of Proposed Rulemaking distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace at Bellefonte, PA, providing the controlled airspace

required to support the RNAV GPS standard instrument approach procedures for Bellefonte Airport. Controlled airspace extending upward from 700 feet above the surface would be established for the safety and management of IFR operations at the airport.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9V, dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

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

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, effective September 15, 2011, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AEA PA E5 Bellefonte, PA [New]

Bellefonte Airport, PA
(Lat. 40°53′08″ N., long. 77°48′59″ W.)

That airspace extending upward from 700 feet above the surface within a 15-mile radius of Bellefonte Airport.

Issued in College Park, Georgia, on December 13, 2011.

Michael Vermuth,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2011–32802 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 537

RIN 3141–AA46

Management Contracts—Background Investigations

AGENCY: National Indian Gaming Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: This action proposes to amend NIGC regulations to include tribes, wholly owned tribal entities, and national banks that are already federally regulated or required to undergo a background investigation and licensure by a state or tribe pursuant to a tribal-state compact as entities that the Chair may exercise discretion regarding the submission of information and background investigations.

This process may provide for a streamlined review for such entities in the background investigation process required for management contracts. The proposed revision may reduce duplication of efforts while maintaining the integrity of NIGC review. The proposal maintains the Chair's discretion in determining which entities should be allowed to proceed through an expedited background investigation. This amendment has been included in this proposed rule.

The Commission also considered revising its regulations to clarify that a management contractor should be required to submit background information when the contract is for management of both Class II and Class III gaming activities. Many public comments noted that it was not a necessary revision. The Commission agrees with those public comments and does not propose that clarification.

DATES: The agency must receive comments on or before February 21, 2012.

ADDRESSES: You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

■ *Email comments to:* *reg.review@nigc.gov.*

■ *Mail comments to:* National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005.

■ *Hand deliver comments to:* 1441 L Street NW., Suite 9100, Washington, DC 20005.

■ *Fax comments to:* National Indian Gaming Commission at (202) 632–0045.

FOR FURTHER INFORMATION CONTACT: National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005. Telephone: (202) 632–7009; email: *reg.review@nigc.gov.*

SUPPLEMENTARY INFORMATION:

I. Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal.

II. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (''Commission'') and sets out a comprehensive framework for the regulation of three classes of gaming on Indian lands. The purposes of IGRA

include providing a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; ensuring that the Indian tribe is the primary beneficiary of the gaming operation; and declaring that the establishment of independent federal regulatory authority for gaming on Indian lands, the establishment of federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. 25 U.S.C. 2702.

On November 18, 2010, the National Indian Gaming Commission (NIGC) issued a Notice of Inquiry and Notice of Consultation (NOI) advising the public that the NIGC was conducting a comprehensive review of its regulations and requesting public comment on which of its regulations were most in need of revision, in what order the Commission should review its regulations, and the process NIGC should utilize to make revisions. 75 FR 70680. On April 4, 2011, after holding eight consultations and reviewing all comments, NIGC published a Notice of Regulatory Review Schedule setting out a consultation schedule and process for review. 76 FR 18457. The Commission's regulatory review process established a tribal consultation schedule with a description of the regulation groups to be covered at each consultation. This Part 537 was included in the regulatory review process.

III. Development of the Proposed Rule

The Commission conducted a total of 10 tribal consultations as part of its review of Part 537. Tribal consultations were held in every region of the country and were attended by over 137 tribes and 381 tribal leaders or their representatives. In addition to tribal consultations, on June 28, 2011, the Commission requested public comment on a Preliminary Draft of amendments to Part 537. The Notice of Regulatory Review Schedule (NRR) announced the Commission's intent to review whether Part 537 should be revised to clarify that a management contractor should be required to submit background information when the contract is for management of both Class II and Class III gaming activities. Additionally, comments received from the NRR included a recommendation for the Commission to include a provision to streamline background investigations for certain entities already subject to background requirements and for tribes.

A. Streamlined Background Investigation for Tribes and Entities Otherwise Subject to Background Investigations

The NRR identified a recommendation that the NIGC should provide streamlined or expedited review for tribes, tribal entities or other entities required to be licensed by a compact or are otherwise federally regulated. The discussion draft of the Part included a new section providing discretion to reduce the background requirements for ''a tribe, a wholly owned tribal entity, national bank, or institutional investor that is federally regulated or is required to undergo a background investigation and licensure by a state or tribe pursuant to a tribal-state compact''. Comments were supportive of this change. One commentator stated that they welcomed this change, while another commentator disagreed that the reduced scope be at the discretion of the Chair.

The Commission believes that this is a reasonable addition to the regulations. The proposed revision can reduce duplication of efforts. However, it is important for the Chair to retain the discretion in determining which entities should be allowed to proceed through an expedited background investigation. This amendment has been included in this proposed rule through a revision to 25 CFR 537.1(a)(4).

B. Background Investigations for Management Contractors of a Class II and Class III Gaming Operation

The NRR identified background investigation information requirements for management contractors of a Class II and Class III gaming operations as a topic for review. Responses to the NOI indicated that this was an area that may need some clarification. The NIGC developed a discussion draft making this clarification and requested comment on the draft. After consulting extensively on this issue and receiving comments from tribes, it is clear that while most comments were amenable to the proposed revision, many noted that it was not a necessary revision.

The Commission does not believe the revision is necessary and has not made the proposed change included in the discussion draft.

Regulatory Matters

Regulatory Flexibility Act

The proposed rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Moreover, Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule does not have an effect on the economy of $100 million or more. This rule will not cause a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies or geographic regions. Nor will the proposed rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

The Commission, as an independent regulatory agency within the Department of the Interior, is exempt from compliance with the Unfunded Mandates Reform Act. 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the proposed rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

Paperwork Reduction Act

The information collection requirements contained in this rule were previously approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 3141–0007, which expired in August of 2011. The NIGC is in the process of reinstating that Control Number.

List of Subjects in 25 CFR Part 537

Gambling, Indians—tribal government, Indians—business and finance.

For the reasons discussed in the Preamble, the Commission proposes to revise its regulations at 25 CFR Part 537 as follows:

PART 537—BACKGROUND INVESTIGATIONS FOR PERSONS OR ENTITIES WITH A FINANCIAL INTEREST IN, OR HAVING MANAGEMENT RESPONSIBILITY FOR, A MANAGEMENT CONTRACT

1. The authority citation for art 537 continues to read as follows:

Authority: 25 U.S.C. 81, 2706(b)(10), 2710(d)(9), 2711.

2. Amend § 537.1 by revising paragraph (a)(4) to read as follows:

§ 537.1 Applications for approval.

(a) * * *

(4) Any entity with a financial interest in a management contract (in the case of any tribe, a wholly owned tribal entity, national bank, or institutional investor that is federally regulated or is required to undergo a background investigation and licensure by a state or tribe pursuant to a tribal-state compact, the Chairman may exercise discretion and reduce the scope of the information to be furnished and the background investigation to be conducted); and

* * * * *

3. Revise § 537.3 paragraphs (b), (c) and (d) to read as follows:

§ 537.3 Fees for background investigations.

* * * * *

(b) The management contractor shall post a deposit with the Commission to cover the cost of the background investigations as follows:

* * * * *

(c) The management contractor shall be billed for the costs of the investigation as it proceeds; the investigation shall be suspended if the unpaid costs exceed the amount of the deposit available.

* * * * *

(d) The deposit will be returned to the management contractor when all bills have been paid and the investigations have been completed or terminated.

4. Section 537.4 is revised to read as follows:

§ 537.4 Determinations.

The Chair shall determine whether the results of a background investigation preclude the Chair from approving a management contract because of the individual disqualifying factors contained in § 533.6(b)(1) of this chapter. The Chair shall promptly notify the tribe and management contractor if any findings preclude the Chair from approving a management contract or a change in financial interest.

Dated: December 16, 2011, Washington, DC.

Tracie L. Stevens,

Chairwoman.

Steffani A. Cochran,

Vice-Chairwoman.

Daniel J. Little,

Associate Commissioner.

[FR Doc. 2011–32759 Filed 12–21–11; 8:45 am]

BILLING CODE 7565–02–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 556 and 558

RIN 3141–AA15

Tribal Background Investigations and Licensing

AGENCY: National Indian Gaming Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The proposed rule modifies certain NIGC regulations concerning background investigations and licenses to reduce the quantity of documents that must be submitted to the Commission; to require that two notifications be submitted to the Commission in order to comply with the Indian Gaming Regulatory Act (IGRA); and to establish the requirements for the issuance of temporary and permanent gaming licenses.

DATES: Submit comments on or before February 21, 2012.

ADDRESSES: You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

■ *Email comments to:* *reg.review@nigc.gov.*

■ *Mail comments to:* National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005.

■ *Hand deliver comments to:* 1441 L Street NW., Suite 9100, Washington, DC 20005.

■ *Fax comments to:* National Indian Gaming Commission at (202) 632–0045.

FOR FURTHER INFORMATION CONTACT: National Indian Gaming Commission, 1441 L Street NW., Suite 9100 Washington, DC 20005. Telephone: (202) 632–7009; email: *reg.review@nigc.gov.*

SUPPLEMENTARY INFORMATION:

I. Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal.

II. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (''Commission'') and sets out a comprehensive framework for the regulation of gaming on Indian lands. The purposes of IGRA include providing a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; ensuring that the Indian tribe is the primary beneficiary of the gaming operation; and declaring that the establishment of independent federal regulatory authority for gaming on Indian lands, the establishment of federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. 25 U.S.C. 2702.

On November 18, 2010, the National Indian Gaming Commission (NIGC) issued a Notice of Inquiry and Notice of Consultation (NOI) advising the public that the NIGC was conducting a comprehensive review of its regulations and requesting public comment on which of its regulations were most in need of revision, in what order the Commission should review its regulations, and the process NIGC should utilize to make revisions. 75 FR 70680 (Nov. 18, 2010). On April 4, 2011, after holding eight consultations and reviewing all comments, NIGC published a Notice of Regulatory Review Schedule (NRR) setting out a consultation schedule and process for review. 76 FR 18457. The Commission's regulatory review process established a tribal consultation schedule with a description of the regulation groups to be covered at each consultation. These Parts 556 and 558 were included in this regulatory review.

III. Development of the Proposed Rule

The Commission conducted a total of 9 tribal consultations as part of its review of Parts 556 and 558. Tribal consultations were held in every region of the country and were attended by over 137 tribes and 381 tribal leaders or their representatives. In addition to tribal consultations, on July 7, 2011, the Commission requested public comment on a Preliminary Draft of amendments to Parts 556 and 558. After considering the comments received from the public and through tribal consultations, the Commission proposes to amend these parts and formalize the ''pilot program'' background investigation and licensing procedures.

Parts 556 and 558 address background investigations and licenses for gaming operation key employees and primary management officials. These regulations require tribes to submit to the NIGC an application and investigative report on all key employees and primary management officials employed by tribal gaming operations. In the 1990s, the NIGC initiated a ''pilot program'' for tribes who had a proven track record of complying with the background and licensing regulations. The purpose of this program was to reduce the quantity of documents the tribes were required to submit to the NIGC. Tribes participated in the pilot program by signing a memorandum of understanding with the NIGC that allowed a tribe to submit a notice of results (NOR) instead of the application and investigative report. The notice of results provided a synopsis of the background investigation and results to the NIGC on key employees and primary management officials. These regulatory changes would negate the need for memorandum of understandings with tribes and eliminate requirement that tribes submit an application and investigation report for each key employee and primary management official. Instead, tribes would be required to submit a notice of results for the background investigation of key employees and primary management officials as well as to retain applications and investigation reports for the NIGC to review.

The IGRA requires that tribes submit background investigation results to the Commission before issuing licenses. 25 U.S.C. 2710(b)(2)(F)(ii)(III). The tribe must then notify the NIGC after it has issued the license to primary management officials or key employees. 25 U.S.C. 2710(b)(2)(F)(ii)(I).

A. General Comments

Commenters supported the changes put forward in the preliminary draft. Tribes noted that the pilot program has been a success and that they were supportive of the NIGC's proposal to formalize the pilot program into regulations. One commenter noted that the current procedure is burdensome and that formalization of the pilot program creates efficiency in the background and licensing process. Some commenters questioned the level of detail included in the regulations, but also noted that these changes were an improvement over the current regulations while not substantively increasing the requirements.

B. Background Investigation and Licensing

Tribes are currently required to submit a completed application of background information upon the employment of a key employee or primary management official. 25 CFR 556.5(a). Tribes are also required to submit a background investigative report before issuing a license to a key employee or primary management official. 25 CFR 556.5(b). The investigative report is required to include: (1) Steps taken in conducting a background investigation; (2) results obtained; (3) conclusions reached; and (4) the bases for those conclusions. 25 CFR 556.5(b). When submitting the investigative report, tribes are also required to include a copy of the eligibility determination. Some commenters recommended using ''suitability determination'' in the place of ''eligibility determination.'' The Commission considered this recommendation but after reviewing the language of the Act, decided against making that change. The Act references suitability for determining whether a person is eligible for employment. 25 U.S.C. 2710(b)(2)(f)(ii)(II).

A tribe is required to develop licensing procedures for all employees of the gaming operation and to retain applications for employment and reports of any background investigations for inspection by the Commission for no less than three years from the dates of termination of employment of key employees and primary management officials. The licensing requirements are included in a tribal ordinance when submitted to the Chair for approval.

The proposed rule continues to require a tribe to create and maintain: (1) A gaming license application identical to the one required under the current regulations; (2) an investigative report identical to the one required to be submitted to the NIGC under the current regulations; and (3) a copy of the eligibility determination. The proposed rule, however, reduces the submission requirements. In cases where a tribe issues a license, the tribe need only submit a notice of results (NOR)—rather than the application and investigative report—to the NIGC no later than 60 days after the applicant begins work. Tribes are also required to submit a notice of the issuance of a license to the NIGC. In cases where a tribe does not issue a license, it must forward the investigative report to NIGC for inclusion in the Indian Gaming Individual Records System.

Many commenters noted that a uniform method of sending the NOR to the NIGC would be useful. The Commission agrees and has developed the form included in this Notice to be used by all tribes submitting NOR's to the NIGC.

Under the proposed rule, a tribe would be required to maintain a completed licensing application for a primary management official or key employee. The tribe must conduct a background investigation to determine the eligibility of the employee for a gaming license. The proposed rule refines the purpose of the background investigation as one needed to determine whether the employee is eligible for a gaming license. Tribes can determine for themselves what services to utilize to conduct the investigation. In some instances, the state may provide this service, or in others, the tribe may utilize federal or private services. One commenter suggested requiring applicants to provide a list of all associations to which they pay membership dues. While this change was not made in the proposed rule, the Commission is interested in hearing whether this is a requirement that should be included in the regulation.

In addition, the proposed rule changes current regulations by clarifying that these parts do not apply to licenses that are intended to expire within 90 days of issuance. Many tribes utilize a temporary license system. The NIGC does not propose to restrict the tribes' authority to send applicants to work while processing their background investigations, so long as they are not employed for more than 90 days without obtaining a license that meets the requirements of these parts.

C. Access to Background Investigation

Many commenters requested improved access to the background investigation materials obtained by the NIGC. While the NIGC does collect the NOR submitted by tribes on primary

management officials and key employees that information is not currently made available to third-party tribes. In response to the many comments on improved access the NIGC is working towards making information more readily available to tribes. Until there is sufficient resources and technology to make this kind of information available in a secure format, the NIGC will endeavor to make information available when and where appropriate.

Two commenters requested that the NIGC remove the requirements of § 556.2 and § 556.3 which reference ordinance amendments with regard to the Privacy Act and False Statement notices. The NIGC agrees that ordinance amendments need not be mentioned in that section because tribes may include specifics of background investigation procedures—including Privacy Act and False Statement notices—in supplementary submission materials rather than placing them in the ordinance itself (See 25 CFR 522.2(b)). Once final, however, all future ordinances and submission materials must comply with § 556.8 of this proposed rule. The NIGC further notes that the privacy notice is required by federal law to notify applicants of the restrictions binding the NIGC as a federal agency for releasing personal information. Tribes are not necessarily bound by those restrictions, but must supply the notice to applicants before submitting their information to NIGC as required by 25 U.S.C. 2710(b)(2)(F)(ii)(III).

One commenter suggested that tribes should have the discretion to decide whether to keep confidential the identities of those interviewed in the course of a background investigation. NIGC disagrees, notes that this is an existing requirement under the current regulations and pilot program (*See* 25 CFR 556.4(b)), and believes the promise of confidentiality is necessary for obtaining sensitive information from those interviewed.

Regulatory Matters

Regulatory Flexibility Act

The proposed rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of $100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions, nor will the proposed rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises to compete with foreign based enterprises.

Unfunded Mandates Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the proposed rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

The information collection requirements contained in this rule were previously approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501 et seq. and assigned OMB Control Number 3141–0007, which expired in August of 2011. The NIGC is in the process of reinstating that Control Number.

List of Subjects

25 CFR Part 556

Gaming, Indian lands.

25 CFR Part 558

Gaming, Indian lands.

Text of the Proposed Rules

For the reasons discussed in the Preamble, the Commission proposes to amend Subchapter E of Title 25 to read as follows:

1. Revise Part 556 to read as follows:

PART 556—BACKGROUND INVESTIGATIONS FOR PRIMARY MANAGEMENT OFFICIALS AND KEY EMPLOYEES

Sec.

556.1 Scope of this part.
556.2 Privacy notice.
556.3 Notice regarding false statements.
556.4 Background investigations.
556.5 Tribal eligibility determination.
556.6 Report to the Commission.
556.7 Notice.
556.8 Compliance with this part.

Authority: 25 U.S.C. 2706, 2710, 2712.

§ 556.1 Scope of this part.

Unless a tribal-state compact assigns sole jurisdiction to an entity other than a tribe with respect to background investigations, the requirements of this part apply to all class II and class III gaming. The procedures and standards of this part apply only to primary management officials and key employees. This part does not apply to any license that is intended to expire within 90 days of issuance.

§ 556.2 Privacy notice.

(a) A tribe shall place the following notice on the application form for a key employee or a primary management official before that form is filled out by an applicant:

In compliance with the Privacy Act of 1974, the following information is provided: Solicitation of the information on this form is authorized by 25 U.S.C. 2701 *et seq.* The purpose of the requested information is to determine the eligibility of individuals to be granted a gaming license. The information will be used by the Tribal gaming regulatory authorities and by the National Indian Gaming Commission (NIGC) members and staff who have need for the information in the performance of their official duties. The information may be disclosed by the Tribe or the NIGC to appropriate Federal, Tribal, State, local, or foreign law enforcement and regulatory agencies when relevant to civil, criminal or regulatory investigations or prosecutions or when pursuant to a requirement by a tribe or the NIGC in connection with the issuance, denial, or revocation of a gaming license, or investigations of activities while associated with a tribe or a gaming operation. Failure to consent to the disclosures indicated in this notice will

result in a tribe's being unable to license you for a primary management official or key employee position.

The disclosure of your Social Security Number (SSN) is voluntary. However, failure to supply a SSN may result in errors in processing your application.

(b) A tribe shall notify in writing existing key employees and primary management officials that they shall either:

(1) Complete a new application form that contains a Privacy Act notice; or

(2) Sign a statement that contains the Privacy Act notice and consent to the routine uses described in that notice.

(c) All license application forms used one-hundred eighty (180) days after the effective date of this section shall comply with this section.

§ 556.3 Notice regarding false statements.

(a) A tribe shall place the following notice on the application form for a key employee or a primary management official before that form is filled out by an applicant:

A false statement on any part of your license application may be grounds for denying a license or the suspension or revocation of a license. Also, you may be punished by fine or imprisonment (U.S. Code, title 18, section 1001).

(b) A tribe shall notify in writing existing key employees and primary management officials that they shall either:

(1) Complete a new application form that contains a notice regarding false statements; or

(2) Sign a statement that contains the notice regarding false statements.

(c) All license application forms used 180 days after the effective date of this section shall comply with this section.

§ 556.4 Background investigations.

A tribe shall perform a background investigation for each primary management official and for each key employee of a gaming operation.

(a) A tribe shall request from each primary management official and from each key employee all of the following information:

(1) Full name, other names used (oral or written), social security number(s), birth date, place of birth, citizenship, gender, all languages (spoken or written);

(2) Currently and for the previous five years: business and employment positions held, ownership interests in those businesses, business and residence addresses, and driver's license numbers;

(3) The names and current addresses of at least three personal references, including one personal reference who was acquainted with the applicant during each period of residence listed under paragraph (a)(2) of this section;

(4) Current business and residence telephone numbers;

(5) A description of any existing and previous business relationships with Indian tribes, including ownership interests in those businesses;

(6) A description of any existing and previous business relationships with the gaming industry generally, including ownership interests in those businesses;

(7) The name and address of any licensing or regulatory agency with which the person has filed an application for a license or permit related to gaming, whether or not such license or permit was granted;

(8) For each felony for which there is an ongoing prosecution or a conviction, the charge, the name and address of the court involved, and the date and disposition if any;

(9) For each misdemeanor conviction or ongoing misdemeanor prosecution (excluding minor traffic violations) within 10 years of the date of the application, the name and address of the court involved and the date and disposition;

(10) For each criminal charge (excluding minor traffic charges) whether or not there is a conviction, if such criminal charge is within 10 years of the date of the application and is not otherwise listed pursuant to paragraph (a)(8) or (a)(9) of this section, the criminal charge, the name and address of the court involved and the date and disposition;

(11) The name and address of any licensing or regulatory agency with which the person has filed an application for an occupational license or permit, whether or not such license or permit was granted;

(12) A photograph;

(13) Any other information a tribe deems relevant; and

(14) Fingerprints consistent with procedures adopted by a tribe according to § 522.2(h) of this chapter.

(b) If, in the course of a background investigation, a tribe discovers that the applicant has a notice of results on file with the NIGC from a prior investigation and the tribe has access to the earlier investigative materials (either through the NIGC or the previous tribal investigative body), the tribe may rely on those materials and update the investigation and investigative report under § 556.6(b)(1) of this part.

(c) In conducting a background investigation, a tribe or its agents shall keep confidential the identity of each person interviewed in the course of the investigation.

§ 556.5 Tribal Eligibility Determination.

A tribe shall conduct an investigation sufficient to make an eligibility determination.

(a) To make a finding concerning the eligibility of a key employee or primary management official for granting of a gaming license, an authorized tribal official shall review a person's:

(1) Prior activities;

(2) Criminal record, if any; and

(3) Reputation, habits and associations.

(b) If the authorized tribal official, in applying the standards adopted in a tribal ordinance, determines that licensing of the person poses a threat to the public interest or to the effective regulation of gaming, or creates or enhances the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming, an authorizing tribal official shall not license that person in a key employee or primary management official position.

§ 556.6 Report to the Commission.

(a) When a tribe employs a primary management official or a key employee, the tribe shall maintain a complete application file containing the information listed under § 556.4(a)(1)–(14) of this part.

(b) Before issuing a license to a primary management official or to a key employee, a tribe shall:

(1) Create and maintain an investigative report on each background investigation. An investigative report shall include all of the following:

(i) Steps taken in conducting a background investigation;

(ii) Results obtained;

(iii) Conclusions reached; and

(iv) The bases for those conclusions.

(2) Submit a notice of results of the applicant's background investigation to the Commission no later than sixty (60) days after the applicant begins work. The notice of results shall contain:

(i) Applicant's name, date of birth, and social security number;

(ii) Date on which applicant began or will begin work as key employee or primary management official;

(iii) A summary of the information presented in the investigative report, which shall at a minimum include a listing of:

A. Licenses that have previously been denied;

B. Gaming licenses that have been revoked, even if subsequently reinstated;

C. Every known criminal charge brought against the applicant within the last 10 years of the date of application; and

D. Every felony of which the applicant has been convicted or any ongoing prosecution.

(iv) A copy of the eligibility determination made under § 556.5 of this part.

§ 556.7 Notice.

(a) All notices under this part shall be provided to the Commission through the appropriate Regional office.

(b) Should a tribe wish to submit notices electronically, it should contact the appropriate Regional office for guidance on acceptable document formats and means of transmission.

§ 556.8 Compliance with this part.

All tribal gaming ordinances and ordinance amendments approved by the Chair prior to the effective date of this part and that reference this part, do not need to be amended to comply with this part. All future ordinance submissions, however, must comply.

2. Revise Part 558 to read as follows:

PART 558—GAMING LICENSES FOR KEY EMPLOYEES AND PRIMARY MANAGEMENT OFFICIALS

Sec.

558.1 Scope of this part.
558.2 Review of notice of results for a key employee or primary management official.
558.3 Notification to NIGC of license issuance and retention obligations.
558.4 Notice of disqualifying information and licensee right to a hearing.
558.5 Submission of notices.
558.6 Compliance with this part.

Authority: 25 U.S.C. 2706, 2710, 2712.

§ 558.1 Scope of this part.

Unless a tribal-state compact assigns responsibility to an entity other than a tribe, the licensing authority for class II or class III gaming is a tribal authority. The procedures and standards of this part apply only to licenses for primary management officials and key employees. This part does not apply to any license that is intended to expire within 90 days of issuance.

§ 558.2 Review of notice of results for a key employee or primary management official.

(a) Upon receipt of a complete notice of results for a key employee or primary management official as required by 25 CFR 556.6(b)(2), the Chair has 30 days to request additional information from a tribe concerning the applicant or licensee and to object.

(b) If the Commission has no objection to issuance of a license, it shall notify the tribe within thirty (30) days of receiving notice of results pursuant to § 556.6(b)(2).

(c) If, within the 30 day period described in § 558.3(a) of this part, the Commission provides the tribe with a statement itemizing objections to the issuance of a license to a key employee or to a primary management official applicant for whom the tribe has provided a notice of results, the tribe shall reconsider the application, taking into account the objections itemized by the Commission. The tribe shall make the final decision whether to issue a license to such applicant.

(d) If the tribe has issued the license before receiving the Commission's statement of objections, notice and hearing shall be provided to the licensee as provided by § 558.4.

§ 558.3 Notification to NIGC of license issuance and retention obligations.

(a) After a tribe has provided a notice of results of the background check to the Commission, a tribe may license a primary management official or key employee.

(b) A gaming operation shall not employ a key employee or primary management official who does not have a license after ninety (90) days.

(c) If a tribe does not license an applicant—

(1) The tribe shall notify the Commission; and

(2) Shall forward copies of its eligibility determination under this section and investigative report (if any) under § 556.6(b)(1) to the Commission for inclusion in the Indian Gaming Individuals Record System.

(d) Within 30 days after the issuance of the license, a tribe shall notify the Commission of its issuance.

(e) A tribe shall retain the following for inspection by the Chair or his or her designee for no less than three years from the date of termination of employment:

(1) Applications for licensing;

(2) Investigative reports; and

(3) Eligibility determinations.

§ 558.4 Notice of information impacting eligibility and licensee's right to a hearing.

(a) If, after the issuance of a gaming license, the Commission receives reliable information indicating that a key employee or a primary management official is not eligible for employment under § 556.5, the Commission shall notify the issuing tribe of the information.

(b) Upon receipt of such notification under paragraph (a) of this section, a tribe shall immediately suspend the license and shall provide the licensee with written notice of suspension and proposed revocation.

(c) A tribe shall notify the licensee of a time and a place for a hearing on the proposed revocation of a license.

(d) A right to a hearing under this part shall vest only upon receipt of a license granted under an ordinance approved by the Chair.

(e) After a revocation hearing, a tribe shall decide to revoke or to reinstate a gaming license. A tribe shall notify the Commission of its decision within 45 days of receiving notification from the Commission pursuant to subsection (a).

§ 558.5 Submission of notices.

(a) All notices under this part shall be provided to the Commission through the appropriate Regional office.

(b) Should a tribe wish to submit notices electronically, it should contact the appropriate Regional office for guidance on acceptable document formats and means of transmission.

§ 558.6 Compliance with this part.

All tribal gaming ordinances and ordinance amendments that have been approved by the Chair prior to the effective date of this section and that reference this part do not need to be amended to comply with this section. All future ordinance submissions, however, must comply.

Dated: December 16, 2011, Washington, DC.

Tracie L. Stevens,

Chairwoman.

Steffani A. Cochran,

Vice-Chairwoman.

Daniel J. Little,

Associate Commissioner.

[FR Doc. 2011–32760 Filed 12–21–11; 8:45 am]

BILLING CODE 7565–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2011–1095]

RIN 1625–AA08

Special Local Regulations; Patriot Challenge Kayak Race, Ashley River, Charleston, SC

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish special local regulations on the Ashley River in Charleston, South Carolina during the Patriot Challenge Kayak Race on Saturday, April 28, 2012. Approximately 150 paddle boats are

anticipated to participate in the Patriot Challenge Kayak Race. Participant paddle boats will include: kayaks, canoes, and paddleboards. These special local regulations are necessary to provide for the safety of life on navigable waters of the United States during the race. The special local regulations consist of a series of moving buffer zones around participant vessels as they transit the Ashley River from Brittlebank Park to Tidewater Reach and back to Brittlebank Park. Persons and vessels that are not participating in the race are prohibited from entering, transiting through, anchoring in, or remaining within any of the buffer zones unless authorized by the Captain of the Charleston or a designated representative.

DATES: Comments and related material must be received by the Coast Guard on or before February 10, 2012. Requests for public meetings must be received by the Coast Guard on or before January 18, 2012.

ADDRESSES: You may submit comments identified by docket number USCG–2011–1095 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* (202) 493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Ensign John Santorum, Sector Charleston Office of Waterways Management, Coast Guard; telephone (843) 740–3184, email *John.R.Santorum@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–1095), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Proposed Rule'' and insert ''USCG–2011–1095'' in the ''Keyword'' box. Click ''Search'' then click on the balloon shape in the ''Actions'' column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–1095'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting, but you may submit a request for one on or before February 10, 2012 using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Basis and Purpose

The legal basis for the proposed rule is the Coast Guard's authority to establish special local regulations: 33 U.S.C. 1233. The purpose of the proposed rule is to insure safety of life on navigable waters of the United States during the Patriot Challenge Kayak Race.

Discussion of Proposed Rule

On Saturday, April 28, 2012, the Patriot Challenge Kayak Race is scheduled to take place on the waters of the Ashley River in Charleston, South Carolina. The race will begin at Brittlebank Park, transit southeast on the Ashley River, head north between Shutes Folly Island and the Charleston peninsula, and then turn around in Tidewater Reach. The race will return to Brittlebank Park by the same route. Approximately 150 paddle boats are anticipated to participate in the Patriot Challenge Kayak Race. Participant paddle boats will include: Kayaks, canoes, and paddleboards.

The proposed rule would establish special local regulations on the Ashley River in Charleston, South Carolina consisting of a series of buffer zones around vessels participating in the Patriot Challenge Kayak Race. These buffer zones would be as follows: (1) All waters within 75 yards of the lead safety

vessel; (2) all waters within 75 yards of the last safety vessel; and (3) all waters within 100 yards of all other participating vessels, including kayaks, canoes, and paddleboards. Notice of the special local regulations, including the identities of the lead safety vessel and the last safety vessel, would be provided prior to the marine parade by Local Notice to Mariners and Broadcast Notice to Mariners. The special local regulations would be enforced from 12:30 p.m. until 3:30 p.m. on April 28, 2012. Persons and vessels would be prohibited from entering, transiting through, anchoring in, or remaining within the buffer zones unless authorized by the Captain of the Port Charleston or a designated representative. Persons and vessels would be able to request authorization to enter, transit through, anchor in, or remain within the buffer zones by contacting the Captain of the Port Charleston by telephone at (843) 740–7050, or a designated representative via VHF radio on channel 16. If authorization to enter, transit through, anchor in, or remain within any of the buffer zones is granted by the Captain of the Port Charleston or a designated representative, all persons and vessels receiving such authorization would be required to comply with the instructions of the Captain of the Port Charleston or a designated representative.

Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

Executive Orders 13563, Improving Regulation and Regulatory Review, and 12866, Regulatory Planning and 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. This proposed rule has not been designated a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget has not reviewed this proposed rule under Executive Order 12866.

The economic impact of this proposed rule is not significant for the following reasons: (1) The special local regulations would be enforced for only three hours; (2) although persons and vessels would not be able to enter, transit through, anchor in, or remain within the buffer zones without authorization from the Captain of the Port Charleston or a designated representative, they would be able to operate in the surrounding area during the enforcement period; (3) persons and vessels would still be able to enter, transit through, anchor in, or remain within the buffer zones if authorized by the Captain of the Port Charleston or a designated representative; and (4) the Coast Guard would provide advance notification of the safety zone to the local maritime community by Local Notice to Mariners and Broadcast Notice to Mariners.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule may affect the following entities, some of which may be small entities: the owners or operators of vessels intending to enter, transit through, anchor in, or remain within that portion of the Ashley River encompassed within the special local regulations from 12:30 p.m. until 3:30 p.m. on April 28, 2012. For the reasons discussed in the Regulatory Planning and Review section above, this proposed rule would not have a significant economic impact on a substantial number of small entities.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this proposed rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Ensign John Santorum, Sector Charleston Office of Waterways Management, Coast Guard; telephone (843) 740–3184, email *John.R.Santorum@uscg.mil.* The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

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 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this proposed rule elsewhere in this preamble.

Taking of Private Property

This proposed rule would not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves establishing special local regulations issued in conjunction with a marine parade, as described in figure 2–1, paragraph (34)(h), of the Instruction. Under figure 2–1, paragraph (34)(h), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this proposed rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

2. Add a temporary § 100.T07–1095 to read as follows:

§ 100.T07–1095 Special Local Regulations; Patriot Challenge Kayak Race, Ashley River, Charleston, SC.

(a) *Regulated Areas.* The following buffer zones are regulated areas during the Patriot Challenge Kayak Race: (1) All waters within 75 yards of the lead safety vessel; (2) all waters within 75 yards of the last safety vessel; and (3) all waters within 100 yards of all other participating vessels, including kayaks, canoes, and paddleboards. The identities of the lead safety vessel and the last safety vessel will be provided prior to the Patriot Challenge Kayak Race by Local Notice to Mariners and Broadcast Notice to Mariners. The race will begin at Brittlebank Park, transit southeast the Ashley River, head north between Shutes Folly Island and the Charleston peninsula, and then turn around in Tidewater Reach. The race will return to Brittlebank Park by the same route.

(b) *Definition.* The term ''designated representative'' means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the Captain of the Port Charleston in the enforcement of the regulated areas.

(c) *Regulations.*

(1) All persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated areas unless authorized by the Captain of the Port Charleston or a designated representative.

(2) Persons and vessels desiring to enter, transit through, anchor in, or remain within the regulated areas may contact the Captain of the Port Charleston by telephone at (843) 740–7050, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain within the regulated areas is granted by the Captain of the Port Charleston or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Charleston or a designated representative.

(3) The Coast Guard will provide notice of the regulated areas by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

(d) *Enforcement Date.* This rule will be enforced from 12:30 p.m. until 3:30 p.m. on April 28, 2012.

Dated: December 5, 2011.

M.F. White,

Captain, U.S. Coast Guard, Captain of the Port Charleston.

[FR Doc. 2011–32850 Filed 12–21–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2011–0081; FRL–9609–5]

RIN 2060–AQ69

Revisions to Final Response to Petition From New Jersey Regarding SO_2 Emissions From the Portland Generating Station

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action proposes to amend the preamble and regulatory text to the *Final Response to Petition From New Jersey Regarding SO_2 Emissions From the Portland Generating Station* (Portland) published November 7, 2011, to revise minor misstatements. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour sulfur dioxide (SO_2) national ambient air quality standard (NAAQS) in the State of New Jersey, and not in specific counties within the state. These revisions have no impact on any other provisions of the rule.

DATES: *Comments.* Written comment must be received on or before February 21, 2012.

Public Hearing: If a public hearing on this proposal is requested by December 29, 2011, it will be held on January 11, 2012, at 9 a.m. at the U.S. EPA Region 3 Regional Office, 1650 Arch Street, Philadelphia, Pennsylvania 19103–2029. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the comment period and the public hearing.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2011–0081, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Attention Docket ID No. EPA–HQ–OAR–2011–0081.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2011–0081.
- *Mail:* EPA Docket Center, EPA West (Air Docket), Attention Docket ID No. EPA–HQ–OAR–2011–0081, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW. Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center (Air Docket), Attention Docket ID No. EPA–HQ–OAR–2011–0081, Environmental Protection Agency, 1301 Constitution Avenue NW., Room 3334, Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2011–0081. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters and any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Todd Hawes (919) 541–5591, *hawes.todd@epa.gov,* or Ms. Gobeail McKinley (919) 541–5246, *mckinley.gobeail@epa.gov,* Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail Code C539–04, Research Triangle Park, NC 27711.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Why is the EPA issuing this proposed rule?

This document proposes minor amendments to the *Final Response to Petition From New Jersey Regarding SO_2 Emissions From the Portland Generating Station* (*See* 76 FR 69052). We have published a direct final rule, making minor modifications to that rule in the ''Rules and Regulations'' section of this **Federal Register** because we view this as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule.

If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment, we will withdraw the direct final rule and it will not take effect. We would address all public comments in any subsequent final rule based on this proposed rule. We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposal will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this action will be posted on the EPA's Web site *www.epa.gov/ttn/oarpg/new.html.*

C. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to the EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer

(C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2011–0081.

2. *Tips for preparing your comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

D. How can I find information about a public hearing?

The public hearing, if requested by December 29, 2011, will be held on January 11, 2012, at the EPA Region 3 Regional Office, 1650 Arch Street, Philadelphia, Pennsylvania 19103–2029 from 9 a.m. until the last registered speaker has spoken. The EPA will make every effort to accommodate all speakers that arrive and register before 12 noon. Oral testimony will be limited to 5 minutes per commenter. The EPA encourages commenters to provide written versions of their oral testimonies either electronically or in paper copy. Verbatim transcripts and written statements will be included in the rulemaking docket. If you would like to present oral testimony at the hearing, please notify Ms. Pam S. Long, Air Quality Policy Division (C504–03), U.S. EPA, Research Triangle Park, NC 27711, telephone number (919) 541–0641, *long.pam@epa.gov.* Persons interested in presenting oral testimony should notify Ms. Long at least 1 day in advance of the public hearing. The last day to register will be January 10, 2012. If using email to register, please provide the following information: Name, affiliation, address, email address, and telephone and fax numbers. Commenters should also notify Ms. Long if they will need specific equipment, or if there are other special needs related to providing comments at the public hearing. The EPA will provide equipment for commenters to show overhead slides or make computerized slide presentations if we receive special requests in advance. The EPA encourages commenters to provide a copy of their oral testimony electronically (via email or CD) or in hard copy form. For updates and additional information on the public hearing, please check EPA's Web site for this rulemaking, *www.epa.gov/ttn/oarpg/new.html.* The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the proposed rule. The EPA may ask clarifying questions during the oral presentations, but will not respond to the presentations or comments at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at a public hearing.

E. How is the preamble organized?

SUPPLEMENTARY INFORMATION:

I. General Information
- A. Why is the EPA issuing this proposed rule?
- B. Where can I get a copy of this document and other related information?
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II. Specific Revisions

III. Statutory and Executive Order Reviews
- A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
- B. Paperwork Reduction Act
- C. Regulatory Flexibility Act (RFA)
- D. Unfunded Mandates Reform Act
- E. Executive Order 13132: Federalism
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- G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
- H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer and Advancement Act
- J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

II. Specific Revisions

The preamble and rule text to the *Final Response to Petition From New Jersey Regarding SO_2 Emissions From the Portland Generating Station* (*See* FR 76 69052) contain minor misstatements that the EPA is proposing to revise in this action. In the preamble section IV.A, Summary of the Modeling for the Proposed Rule, the EPA inadvertently referred to four specific counties in New Jersey when discussing violations of the 1-hour SO_2 NAAQS. The statement reads, ''The EPA also modeled the emissions from Portland using the AERMOD dispersion model and determined that the modeled concentrations from Portland, when combined with the relatively low background concentrations, cause violations of the 1-hour SO_2 NAAQS in Morris, Sussex, Warren and Hunterdon Counties in New Jersey.'' This conclusion is not correctly stated as the EPA's modeling did not separately examine air quality in each of the four counties identified. A more accurate description of the EPA's conclusion was presented in the April 7, 2011, proposal which did not refer to those counties in our explanations of the modeling results. Furthermore, between proposal and promulgation, the EPA did not separately examine each of the four counties identified, so in the final rule there was no reason to change this proposed description to specifically list counties. Therefore, we are now proposing to revise the statement in the November 7, 2011, final rule preamble to be consistent with the description in the April 7, 2011, proposal by removing the references to Morris, Sussex, Warren, and Hunterdon Counties. We propose that the statement will now read, ''The EPA also modeled the emissions from Portland using the AERMOD dispersion model and determined that the modeled concentrations from Portland, when combined with the relatively low background concentrations, cause violations of the 1-hour SO_2 NAAQS in New Jersey.''

Similarly, in the rule text, Part 52—[Amended], Subpart NN—Pennsylvania, section 52.2039 in 40 CFR part 52, of the final rule, the EPA inadvertently referred to those same four counties in describing the finding of significant contribution to nonattainment and interference with maintenance of the 1-hour SO_2 NAAQS. The provision reads, ''The EPA has made a finding pursuant to section 126 of the Clean Air Act (the Act) that emissions of sulfur dioxide (SO_2) from the Portland Generating Station in Northampton County, Upper Mount Bethel Township, Pennsylvania (Portland) significantly contribute to nonattainment and

interfere with maintenance of the 1-hour SO_2 national ambient air quality standard (NAAQS) in Morris, Sussex, Warren, and Hunterdon Counties in New Jersey.'' We propose that the rule text now read, ''The EPA has made a finding pursuant to section 126 of the Clean Air Act (the Act) that emissions of sulfur dioxide (SO_2) from the Portland Generating Station in Northampton County, Upper Mount Bethel Township, Pennsylvania (Portland) significantly contribute to nonattainment and interfere with maintenance of the 1-hour SO_2 national ambient air quality standard (NAAQS) in New Jersey.''

Although the New Jersey Department of Environmental Protection (NJDEP) modeling analysis submitted with the September 2010 petition identified NAAQS violations at receptors in certain counties, the purpose of the EPA modeling was not to identify or corroborate the entire geographic footprint of the violations in New Jersey. The EPA modeling analysis was conducted for the purpose of corroborating the existence of NAAQS violations in New Jersey caused by Portland and for determining the remedy needed to eliminate all NAAQS violations caused by Portland. The EPA modeling thus focused upon identifying only the area where the maximum concentration was expected to occur. We used the same receptor grid for the final rule as for the proposed rule, which was focused on the area of maximum impacts occurring in Warren County, New Jersey. The remedy was determined by assessing the emission reduction needed to eliminate the maximum modeled violation in New Jersey, which occurs in close proximity to Portland in Warren County. There was no need to make an assessment of impacts at all locations within New Jersey since eliminating the NAAQS violations at the highest impacted receptor provided the basis for the remedy which, by its nature, would eliminate all modeled violations caused by Portland in the entire state. Therefore, the EPA finding pursuant to section 126 of the Clean Air Act (the Act) applies to New Jersey generally. The proposed revision is consistent with NJDEP's request for a finding that emissions from Portland significantly contribute to nonattainment or interfere with maintenance of the 1-hour SO_2 NAAQS in New Jersey. The proposed revision is also consistent with the language in sections 110 and 126 of the Act which is phrased such that the petitioner can request a finding that a source in one state is significantly contributing to nonattainment or interfering with maintenance of the NAAQS in another state. The addition of the counties was neither necessary nor intentional and did not arise from a request from the petitioner or any other commenter.

The proposed revision will not affect the emission limits, increments of progress, compliance schedules, or reporting provisions specified in the November 7, 2011 final rule. No adjustments to the existing modeling or other technical analyses and no new analyses are necessary to make the revisions. Accordingly, we are taking comment only on the proposed change to the phrasing used to describe our finding based on the analyses conducted for the remedy. The proposed revisions do not change the conclusions that the EPA made in the final rule. The EPA is requesting comment only on the specific revisions proposed herein. The EPA is not reopening or requesting comment on any other aspect of the rule published on November 7, 2011, including the agency's air quality modeling, interim emission limits, final emission limits, increments of progress, rationale for the emission limits, or other requirements finalized in the November 7, 2011 rule.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action simply revises minor wording errors in the November 7, 2011 rule. This action corrects a response to a petition that is narrow in scope and affects a single facility. This type of action is exempt from review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.,* because this proposed rule, if finalized, under section 126 of the CAA will not in-and-of itself create any new information collection burdens but simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, not in specific counties within the state.

Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The revisions being proposed in this notice do not impose any new requirements on small entities. This action simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issus related to such impacts.

D. Unfunded Mandates Reform Act

This action does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any 1 year. This action proposes minor wording revisions to the November 7, 2011, final rule in this notice that are not expected to exceed $100 million or more for state, local, and tribal governments, in aggregate, or the private sector in any 1 year. This action simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or

interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. Again, this action simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, not in specific counties within the state.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The November 2011 final rule primarily affects private industry, and does not impose significant economic costs on state or local governments. This action simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with the EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this proposed action from state and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have a substantial direct effect on tribal governments, on the relationship between the federal government and Indian tribes, or the distribution of power and responsibilities between the federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this action. This action simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action simply revises minor wording errors in the November 7, 2011, rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state.

The public is invited to submit comments or identify peer-reviewed studies and data, which the EPA may not be aware.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This rule proposes minor revisions to a previously promulgated rule. These revisions clarify the EPA's finding that Portland significantly contributes to nonattainment or interferes with maintenance of the 1-hour SO_2 NAAQS in the State of New Jersey, and not in specific counties within the state.

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practice and procedures, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: December 14, 2011.

Lisa P. Jackson,

Administrator.

[FR Doc. 2011–32653 Filed 12–21–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2010–0523; FRL–9610–5]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Illinois; Redesignation of the Illinois Portion of the St. Louis, MO-IL Area to Attainment for the 1997 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a request from Illinois to redesignate the Illinois portion of the St. Louis, MO-IL nonattainment area, ''the St. Louis area,'' to attainment for the 1997 8-hour ozone standard because the request meets the statutory requirements for redesignation under the Clean Air Act (CAA). The St. Louis area includes Jersey, Madison, Monroe, and St. Clair Counties in Illinois and St. Louis City and Franklin, Jefferson, St. Charles and St. Louis Counties in Missouri. The Illinois Environmental Protection Agency (IEPA) submitted this request on May 26, 2010 and supplemented it on September 16, 2011. (EPA will address the Missouri portion of the St. Louis area in a separate rulemaking action.) This proposed approval also involves several related actions. EPA is proposing to approve, as a revision to the Illinois State Implementation Plan (SIP), the State's plan for maintaining the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS) through 2025 in the area. EPA is proposing to approve the 2002 emissions inventory, submitted by IEPA on June 21, 2006, and supplemented on September 16, 2011, as meeting the comprehensive emissions inventory requirement of the CAA for the Illinois portion of the St. Louis area. Finally, EPA finds adequate and is proposing to approve the State's 2008 and 2025 Motor Vehicle Emission Budgets (MVEBs) for the Illinois portion of the St. Louis area.

DATES: Comments must be received on or before January 23, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2010–0523, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: Aburano.Douglas@epa.gov.*
3. *Fax:* (312) 353–6960.
4. *Mail:* Doug Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand delivery:* Doug Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, 18th floor, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2010–0523. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to section I of this document, ''What Should I Consider as I Prepare My Comments for EPA?''

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Kathleen D'Agostino, Environmental Engineer, at (312) 886–1767 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Kathleen D'Agostino, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–1767, *dagostino.kathleen@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

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I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

II. What actions is EPA proposing to take?

EPA is proposing to determine that the Illinois portion of the St. Louis area has met the requirements for redesignation under section 107(d)(3)(E) of the CAA. EPA is thus proposing to approve the request from IEPA to change the legal designation of the Illinois portion of the St. Louis area from nonattainment to attainment for the 1997 8-hour ozone NAAQS. EPA is also taking several additional actions related to the State's redesignation request, as discussed below.

EPA is proposing to approve, as a revision to the Illinois SIP, the State's maintenance plan (such approval being one of the CAA criteria for redesignation to attainment status). The maintenance plan is designed to keep the St. Louis area in attainment of the ozone NAAQS through 2025.

EPA is proposing to approve the 2002 volatile organic compound (VOC) and nitrogen oxides (NO_X) emissions inventories for the Illinois portion of the St. Louis area, documented in IEPA's May 26, 2010, and September 16, 2011 submittals. These emissions inventories satisfy the requirement in section 182(a)(1) of the CAA for a comprehensive emission inventory.

Finally, EPA finds adequate and is proposing to approve the newly-established 2008 and 2025 MVEBs for the Illinois portion of the St. Louis area. The adequacy comment period for the MVEBs began on September 26, 2011, with EPA's posting of the availability of the submittal on EPA's Adequacy Web site (at *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm*). The adequacy comment period for these MVEBs ended on October 26, 2011. EPA did not receive any requests for this submittal, or comments on this submittal during the adequacy comment period. Please see section V.B. of this rulemaking, ''Adequacy of the MVEBs,'' for further explanation of this process. Therefore, EPA finds adequate, and is proposing to approve, the State's 2008 and 2025 MVEBs for the Illinois portion of the St. Louis area. These MVEBs will be used in future transportation conformity analyses for the area.

III. What is the background for these actions?

A. What is the general background information?

Ground-level ozone is not emitted directly by sources. Rather, emissions of NO_X and VOCs react in the presence of sunlight to form ground-level ozone. NO_X and VOCs are referred to as precursors of ozone.

The CAA establishes a process for air quality management through the NAAQS. Before promulgation of the 8-hour standard, the ozone NAAQS was based on a 1-hour standard. On November 6, 1991 (56 FR 56693, 56751 and 56813), the St. Louis area was designated as a moderate nonattainment area under the 1-hour ozone NAAQS. Jersey County, Illinois, was not included as part of the St. Louis area, and was designated as a marginal nonattainment area under the 1-hour standard (56 FR 56693 and 56751). The Illinois portion of the St. Louis area was subsequently redesignated to attainment of the 1-hour standard effective May 12, 2003. (See 68 FR 25442, published May 12, 2003.) Jersey County was redesignated to attainment of the 1-hour standard effective April 13, 1995. (See 60 FR 13631, published March 14, 1995.) These attainment designations were thus in effect at the time EPA revoked the 1-hour ozone NAAQS, on June 15, 2005.

On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone standard of 0.08 parts per million parts (ppm). On April 30, 2004 (69 FR 23857), EPA published a final rule designating and classifying areas under the 8-hour ozone NAAQS. These designations and classifications became effective June 15, 2004. EPA designated as nonattainment any area that was violating the 8-hour ozone NAAQS based on the three most recent years of air quality data, 2001–2003.

The CAA contains two sets of provisions, subpart 1 and subpart 2, that address planning and control requirements for nonattainment areas. (Both are found in title I, part D, of the CAA; 42 U.S.C. 7501–7509a and 7511–7511f, respectively.) Subpart 1 contains general requirements for nonattainment areas for any pollutant, including ozone, governed by a NAAQS. Subpart 2 provides more specific requirements for ozone nonattainment areas.

Under EPA's implementation rule for the 1997 8-hour ozone standard, (69 FR 23951, published April 30, 2004), an area was classified under subpart 2 based on its 8-hour ozone design value (*i.e.* the three-year average annual fourth-highest daily maximum 8-hour average ozone concentration), if it had a 1-hour design value at the time of designation at or above 0.121 ppm (the lowest 1-hour design value in Table 1 of subpart 2) (69 FR 23954). All other areas were covered under subpart 1, based upon their 8-hour design values (69 FR 23958). The St. Louis area was designated as a subpart 2, 8-hour ozone moderate nonattainment area by EPA on April 30, 2004 (69 FR 23857, 23898, and 23915), based on air quality monitoring data from 2001–2003 (69 FR 23860).

40 CFR 50.10 and 40 CFR part 50, appendix I provide that the 8-hour ozone standard is attained when the three-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm, when rounded. The data completeness requirement is met when the average percent of days with valid ambient monitoring data is greater than 90%, and no single year has less than 75% data completeness. See 40 CFR part 50, appendix I, 2.3(d).

IEPA submitted a request to redesignate the Illinois portion of the St. Louis area to attainment for the 8-hour ozone standard on May 26, 2010 and supplemented the request on September 16, 2011. Complete, quality-assured and certified data for 2008–2010 indicate that the 8-hour NAAQS for ozone, as promulgated in 1997, has been attained for the St. Louis area. In addition, available preliminary monitoring data for 2011 continue to show the area in attainment of the standard. Under the CAA, nonattainment areas may be

redesignated to attainment if sufficient complete, quality-assured data are available for the Administrator to determine that the area has attained the standard, and the area meets the other CAA redesignation requirements in section 107(d)(3)(E).

On March 27, 2008 (73 FR 16436), EPA promulgated a revised 8-hour ozone standard of 0.075 ppm. EPA has not yet designated areas under the 2008 standard. The actions addressed in today's proposed rulemaking relate only to the 1997 8-hour ozone standard.

B. What are the impacts of the December 22, 2006, and June 8, 2007, United States Court of Appeals decisions regarding EPA's Phase 1 Implementation Rule?

1. Summary of Court Decision

On December 22, 2006, in *South Coast Air Quality Management Dist.* v. *EPA,* the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's Phase 1 Implementation Rule for the 8-hour Ozone Standard (69 FR 23951, April 30, 2004). 472 F.3d 882 (DC Cir. 2006). On June 8, 2007, in response to several petitions for rehearing, the D.C. Circuit Court (Court) clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. *Id.,* Docket No. 04 1201. Therefore, several provisions of the Phase 1 Rule remain effective: Provisions related to classifications for areas currently classified under subpart 2 of title I, part D, of the CAA as 8-hour ozone nonattainment areas; the 8-hour ozone attainment dates; and the timing for emissions reductions needed for attainment of the 8-hour ozone NAAQS. The June 8, 2007, decision also left intact the Court's rejection of EPA's reasons for implementing the 8-hour standard in certain nonattainment areas under subpart 1 in lieu of subpart 2. By limiting the vacatur, the Court let stand EPA's revocation of the 1-hour standard and those anti-backsliding provisions of the Phase 1 Rule that had not been successfully challenged.

The June 8, 2007, decision reaffirmed the December 22, 2006, decision that EPA had improperly failed to retain four measures required for 1-hour nonattainment areas under the anti-backsliding provisions of the regulations: (1) Nonattainment area New Source Review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) section 185 penalty fees for 1-hour severe or extreme nonattainment areas; (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the CAA, on the contingency of an area not making reasonable further progress toward attainment of the 1-hour NAAQS, or for failure to attain that NAAQS; and (4) certain transportation conformity requirements for certain types of Federal actions. The June 8, 2007, decision clarified that the Court's reference to conformity requirements was limited to requiring the continued use of 1-hour motor vehicle emissions budgets until 8-hour budgets were available for 8-hour conformity determinations.

This section sets forth EPA's views on the potential effect of the Court's rulings on this proposed redesignation action. For the reasons set forth below in sections B.2. and B.3., EPA does not believe that the Court's rulings alter any requirements relevant to this redesignation action so as to preclude redesignation or prevent EPA from proposing or ultimately finalizing this redesignation. EPA concludes that the Court's December 22, 2006, and June 8, 2007, decisions impose no impediment to moving forward with redesignation of this area to attainment, because even in light of the Court's decisions, redesignation is appropriate under the relevant redesignation provisions of the CAA and longstanding policies regarding redesignation requests.

2. Requirements Under the 8-Hour Standard

With respect to the 8-hour standard, the St. Louis area is classified under subpart 2. The June 8, 2007, opinion clarifies that the Court did not vacate the Phase 1 Rule's provisions with respect to classifications for areas under subpart 2. The Court's decision therefore upholds EPA's classifications for those areas classified under subpart 2 for the 1997 8-hour ozone standard.

3. Requirements Under the 1-Hour Standard

With respect to the 1-hour standard requirements, the St. Louis area and Jersey County area were attainment areas subject to a CAA section 175A maintenance plan under the 1-hour standard. The DC Circuit's decisions with respect to 1-hour nonattainment anti-backsliding requirements do not impact redesignation requests for these types of areas, except to the extent that the Court, in its June 8, 2007, decision, clarified that for those areas with 1-hour motor vehicle emissions budgets in their maintenance plans, anti-backsliding requires that those 1-hour budgets must be used for 8-hour conformity determinations until replaced by 8-hour budgets. All conformity determinations must comply with the applicable requirements of EPA's conformity regulations at 40 CFR part 93.

The three other anti-backsliding provisions for the 1-hour standard that the Court found were not properly retained, the nonattainment NSR requirements, contingency measures (pursuant to section 172(c)(9) or 182(c)(9)), and penalty fee provisions, do not apply to the St. Louis area and Jersey County area because these areas are attainment areas subject to a maintenance plan for the 1-hour standard, and have been redesignated to attainment for the 1-hour standard.

Thus, the decision in South Coast Air Quality Management Dist. would not preclude EPA from finalizing the redesignation of the St. Louis area.

IV. What are the criteria for redesignation to attainment?

The CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) allows for redesignation provided that: (1) The Administrator determines that the area has attained the applicable NAAQS; (2) the Administrator has fully approved the applicable implementation plan for the area under section 110(k); (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions; (4) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A; and, (5) the state containing such area has met all requirements applicable to the area under section 110 and part D. Illinois' request for redesignation of the Illinois portion of the St. Louis area is evaluated for each of these requirements in section V.A. below.

EPA provided guidance on redesignation in the General Preamble for the Implementation of Title I of the CAA Amendments of 1990 on April 16, 1992 (57 FR 13498), and supplemented this guidance on April 28, 1992 (57 FR 18070). EPA has provided further guidance on processing redesignation requests in the following documents:

''Ozone and Carbon Monoxide Design Value Calculations,'' Memorandum from William G. Laxton, Director Technical Support Division, June 18, 1990;

''Maintenance Plans for Redesignation of Ozone and Carbon Monoxide Nonattainment Areas,'' Memorandum from G.T. Helms,

Chief, Ozone/Carbon Monoxide Programs Branch, April 30, 1992;

''Contingency Measures for Ozone and Carbon Monoxide (CO) Redesignations,'' Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, June 1, 1992;

''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992;

''State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (ACT) Deadlines,'' Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992;

''Technical Support Documents (TSD's) for Redesignation Ozone and Carbon Monoxide (CO) Nonattainment Areas,'' Memorandum from G.T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, August 17, 1993;

''State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) On or After November 15, 1992,'' Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, September 17, 1993;

''Use of Actual Emissions in Maintenance Demonstrations for Ozone and CO Nonattainment Areas,'' Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, to Air Division Directors, Regions 1–10, November 30, 1993.

''Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment,'' Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994; and

''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard,'' Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995.

V. What is EPA's analysis of the state's request?

A. Redesignation

EPA is proposing to determine that the Illinois portion of the St. Louis area has met all applicable redesignation criteria under CAA section 107(d)(3)(E). The basis for EPA's proposed approval of the redesignation request is as follows:

1. The Area Has Attained the 8-Hour Ozone NAAQS (Section 107(d)(3)(E)(i))

On June 9, 2011 (76 FR 33647) EPA made a determination that the St. Louis area attained the 1997 8-hour ozone NAAQS based on monitoring data for the 2008–2010 time period. An area may be considered to be attaining the 8-hour ozone NAAQS if there are no violations, as determined in accordance with 40 CFR 50.10 and part 50, appendix I, based on three complete, consecutive calendar years of quality-assured air quality monitoring data. To attain this standard, the three-year average of the fourth-highest daily maximum 8-hour average ozone concentration measured at each monitor within an area over each year must not exceed 0.08 ppm. Based on the rounding convention described in 40 CFR part 50, appendix I, the standard is attained if the design value[1] is 0.084 ppm or below. The data must be collected and quality-assured in accordance with 40 CFR part 58, and recorded in the EPA's Air Quality System (AQS). The monitors generally should have remained at the same location for the duration of the monitoring period required for demonstrating attainment.

All 2008–2010 monitoring data have been quality-assured in accordance with 40 CFR 58.10, recorded in the AQS database, and certified. The data meet the completeness criteria in 40 CFR part 50, appendix I, which requires a minimum completeness of 75 percent annually and 90 percent over each three-year period. Monitoring data are presented in Table 1 below. In addition, available preliminary monitoring data for 2011 continue to show the area in attainment of the standard.

TABLE 1—ANNUAL 4TH HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATION AND THREE YEAR AVERAGES OF 4TH HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATIONS

State	County	Monitor	2008 4th high (ppm)	2009 4th high (ppm)	2010 4th high (ppm)	2008–2010 average (ppm)
Illinois	Jersey	Jerseyville 17–083–1001.	0.069	0.068	0.072	0.069
	Madison	Alton 17–119–0008	0.068	0.067	0.080	0.071
		Maryville 17–119–1009	0.070	0.074	0.074	0.072
		Wood River 17–119–3007.	0.067	0.066	0.070	0.067
	St. Clair	East St. Louis 17–163–0010.	0.064	0.069	0.072	0.068
Missouri	Jefferson	Arnold 29–099–00019	0.070	0.070	0.077	0.072
	St. Charles	Orchard Farm 29–183–1004.	0.072	0.073	0.077	0.074
		West Alton 29–183–1002.	0.076	0.071	0.084	0.077
	St. Louis	Maryland Heights 29–189–0014.	0.069	0.070	0.076	0.071
		Pacific 29–189–0005	0.064	0.064	0.069	0.065
	St. Louis City	Blair Street 29–510–0085.	0.073	0.065	0.071	0.069

[1] The design value is the highest three-year average of the fourth-highest daily maximum 8-hour average for all monitors within the area.

As discussed in section V.A.4. below with respect to the maintenance plan, IEPA has committed to continue to operate an EPA-approved monitoring network as necessary to demonstrate maintenance of the NAAQS. Should changes in the location of an ozone monitor become necessary, IEPA has committed to work with EPA to ensure the adequacy of the monitoring network. Illinois and Missouri remain obligated to continue to quality assure monitoring data in accordance with 40 CFR part 58 and enter all data into AQS in accordance with Federal guidelines.

2. The Area Has Met All Applicable Requirements Under Section 110 and Part D; and the Area Has a Fully Approved SIP Under Section 110(k) (Sections 107(d)(3)(E)(v) and 107(d)(3)(E)(ii))

We have determined that Illinois has met all currently applicable SIP requirements for purposes of redesignation for the Illinois portion of the St. Louis area under section 110 of the CAA (general SIP requirements). We have also determined that the Illinois SIP meets all SIP requirements currently applicable for purposes of redesignation under part D of title I of the CAA (requirements specific to moderate nonattainment areas), in accordance with section 107(d)(3)(E)(v). In addition, with the exception of the comprehensive emissions inventory and certain VOC reasonably available control technology (RACT) regulations, we have determined that the Illinois SIP is fully approved with respect to all applicable requirements for purposes of redesignation, in accordance with section 107(d)(3)(E)(ii). As discussed below, in this action EPA is proposing to approve IEPA's 2002 emissions inventory as meeting the comprehensive emissions inventory requirement. EPA is taking action on the Illinois VOC RACT regulations in a separate rule.

In proposing these determinations, we have ascertained which SIP requirements are applicable to the Illinois portion of the St. Louis area for purposes of redesignation, and have determined that there are SIP measures meeting those requirements and that these measures have been fully approved or will be fully approved under section 110(k) of the CAA by the time EPA takes final action on the redesignation request. See discussions in sections a. and b. below.

In the context of redesignations, EPA has interpreted requirements related to attainment as not applicable for purposes of redesignation. For example, in the General Preamble EPA stated that:

> [t]he section 172(c)(9) requirements are directed at ensuring RFP and attainment by the applicable date. These requirements no longer apply when an area has attained the standard and is eligible for redesignation. Furthermore, section 175A for maintenance plans * * * provides specific requirements for contingency measures that effectively supersede the requirements of section 172(c)(9) for these areas. ''General Preamble for the Interpretation of Title I of the Clean Air Act Amendments of 1990,'' (General Preamble) 57 FR 13498, 13564 (April 16, 1992).

See also the September 4, 1992, Calcagni memorandum (''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992) at 6 (''The requirements for reasonable further progress and other measures needed for attainment will not apply for redesignations because they only have meaning for areas not attaining the standard.'').

a. The Illinois Portion of the St. Louis Area Has Met All Applicable Requirements for Purposes of Redesignation Under Section 110 and Part D of the CAA

i. Section 110 General SIP requirements

Section 110(a) of title I of the CAA contains the general requirements for a SIP. Section 110(a)(2) provides that the implementation plan submitted by a state must have been adopted by the state after reasonable public notice and hearing, and that, among other things, it includes enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the CAA; provides for establishment and operation of appropriate devices, methods, systems and procedures necessary to monitor ambient air quality; provides for implementation of a source permit program to regulate the modification and construction of any stationary source within the areas covered by the plan; includes provisions for the implementation of part C, Prevention of Significant Deterioration (PSD) and part D, NSR permit programs; includes criteria for stationary source emission control measures, monitoring, and reporting; includes provisions for air quality modeling; and provides for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires that SIPs contain measures to prevent sources in a state from significantly contributing to air quality problems in another state. To implement this provision, EPA has required certain states to establish programs to address transport of air pollutants (NO_X SIP Call,[2] Clean Air Interstate Rule (CAIR) (70 FR 25162, May 12, 2005), and Cross-State Air Pollution Rule (CSAPR) (75 FR 48208, August 8, 2011), which replaces CAIR). However, the section 110(a)(2)(D) requirements for a state are not linked with a particular nonattainment area's designation and classification. EPA concludes that the requirements linked with a particular nonattainment area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. The section 110(a)(2)(D) requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. Thus, we conclude that these requirements should not be construed to be applicable requirements for purposes of redesignation.

Further, we conclude that the other section 110 elements described above that are not connected with nonattainment plan submissions and not linked with an area's attainment status are also not applicable requirements for purposes of redesignation. A state remains subject to these requirements after an area is redesignated to attainment. We conclude that only the section 110 and part D requirements which are linked with a particular area's designation and classification are the relevant measures which we may consider in evaluating a redesignation request. This approach is consistent with EPA's existing policy on applicability of conformity and oxygenated fuels requirements for redesignation purposes, as well as with section 184 ozone transport requirements. See Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176, October 10, 1996), (62 FR 24826, May 7, 1997); Cleveland-Akron-Lorain, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking (60 FR 62748, December 7, 1995). See also the discussion on this issue in the Cincinnati, Ohio 1-hour

[2] On October 27, 1998 (63 FR 57356), EPA issued a NO_X SIP Call requiring the District of Columbia and 22 states to reduce emissions of NO_X in order to reduce the transport of ozone and ozone precursors. In compliance with EPA's NO_X SIP Call, IEPA developed rules governing the control of NO_X emissions from Electric Generating Units (EGUs), major non-EGU industrial boilers, major cement kilns, and internal combustion engines. EPA approved the Illinois rules as fulfilling Phase I of the NO_X SIP Call on June 28, 2001 (66 FR 34382) and November 21, 2001 (66 FR 56454), and as meeting Phase II of the NO_X SIP Call on June 26, 2009 (74 FR 30466).

ozone redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh, Pennsylvania 1-hour ozone redesignation (66 FR 50399, October 19, 2001).

We have reviewed the Illinois SIP and have concluded that it meets the general SIP requirements under section 110 of the CAA applicable to the State's request for redesignation. EPA has previously approved provisions of the Illinois SIP addressing section 110 elements under the 1-hour ozone standard (40 CFR 52.1870). Further in a submittal dated December 12, 2007, Illinois confirmed that the State continues to meet the section 110(a)(2) infrastructure requirements for the 8-hour ozone standard. EPA approved some elements of this Illinois submittal on July 13, 2011, at 76 FR 41075. The requirements of section 110(a)(2), however, are statewide requirements that are not linked to the 8-hour ozone nonattainment status of the St. Louis area. Therefore, EPA concludes that these infrastructure SIP elements are not applicable requirements for purposes of review of the State's 8-hour ozone redesignation request.

ii. Part D Requirements

EPA has determined that, if EPA finalizes the approval of the 2002 comprehensive emissions inventory, discussed in section V.C. of this rulemaking, and the VOC RACT submittal, discussed below under the heading ''Subpart 2 Section 182(a) and (b) Requirements,'' the Illinois SIP will meet the SIP requirements applicable for purposes of redesignation under part D of the CAA for the Illinois portion of the St. Louis area. Subpart 1 of part D, found in sections 172–176 of the CAA, sets forth the basic nonattainment requirements applicable to all nonattainment areas. Subpart 2 of part D, which includes section 182 of the CAA, establishes additional specific requirements depending on the area's nonattainment classification.

The St. Louis area was classified as a moderate nonattainment area under subpart 2, therefore the state must meet the applicable requirements of both subpart 1 and subpart 2 of part D. The applicable subpart 1 requirements are contained in sections 172(c)(1)–(9) and in section 176. The applicable subpart 2 requirements are contained in sections 182(a) and (b) (marginal and moderate nonattainment area requirements).

Subpart 1 Section 172 Requirements.

For purposes of evaluating this redesignation request, the applicable section 172 SIP requirements for the St. Louis area are contained in sections 172(c)(1)–(9). A thorough discussion of the requirements contained in section 172 can be found in the General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992).

Section 172(c)(1) requires the plans for all nonattainment areas to provide for the implementation of all reasonably available control measures as expeditiously as practicable and to provide for attainment of the national primary ambient air quality standards. EPA interprets this requirement to impose a duty on all states containing nonattainment areas to consider all available control measures and to adopt and implement such measures as are reasonably available for implementation in each area as components of the area's attainment demonstration. Because attainment has been reached in the St. Louis area, no additional measures are needed to provide for attainment, and section 172(c)(1) requirements are no longer considered to be applicable as long as the area continues to attain the standard until redesignation. See 40 CFR 51.918.

The reasonable further progress (RFP) requirement under section 172(c)(2) is defined as progress that must be made toward attainment. This requirement is not relevant for purposes of redesignation because the St. Louis area has monitored attainment of the ozone NAAQS. (General Preamble, 57 FR 13564). See also 40 CFR 51.918. In addition, because the St. Louis area has attained the ozone NAAQS and is no longer subject to an RFP requirement, the requirement to submit the section 172(c)(9) contingency measures is not applicable for purposes of redesignation. *Id.*

Section 172(c)(3) requires submission and approval of a comprehensive, accurate and current inventory of actual emissions. This requirement is superseded by the emission inventory requirement in section 182(a)(1).

Section 172(c)(4) requires the identification and quantification of allowable emissions for major new and modified stationary sources to be allowed in an area, and section 172(c)(5) requires source permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA approved the Illinois nonattainment NSR program on December 17, 1992 (57 FR 59928), September 27, 1995 (60 FR 49780) and May 13, 2003 (68 FR 25504). Further, EPA has determined that, since PSD requirements will apply after redesignation, areas being redesignated need not comply with the requirement that a part D NSR program be approved prior to redesignation, provided that the area demonstrates maintenance of the NAAQS without a part D NSR program. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' Illinois has demonstrated that the St. Louis area will be able to maintain the 1997 8-hour ozone standard without a part D NSR program in effect; therefore, EPA concludes that the State need not have a fully approved part D NSR program prior to approval of the redesignation request. The State's PSD program will become effective in the St. Louis area upon redesignation to attainment. See rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

Section 172(c)(6) requires the SIP to contain control measures necessary to provide for attainment of the standard. Because attainment has been reached, no additional measures are needed to provide for attainment.

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted above in section i, we conclude the Illinois SIP meets the requirements of section 110(a)(2) applicable for purposes of redesignation.

Subpart 1 Section 176 Conformity Requirements.

Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that federally supported or funded activities, including highway projects, conform to the air quality planning goals in the applicable SIPs. The requirement to determine conformity applies to transportation plans, programs and projects developed, funded or approved under title 23 of the U.S. Code and the Federal Transit Act (transportation conformity) as well as to all other Federally supported or funded projects (general conformity). State conformity revisions must be consistent with Federal conformity regulations relating to consultation, enforcement, and enforceability, which EPA promulgated pursuant to CAA requirements.

EPA thinks that it is reasonable to interpret the conformity SIP requirements as not applying for purposes of evaluating the redesignation request under section 107(d) for two reasons. First, the requirement to submit SIP revisions to comply with the

conformity provisions of the CAA continues to apply to areas after redesignation to attainment since such areas would be subject to a section 175A maintenance plan. Second, EPA's Federal conformity rules require the performance of conformity analyses in the absence of Federally approved state rules. Therefore, because areas are subject to the conformity requirements regardless of whether they are redesignated to attainment and, because they must implement conformity under Federal rules if state rules are not yet approved, EPA concludes it is reasonable to view these requirements as not applying for purposes of evaluating a redesignation request. See *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), upholding this interpretation. See also 60 FR 62748, 62749–62750 (Dec. 7, 1995) (Tampa, Florida).

EPA approved Illinois's general conformity SIP on December 23, 1997 (62 FR 67000). Illinois does not have a federally approved transportation conformity SIP. However, Illinois performs conformity analyses pursuant to EPA's Federal conformity rules. Illinois has submitted on-road MVEBs for the Illinois portion of the St. Louis area of 17.27 and 5.68 tons per day (tpd) VOC and 52.57 and 15.22 tpd NO_X for the years 2008 and 2025, respectively. Illinois must use these MVEBs in any conformity determination that is effective on or after the effective date of the maintenance plan approval.

Subpart 2 Section 182(a) and (b) Requirements.

Comprehensive Emissions Inventory. Section 182(a)(1) requires the submission of a comprehensive emissions inventory. IEPA submitted a 2002 emissions inventory on June 21, 2006. On September 16, 2011, IEPA supplemented this inventory with on-road mobile emissions estimates based on the MOVES model. As discussed below in section V.C., EPA is proposing to approve the 2002 inventory as meeting the section 182(a)(1) comprehensive emissions inventory requirement.

Emissions Statements. EPA approved the Illinois emission statement SIP required by section 182(a)(3)(B), on September 9, 1993 (58 FR 47379) and May 15, 2002 (67 FR 34614).

Reasonable Further Progress and Attainment Demonstration. On July 2, 2007, IEPA submitted an attainment demonstration and reasonable further progress plan for the Illinois portion of the St. Louis area as required by section 182(b)(1) of the CAA. Because attainment has been reached, section 182(b)(1) requirements are no longer considered to be applicable as long as the area continues to attain the standard. If EPA finalizes approval of the redesignation of the Illinois portion of the St. Louis area, EPA will take no further action on the attainment demonstration submitted by Illinois for the area.

VOC RACT. Section 182(b)(2) requires states with moderate nonattainment areas to implement RACT under section 172(c)(1) with respect to each of the following: (1) All sources covered by a Control Technology Guideline (CTG) document issued between November 15, 1990, and the date of attainment; (2) all sources covered by a CTG issued prior to November 15, 1990; and, (3) all other major non-CTG stationary sources. As required under the 1-hour ozone standard, Illinois submitted VOC RACT rules covering the second and third categories. EPA approved these VOC RACT rules on February 21, 1980(45 FR 11472), November 21, 1987 (52 FR 45333), and September 9, 1994 (59 FR 46562). With respect to the first category, EPA issued CTGs for five source categories in September 2006, three source categories in September 2007, and five additional source categories in September 2008. Areas classified as moderate and above were required to submit VOC RACT for the source categories covered by these CTGs, by September 2007, September 2008, and September 2009, respectively. IEPA submitted a SIP revision to address these CTGs on July 29, 2010, September 16, 2011, and September 29, 2011. EPA is taking action on these revisions in a separate rulemaking action. Full approval of IEPA's VOC RACT submittal is a prerequisite for approval of the redesignation of the Illinois portion of the St. Louis area to attainment.

NO_X RACT. Section 182(f) establishes NO_X requirements for ozone nonattainment areas. However, it provides that these requirements do not apply to an area if the Administrator determines that NO_X reductions would not contribute to attainment. On February 22, 2011 (76 FR 9655), EPA approved a request from IEPA to exempt sources of NO_X in the Illinois portion of the St Louis area from section 182(f) NO_X RACT requirements. Therefore, the State of Illinois need not have fully approved NO_X control measures under section 182(f) for the Illinois portion of the St. Louis area to be redesignated to attainment.

Stage II Vapor Recovery. Section 182(b)(3) of the CAA requires states with moderate nonattainment areas to submit Stage II vapor recovery rules. EPA approved Illinois's Stage II vapor recovery regulations on January 12, 1993 (58 FR 3841). Further, section 202(a)(6) of the CAA provides that Stage II vapor recovery regulations are not required if EPA promulgates on-board vapor recovery regulations for vehicles. EPA promulgated such regulations on April 6, 1994 (59 FR 16262), which became effective on May 6, 1994. Therefore, pursuant to section 202(a)(6) of the CAA, Stage II regulations are no longer required in the area. EPA approved the removal of Stage II vapor recovery regulations from the Illinois SIP on December 16, 1994 (59 FR 64853).

Vehicle Inspection and Maintenance (I/M). Section 182(b)(4) and EPA's final I/M regulations in 40 CFR part 85 require the States to submit a fully adopted I/M program. EPA approved the Illinois enhanced I/M program on February 22, 1999 (64 FR 8517).

Thus, as discussed above, with approval of the comprehensive emissions inventory and the Illinois VOC RACT submittal, the Illinois portion of the St. Louis area will satisfy the requirements applicable for purposes of redesignation under section 110 and part D of the CAA.

b. The Illinois Portion of the St. Louis Area Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

If EPA issues a final approval of the comprehensive emissions inventory and the Illinois VOC RACT submittal, EPA will have fully approved the State's SIP for the Illinois portion of the St. Louis area under section 110(k) of the CAA for all requirements applicable for purposes of redesignation. EPA may rely on prior SIP approvals in approving a redesignation request (See page 3 of the September 4, 1992, John Calcagni memorandum; *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984, 989–990 (6th Cir. 1998); *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001)) plus any additional measures it may approve in conjunction with a redesignation action. See 68 FR 25413, 25426 (May 12, 2003). Since the passage of the CAA of 1970, Illinois has adopted and submitted, and EPA has fully approved, provisions addressing various required SIP elements under the 1-hour ozone standard. In this action, EPA is proposing to approve the comprehensive 2002 emissions inventory for the Illinois portion of the St. Louis area as meeting the requirement of section 182(a)(1) of the CAA. In a separate rule, EPA will take action on the Illinois VOC RACT submission. No SIP provisions for the Illinois portion of the St. Louis area are currently disapproved, conditionally approved, or partially approved.

3. The Improvement in Air Quality Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions (Section 107(d)(3)(E)(iii))

EPA finds that Illinois has demonstrated that the observed air quality improvement in the St. Louis area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal measures, and other state-adopted measures discussed below.

In making this demonstration, IEPA has calculated the change in emissions between 2002 and 2008. For the nonattainment inventory, Illinois is using the 2002 emissions inventory developed to meet the comprehensive emissions inventory requirement of section 182(a)(1) of the CAA. Illinois developed an attainment inventory for 2008, one of the years the St. Louis area monitored attainment of the standard. The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of regulatory control measures that St. Louis and upwind areas have implemented in recent years.

a. Permanent and Enforceable Controls Implemented

The following is a discussion of permanent and enforceable measures that have been implemented in the area:

i. Stationary Source NO_X Rules

IEPA has developed rules governing the control of NO_X emissions from Electric Generating Units (EGUs), major non-EGU industrial boilers, major cement kilns, and internal combustion engines. EPA approved the Illinois rules as fulfilling Phase I of the NO_X SIP Call on June 28, 2001 (66 FR 34382) and November 21, 2001 (66 FR 56454), and as meeting Phase II of the NO_X SIP Call on June 26, 2009 (74 FR 30466). Illinois began complying with Phase I of this rule in 2004. Compliance with Phase II of the SIP Call requires the control of NO_X emissions from large stationary internal combustion engines. Implementation of Phase II began in 2007 and was projected to result in an 82 percent NO_X reduction from 1995 levels.

ii. Consumer Products and Architectural and Industrial Maintenance Coatings (AIM) Rules

Illinois adopted consumer products and AIM rules on May 7, 2009. Compliance with these rules was required by July 1, 2009. EPA is acting on these rules in a separate rulemaking.

iii. Reformulated Gasoline (RFG)

Illinois requested that EPA extend the requirement for sale of RFG to Jersey, Madison, Monroe, and St. Clair counties. EPA granted this request on April 24, 2007, with compliance required by July 1, 2007.

iv. Consent Decrees—Dynegy Midwest Generation and ConocoPhillips

Dynegy Midwest Generation and ConocoPhillips entered separate settlement agreements with EPA in 2005. The settlement reached with Dynegy Midwest Generation for alleged violations at the Baldwin Generating Station included the requirements to ''commence operation of the SCRs installed at Baldwin Unit 1, Unit 2 * * * so as to achieve and maintain a 30-day rolling average emission rate from each such unit of not greater than 0.100 lb/mmbtu NO_X'' and ''maintain a 30-day rolling average emission rate of not greater than 0.120 lb/mmbtu NO_X at Baldwin Unit 3.'' Low NO_X burners and overfire air technology are required on Dynegy Midwest Generation's Wood River Units #4 and #5. At the Dynegy Midwest Generation's Baldwin Generating station, ozone season emissions were reduced from 13,204 tons in 2001 to 1,696 tons in 2009. The ConocoPhillips settlement provided for near-term installation of low-NO_X burners and ultra low-NO_X burners on combustion units at its ''Distilling West'' operations. Other NO_X emission reduction requirements are set forth in the consent decree, as are provisions for carbon monoxide (CO), sulfur dioxide (SO_2), and particulate matter reductions.

v. Federal Emission Control Measures

Reductions in VOC and NO_X emissions have occurred statewide and in upwind areas as a result of Federal emission control measures, with additional emission reductions expected to occur in the future. Federal emission control measures include the following.

Tier 2 Emission Standards for Vehicles and Gasoline Sulfur Standards. These emission control requirements result in lower VOC and NO_X emissions from new cars and light duty trucks, including sport utility vehicles. The Federal rules were phased in between 2004 and 2009. The EPA has estimated that, by the end of the phase-in period, the following vehicle NOx emission reductions will occur nationwide: passenger cars (light duty vehicles) (77 percent); light duty trucks, minivans, and sports utility vehicles (86 percent); and, larger sports utility vehicles, vans, and heavier trucks (69 to 95 percent). VOC emission reductions are expected to range from 12 to 18 percent, depending on vehicle class, over the same period. Some of these emission reductions occurred by the attainment years (2007–2009) and additional emission reductions will occur throughout the maintenance period.

Heavy-Duty Diesel Engine Rule. EPA issued this rule in July 2000. This rule includes standards limiting the sulfur content of diesel fuel, which went into effect in 2004. A second phase took effect in 2007 which further reduced the highway diesel fuel sulfur content to 15 parts per million, leading to additional reductions in combustion NO_X and VOC emissions. This rule is expected to achieve a 95 percent reduction in NO_X emissions from diesel trucks and busses.

Non-Road Diesel Rule. EPA issued this rule in 2004. This rule applies to diesel engines used in industries, such as construction, agriculture, and mining. It is estimated that compliance with this rule will cut NO_X emissions from non-road diesel engines by up to 90 percent. Some of these emission reductions occurred by the attainment years (2007–2009) and additional emission reductions will occur throughout the maintenance period.

New Source Performance Standards (NSPS), National Emissions Standards for Hazardous Air Pollutants (NESHAPS) and Maximum Achievable Control Technology Standards (MACT). A broad range of emission sectors are subject to Federal NSPS, NESHAP, and MACT standards with compliance requirements which take effect post-2002 and prior to 2009.

vi. Control Measures in Upwind Areas

On October 27, 1998 (63 FR 57356), EPA issued a NO_X SIP Call requiring the District of Columbia and 22 states (including Illinois) to reduce emissions of NO_X. Affected states were required to comply with Phase I of the SIP Call beginning in 2004, and Phase II beginning in 2007. The reduction in NO_X emissions has resulted in lower concentrations of transported ozone entering the St. Louis area. Emission reductions resulting from regulations developed in response to the NO_X SIP Call are permanent and enforceable.

b. Emission Reductions

Illinois is using the 2002 comprehensive emissions inventory developed to meet the requirement of section 182(a)(1) of the CAA as the nonattainment inventory. This inventory is discussed in more detail in section V.C., below. In summary, IEPA developed the point source inventory

using source reported actual 2002 emissions data from annual emissions reports. The area source inventory was developed using various methodologies to estimate area source activity levels and emissions including applying local activity levels, apportioning national or statewide activity levels to the local level, using per capita emission factors, using per employee emission factors, and using data from inventories complied by others. The documentation supplied in the submittal shows how the county-specific emissions were calculated for each area source category. Non-road mobile source emissions were generated using the NONROAD model version 2.20a. In addition, emissions estimates were developed for commercial marine vessels, aircraft, and railroads, three non-road categories not included in the NONROAD model. On-road mobile emissions were prepared by the IEPA using the MOVES emissions model and daily vehicle miles traveled (VMT) data provided by the Illinois Department of Transportation (IDOT).

Illinois prepared a comprehensive 2008 emissions inventory to use as the attainment year inventory. Point source information was compiled from the 2008 annual emissions reports submitted to IEPA by sources and EPA's Clean Air Markets Division database for electric utilities. Area source emissions were calculated using the most recently available methodologies and emissions factors from EPA along with activity data (population, employment, fuel use, etc.) specific to 2008. Non-road mobile source emissions were calculated using EPA's NONROAD emissions model. In addition, emissions estimates were calculated for commercial marine vessels, aircraft, and railroads, three non-road categories not included in the NONROAD model. On-road mobile source emissions were calculated using EPA's MOVES emissions model with 2008 VMT data provided by IDOT.

Using the inventories described above, as well as emissions inventories provided by Missouri, Illinois has documented changes in VOC and NO_X emissions from 2002 to 2008 for the St. Louis area. Emissions data are shown in Tables 2 through 5 below.

TABLE 2—ST. LOUIS AREA VOC AND NO_X EMISSIONS FOR NONATTAINMENT YEAR 2002

[tpd]

	VOC			NO_X		
	Illinois	Missouri	Area total	Illinois	Missouri	Area total
Point	17.41	32.70	50.11	53.24	127.20	180.44
Area	29.86	71.30	101.16	1.40	19.40	20.80
On-road	25.90	79.57	105.47	76.82	226.03	302.85
Non-road	12.04	47.00	59.04	36.79	60.70	97.49
Total	85.21	230.57	315.78	168.25	433.33	601.58

TABLE 3—ST. LOUIS AREA VOC AND NO_X EMISSIONS FOR ATTAINMENT YEAR 2008

[tpd]

	VOC			NO_X		
	Illinois	Missouri	Area total	Illinois	Missouri	Area total
Point	11.92	18.00	29.92	39.86	88.80	128.66
Area	23.21	98.70	121.91	1.50	6.50	8.00
On-road	17.27	58.50	75.77	52.57	160.40	212.97
Non-road	12.66	46.40	59.06	39.25	60.90	100.15
Total	65.06	221.60	286.66	133.18	316.60	449.78

TABLE 4—COMPARISON OF 2002 AND 2008 VOC AND NO_X EMISSIONS FOR THE ILLINOIS PORTION OF THE ST. LOUIS AREA

[tpd]

	VOC			NO_X		
	2002	2008	Net change (2002–2008)	2002	2008	Net change (2002–2008)
Point	17.41	11.92	−5.49	53.24	39.86	-13.38
Area	29.86	23.21	−6.65	1.40	1.50	0.10
On-road	25.90	17.27	−8.63	76.82	52.57	−24.25
Non-road	12.04	12.66	0.62	36.79	39.25	2.46
Total	85.21	65.06	−20.15	168.25	133.18	-35.07

TABLE 5—COMPARISON OF 2002 AND 2008 VOC AND NO_X EMISSIONS FOR THE ENTIRE ST. LOUIS AREA

[tpd]

	VOC			NO_X		
	2002	2008	Net change (2002–2008)	2002	2008	Net change (2002–2008)
Point	50.11	29.92	−20.19	180.44	128.66	−51.78
Area	101.16	121.91	20.75	20.80	8.00	−12.80
On-road	105.47	75.77	−29.70	302.85	212.97	−89.88
Non-road	59.04	59.06	0.02	97.49	100.15	2.66
Total	315.78	286.66	−29.12	601.58	449.78	−151.80

Table 4 shows that the Illinois portion of the St. Louis area reduced VOC emissions by 20.15 tpd and NO_X emissions by 35.07 tpd between 2002 and 2008. As shown in Table 5, the entire St. Louis area reduced VOC emissions by 29.12 tpd and NO_X emissions by 151.80 tpd between 2002 and 2008. Based on the information summarized above, Illinois has adequately demonstrated that the improvement in air quality is due to permanent and enforceable emissions reductions.

4. The Area Has a Fully Approved Maintenance Plan Pursuant to Section 175A of the CAA. (Section 107(d)(3)(E)(iv))

In conjunction with its request to redesignate the Illinois portion of the St. Louis nonattainment area to attainment status, IEPA submitted a SIP revision to provide for maintenance of the 1997 8-hour ozone NAAQS in the area through 2025.

a. Maintenance Plan Requirements

Section 175A of the CAA sets forth the required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after the Administrator approves a redesignation to attainment. Eight years after the redesignation, the state must submit a revised maintenance plan which demonstrates that attainment will continue to be maintained for ten years following the initial ten-year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures with a schedule for implementation as EPA deems necessary to assure prompt correction of any future 8-hour ozone violations.

The September 4, 1992, John Calcagni memorandum provides additional guidance on the content of a maintenance plan. The memorandum clarifies that an ozone maintenance plan should address the following items: The attainment VOC and NO_X emissions inventories, a maintenance demonstration showing maintenance for the ten years of the maintenance period, a commitment to maintain the existing monitoring network, factors and procedures to be used for verification of continued attainment of the NAAQS, and a contingency plan to prevent or correct future violations of the NAAQS.

b. Attainment Inventory

IEPA developed an emissions inventory for 2008, one of the years used to demonstrate monitored attainment of the 8-hour NAAQS, as described above. The attainment level of emissions is summarized in Table 3, above.

c. Demonstration of Maintenance

Along with the redesignation request, IEPA submitted a revision to the Illinois 8-hour ozone SIP that includes a maintenance plan for the Illinois portion of the St. Louis area, in compliance with section 175A of the CAA. This demonstration shows maintenance of the 1997 8-hour ozone standard through 2025 by showing that current and future emissions of VOC and NO_X for the St. Louis area remain at or below attainment year emission levels. A maintenance demonstration need not be based on modeling. See *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), *Sierra Club* v. *EPA,* 375 F. 3d 537 (7th Cir. 2004). See also 66 FR 53094, 53099–53100 (October 19, 2001), 68 FR 25413, 25430–25432 (May 12, 2003).

Illinois is using emissions inventory projections for the years 2015, 2020 and 2025 to demonstrate maintenance. Point and area source emissions for 2015, 2020 and 2025 were estimated using the 2008 attainment inventory and growth factors appropriate for each source category. Non-road emissions projections were developed using the growth factors contained in EPA's NONROAD model. On-road motor vehicle emissions were estimated using the EPA's MOVES motor vehicle emissions model.

As discussed in section V.a.3.a.v. (Permanent and Enforceable Controls Implemented) above, many of the control programs that helped to bring the area into attainment of the standard will continue to achieve additional emission reductions over the maintenance period. These control programs include Tier 2 emission standards for vehicles and gasoline sulfur standards, the heavy-duty diesel engine rule, and the non-road diesel rule. Emissions data are shown in Tables 6–10, below.

TABLE 6—ST. LOUIS AREA PROJECTED VOC AND NO_X EMISSIONS FOR INTERIM YEAR 2015

[tpd]

	VOC			NO_X		
	Illinois	Missouri	Area total	Illinois	Missouri	Area total
Point	13.70	21.73	35.43	31.86	86.37	118.23
Area	23.76	109.52	133.28	1.55	6.64	8.19
On-road	9.11	33.98	43.09	27.85	83.79	111.64
Non-road	9.27	37.33	46.60	36.41	52.61	89.02

TABLE 6—ST. LOUIS AREA PROJECTED VOC AND NO_X EMISSIONS FOR INTERIM YEAR 2015—Continued

[tpd]

	VOC			NO_X		
	Illinois	Missouri	Area total	Illinois	Missouri	Area total
Total	55.84	202.56	258.40	97.67	229.41	327.08

TABLE 7—ST. LOUIS AREA PROJECTED VOC AND NO_X EMISSIONS FOR INTERIM YEAR 2020

[tpd]

	VOC			NO_X		
	Illinois	Missouri	Area total	Illinois	Missouri	Area total
Point	14.73	24.59	39.32	30.71	86.63	117.34
Area	25.04	117.75	142.79	1.56	6.73	8.29
On-road	4.99	23.51	28.50	16.32	51.51	67.83
Non-road	7.73	30.81	38.54	33.56	46.72	80.28
Total	52.49	196.66	249.15	82.15	191.59	273.74

TABLE 8—ST. LOUIS AREA VOC AND NO_X EMISSIONS FOR MAINTENANCE YEAR 2025

[tpd]

	VOC			NO_X		
	Illinois	Missouri	Area total	Illinois	Missouri	Area total
Point	15.78	27.59	43.37	32.12	88.24	120.36
Area	26.32	126.34	152.66	1.58	6.82	8.40
On-road	5.68	17.74	23.42	15.22	34.17	49.39
Non-road	7.31	24.30	31.61	32.33	40.84	73.17
Total	55.09	195.97	251.06	81.25	170.07	251.32

TABLE 9—COMPARISON OF 2008, 2015, 2020 AND 2025 VOC AND NO_X EMISSIONS FOR THE ILLINOIS PORTION OF THE ST. LOUIS AREA

[tpd]

	VOC					NO_X				
	2008	2015	2020	2025	Net change (2008–2025)	2008	2015	2020	2025	Net change (2008–2025)
Point	11.92	13.70	14.73	15.78	3.86	39.86	31.86	30.71	32.12	−7.74
Area	23.21	23.76	25.04	26.32	3.11	1.50	1.55	1.56	1.58	0.08
On-road	17.27	9.11	4.99	5.68	−11.59	52.57	27.85	16.32	15.22	−37.35
Non-road	12.66	9.27	7.73	7.31	−5.35	39.25	36.41	33.56	32.33	−6.92
Total	65.06	55.84	52.49	55.09	−9.97	133.18	97.67	82.15	81.25	−51.93

TABLE 10—COMPARISON OF 2008, 2015, 2020, AND 2025 VOC AND NO_X EMISSIONS FOR THE ENTIRE ST. LOUIS AREA

[tpd]

	VOC					NO_X				
	2008	2015	2020	2025	Net change (2008–2025)	2008	2013	2020	2025	Net change (2008–2025)
Point	29.92	35.43	39.32	43.37	13.45	128.66	118.23	117.34	120.36	−8.30
Area	121.91	133.28	142.79	152.66	30.75	8.00	8.19	8.29	8.40	0.40
On-road	75.77	43.09	28.50	23.42	−52.35	212.97	111.64	67.83	49.39	−163.58
Non-road	59.06	46.60	38.54	31.61	−27.45	100.15	89.02	80.28	73.17	−26.98
Total	286.66	258.40	249.15	251.06	−35.60	449.78	327.08	273.74	251.32	−198.46

The emission projections show that Illinois and Missouri do not expect emissions in the St. Louis area to exceed the level of the 2008 attainment year inventory during the maintenance period. As shown in Table 9, VOC and NO_X emissions in the Illinois portion of the St. Louis area are projected to decrease by 9.97 tpd and 51.93 tpd, respectively, between 2008 and 2025. As shown in Table 10, VOC and NO_X emissions in the entire St. Louis area are projected to decrease by 35.60 tpd and 198.46 tpd, respectively, between 2008 and 2025.

Because the St. Louis area is affected by the transport of ozone and its precursors, the reduction of NO_X emissions in upwind areas will help to ensure that the area will maintain the 1997 8-hour ozone standard in the future. On August 8, 2011, at 76 FR 48208, EPA promulgated the CSAPR to address interstate transport of emissions. The CSAPR requires substantial reductions of NO_X emissions from EGUs across most of Eastern United States, with implementation beginning on January 1, 2012. Compared to 2005 emissions, EPA estimates that by 2014 this rule and other Federal rules will lower NO_X ozone season emissions from power plants by 340,000 tons.

Further, ozone modeling performed by the Lake Michigan Air Directors Consortium supports the conclusion that the St. Louis area will maintain the 1997 8-hour ozone standard throughout the maintenance period. Peak modeled ozone levels in the area for 2012 and 2018 are 0.084 ppm, and 0.080 ppm, respectively. These projected ozone levels were modeled applying only legally enforceable controls; *e.g.,* consent decrees, rules, the NO_X SIP Call, Federal motor vehicle control programs, etc. The modeling runs did not include emission reductions for implementation of the CSAPR. With the implementation of the CSAPR, actual 2018 ozone levels would be expected to be lower.

As part of its maintenance plan, Illinois elected to include a ''safety margin'' for the area. A ''safety margin'' is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan which continues to demonstrate attainment of the standard. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. The St. Louis area attained the 1997 8-hour ozone NAAQS during the 2007–2009 time period. Illinois used 2008 as the attainment level of emissions for the area. For the Illinois portion of the St. Louis area, the emissions from point, area, non-road, and mobile sources in 2008 equaled 65.06 tpd of VOC. In the maintenance plan, IEPA projected VOC emissions for the year 2025 to be 55.09 tpd of VOC. The SIP submissions demonstrate that the St. Louis area will continue to maintain the standard with emissions at this level. The safety margin for VOC is calculated to be the difference between these amounts or, in this case, 9.97 tpd of VOC for 2025. By this same method, 51.93 tpd (i.e., 133.18 tpd less 81.25 tpd) is the safety margin for NO_X for 2025. The safety margin, or a portion thereof, can be allocated to any of the source categories, as long as the total attainment level of emissions is maintained.

d. Monitoring Network

Illinois currently operates five ozone monitors and Missouri operates six monitors in the St. Louis area. In its redesignation request, IEPA has committed to continue to monitor ozone levels according to an EPA approved monitoring plan. Should changes in the location of an ozone monitor become necessary, IEPA commits to work with EPA to ensure the adequacy of the monitoring network. Illinois remains obligated to continue to quality assure monitoring data in accordance with 40 CFR part 58 and enter all data into the AQS in accordance with Federal guidelines.

e. Verification of Continued Attainment.

Continued attainment of the ozone NAAQS in the St. Louis area depends, in part, on the State's efforts toward tracking indicators of continued attainment during the maintenance period. IEPA's plan for verifying continued attainment of the 8-hour standard in the St. Louis area consists of plans to continue ambient ozone monitoring in accordance with the requirements of 40 CFR part 58. In addition IEPA commits to compiling VOC and NO_X emissions inventories every three years to facilitate emissions trends analyses. The State is required to develop and submit periodic emission inventories as specified in the Federal Consolidated Emissions Reporting Rule (67 FR 39602, June 10, 2002).

f. Contingency Plan

The contingency plan provisions are designed to promptly correct or prevent a violation of the NAAQS that might occur after redesignation of an area to attainment. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to assure that the state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation of the contingency measures, and a time limit for action by the state. The state should also identify specific indicators to be used to determine when the contingency measures need to be adopted and implemented. The maintenance plan must include a requirement that the state will implement all measures with respect to control of the pollutant(s) that were contained in the SIP before redesignation of the area to attainment. See section 175A(d) of the CAA.

As required by section 175A of the CAA, Illinois has adopted a contingency plan for the St. Louis area to address possible future ozone air quality problems. The contingency plan adopted by Illinois has two levels of response, Level I and Level II.

A Level I response will be triggered in the event that: (1) The fourth highest 8-hour ozone concentration at any monitoring site in the St. Louis area exceeds 84 parts per billion (ppb) in any year, or (2) if VOC or NO_X emissions increase more than 5% above the levels contained in the attainment year emissions inventory. IEPA will work with the Missouri Department of Natural Resources to evaluate the causes of high ozone levels or the emissions trends and to determine appropriate control measures needed to ensure continued attainment of the ozone standard. Control measures selected under a Level I trigger will be adopted within 18 months after a determination is made and implemented within 24 months of adoption.

A Level II response will be triggered in the event that a violation of the 8-hour standard is monitored within the St. Louis area. To select appropriate corrective measures, IEPA will work with Missouri to conduct a comprehensive study to determine the causes of the violation and the control measures necessary to mitigate the problem. Implementation of necessary controls in response to a Level II trigger will take place as expeditiously as possible, but in no event later than 18 months after IEPA makes a determination, based on quality-assured ambient monitoring data, that a violation of the NAAQS has occurred.

IEPA included the following list of potential contingency measures in its maintenance plan:

i. Multi-Pollutant Program for electric generating units;

ii. NO_X RACT;

iii. Clean Air Transport Rule;

iv. Best Available Retrofit Technology;

v. Broader geographic applicability of existing measures;

vi. Tier 2 Vehicle Standards and Low Sulfur Fuel;

vii. Heavy Duty Diesel Standards and Low Sulfur Diesel Fuel;

viii. High-enhanced I/M;

ix. Federal railroad/locomotive standards;

x. Federal commercial marine vessel engine standards;

xi. Portable fuel containers;

xii. Architectural/Industrial Maintenance (AIM) Coatings rule;

xiii. Commercial and Consumer Products rule; and

xiv. Aerosol coatings rule.

To qualify as a contingency measure, emissions reductions from that measure must not be factored into the emissions projections used in the maintenance plan.

g. Provisions for Future Updates of the Ozone Maintenance Plan

As required by section 175A(b) of the CAA, IEPA commits to submit to the EPA an updated ozone maintenance plan eight years after redesignation of the St. Louis area to cover an additional ten-year period beyond the initial ten-year maintenance period. As required by section 175A of the CAA, Illinois has committed to retain the VOC and NO_X control measures contained in the SIP prior to redesignation. Illinois also states that any revision to the control measures included as part of the maintenance plan will be submitted to EPA for approval as a SIP revision, and will be accompanied by a showing that such changes will not interfere with maintenance of the NAAQS.

EPA has concluded that the maintenance plan adequately addresses the five basic components of a maintenance plan: attainment inventory, maintenance demonstration, monitoring network, verification of continued attainment, and a contingency plan. Thus EPA proposes to find that the maintenance plan SIP revision submitted by Illinois for the St. Louis area meets the requirements of section 175A of the CAA.

B. Adequacy of the MVEBs

Under the CAA, states are required to submit, at various times, control strategy SIP revisions and ozone maintenance plans for ozone nonattainment areas and for areas seeking redesignations to attainment of the ozone standard. These emission control strategy SIP revisions (*e.g.,* RFP and attainment demonstration SIP revisions) and ozone maintenance plans create MVEBs based on on-road mobile source emissions for criteria pollutants and/or their precursors to address pollution from cars and trucks. The MVEBs are the portions of the total allowable emissions that are allocated to highway and transit vehicle use that, together with emissions from other sources in the area, will provide for attainment or maintenance.

Under 40 CFR part 93, a MVEB for an area seeking a redesignation to attainment is established for the last year of the maintenance plan. The MVEB serves as a ceiling on emissions from an area's planned transportation system. The MVEB concept is further explained in the preamble to the November 24, 1993, transportation conformity rule (58 FR 62188).

Under section 176(c) of the CAA, transportation plans and transportation improvement programs (TIPs) must ''conform'' to (i.e., be consistent with) the SIP. Conformity to the SIP means that transportation activities will not cause new air quality violations, worsen existing air quality violations, delay timely attainment of the NAAQS or delay an interim milestone. If a transportation plan or TIP does not conform, most new transportation projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and assuring conformity of such transportation activities to a SIP.

When reviewing SIP revisions containing MVEBs, including attainment strategies, rate-of-progress plans, and maintenance plans, EPA must affirmatively approve and find that the MVEBs are ''adequate'' for use in determining transportation conformity. Once EPA affirmatively approves or finds the submitted MVEBs to be adequate for transportation conformity purposes, the MVEBs must be used by state and Federal agencies in determining whether proposed transportation projects conform to the SIP as required by section 176(c) of the CAA. EPA's substantive criteria for determining the adequacy of MVEBs are set out in 40 CFR 93.118(e)(4).

EPA's process for determining adequacy of a MVEB consists of three basic steps: (1) Providing public notification of a SIP submission; (2) providing the public the opportunity to comment on the MVEB during a public comment period; and, (3) EPA's finding of adequacy. The process of determining the adequacy of submitted SIP MVEBs is codified at 40 CFR 93.118.

The maintenance plan submitted by Illinois for the St. Louis area contains new VOC and NO_X MVEBs for the Illinois portion of the area for the years 2008 and 2025. The availability of the SIP submission with these 2008 and 2025 MVEBs was announced for public comment on EPA's Adequacy Web site on September 26, 2011, at: *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm.* The EPA public comment period on adequacy of the 2008 and 2025 MVEBs for the Illinois portion of the St. Louis area closed on October 26, 2011. No comments on the submittal were received during the adequacy comment period. The submitted maintenance plan, which included the MVEBs, was endorsed by the Governor (or his or her designee) and was subject to a State public hearing. The MVEBs were developed as part of an interagency consultation process which includes Federal, State, and local agencies. The MVEBs were clearly identified and precisely quantified. These MVEBs, when considered together with all other emissions sources, are consistent with maintenance of the 1997 8-hour ozone standard.

EPA, through this rulemaking, has found adequate and is proposing to approve the MVEBs for use to determine transportation conformity in the Illinois portion of the St. Louis area because EPA has determined that the area can maintain attainment of the 1997 8-hour ozone NAAQS for the relevant maintenance period with mobile source emissions at the levels of the MVEBs. IEPA has determined the 2008 MVEBs for the Illinois portion of the St. Louis area to be 17.27 tpd for VOC and 52.57 tpd for NO_X. IEPA has determined the 2025 MVEBs for the Illinois portion of the St. Louis area to be 5.68 tpd for VOC and 15.22 tpd for NO_X. These MVEBs are consistent with the on-road mobile source VOC and NO_X emissions for 2008 and 2025, as summarized in Table 8 above. Illinois has demonstrated that the St. Louis area can maintain the 1997 8-hour ozone NAAQS with mobile source emissions in the Illinois portion of the area of 16.53 tpd and 7.70 tpd of VOC and 30.84 tpd and 10.34 tpd of NO_X in 2008 and 2025, respectively, since emissions will remain under attainment year emission levels.

Because the MVEBs are based on the MOVES model, the grace period before MOVES is required for new conformity determinations for the Illinois portion of the St. Louis area ends on the effective date of this approval. See Question 11 of the Policy Guidance on the Use of MOVES2010 for SIP Development (*http://epa.gov/otaq/models/moves/420b09046.pdf*).

C. 2002 Comprehensive Emissions Inventory

As discussed above, section 182(a)(1) of the CAA requires states with ozone nonattainment areas to submit comprehensive, accurate and current inventories of actual emissions from all sources in the nonattainment area. On June 21, 2006, IEPA submitted a 2002 emissions inventory to meet this requirement. On September 16, 2011, IEPA supplemented this submittal by replacing on-road emissions estimates derived using the MOBILE6 model with on-road emissions estimates derived using EPA's MOVES model. Emissions contained in the comprehensive 2002 inventory cover the general source categories of point sources, area sources, on-road mobile sources, and non-road mobile sources. All emission summaries were accompanied by source-specific descriptions of emission calculation procedures and sources of input data.

IEPA prepared the point source inventory using source reported actual 2002 emissions data from annual emissions reports. Where necessary, the emissions were adjusted for a typical summer day at each emission unit within the source. The annual emissions reports provided ozone season hourly emissions and operating schedules that enabled the calculation of ozone season weekday emissions.

Illinois used several methodologies to estimate area source activity levels and emissions including applying local activity levels, apportioning national or statewide activity levels to the local level, using per capita emission factors, using per employee emission factors, and using data from inventories complied by others. Sources used by IEPA to determine activity/commodity level data and emission information include: EPA's AP–42, EPA's FIRE emission factor database, data from Federal and state agencies including EPA, the U.S. Department of Energy, the U.S. Bureau of Labor Statistics, IDOT, the Illinois Bureau of the Budget, the Illinois Department of Conservation, the Illinois Secretary of State, the Illinois Department of Revenue, and the Illinois Department of Agriculture. The documentation supplied in the submittal shows how the county-specific emissions were calculated for each area source category.

Non-road mobile source emissions were generated using the NONROAD model version 2.20a. In addition, emissions estimates were developed for commercial marine vessels, aircraft, and railroads, three non-road categories not included in the NONROAD model.

On-road mobile emissions were prepared by IEPA using EPA's MVOES emissions model and daily VMT data provided by IDOT.

IEPA's submittal documents 2002 emissions in the Illinois portion of the St. Louis area in units of tons per summer day. The 2002 summer day emissions of VOC and NO_X are summarized in Table 2, above. EPA is proposing to approve this 2002 inventory as meeting the section 182(a)(1) comprehensive emissions inventory requirement.

VI. Summary of Actions

After evaluating the redesignation request submitted by Illinois, EPA concludes that the request meets the redesignation criteria set forth in section 107(d)(3)(E) of the CAA. Therefore, EPA is proposing to approve the redesignation of the Illinois portion of the St. Louis area from nonattainment to attainment for the 1997 8-hour ozone NAAQS. EPA is also proposing to approve the maintenance plan SIP revision for the Illinois portion of the St. Louis area. EPA's proposed approval of the maintenance plan is based on the State's demonstration that the plan meets the requirements of section 175A of the CAA, as described more fully above. EPA is also proposing to approve IEPA's 2002 comprehensive emissions inventory for the Illinois portion of the St. Louis area as meeting the requirements of section 182(a)(1) of the CAA. Finally, EPA finds adequate under 40 CFR 93.118(e) and is proposing to approve the State's 2008 and 2025 MVEBs for the Illinois portion of the St. Louis area.

VII. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, these actions do not impose additional requirements beyond those imposed by state law and the CAA. For that reason, these actions:

- Are not ''significant regulatory actions'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on tribes, impact any existing sources of air pollution on tribal lands, nor impair the maintenance of ozone national ambient air quality standards in tribal lands.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen oxides, Ozone, Volatile organic compounds.

40 CFR Part 81

Air pollution control, Environmental protection, National parks, Wilderness areas.

Dated: December 14, 2011.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2011–32828 Filed 12–21–11; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2011–0468; FRL–9610–4]

Approval, and Promulgation of Air Quality Implementation Plans; Ohio; Redesignation of the Ohio Portion of the Huntington-Ashland Area to Attainment of the 1997 Annual Standard for Fine Particulate Matter

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On May 4, 2011, the Ohio Environmental Protection Agency submitted a request for EPA to approve the redesignation of the Ohio portion of the Huntington-Ashland (OH-KY-WV) nonattainment area to attainment of the 1997 annual standard for fine particulate matter ($PM_{2.5}$). EPA is proposing to approve Ohio's request. EPA is proposing to approve several additional related actions. EPA is proposing to determine that the entire Huntington-Ashland (OH-KY-WV) area continues to attain the 1997 annual $PM_{2.5}$ standard. EPA is proposing to approve, as revisions to the Ohio State Implementation Plan (SIP), the state's plan for maintaining the 1997 annual $PM_{2.5}$ NAAQS through 2022 in the area. EPA is proposing to approve the 2005 emissions inventory for the Ohio portion of the Huntington-Ashland area as meeting the comprehensive emissions inventory requirement of the Clean Air Act (CAA or Act). Ohio's maintenance plan submission includes an insignificance finding for the mobile source contribution of $PM_{2.5}$ and nitrogen oxides (NO_X) to Ohio's portion of the Huntington-Ashland $PM_{2.5}$ Area for transportation conformity purposes. EPA agrees with this finding. These proposed actions are being taken in accordance with the CAA and EPA's implementation regulation regarding the 1997 p.m.$_{2.5}$ NAAQS.

DATES: Comments must be received on or before January 23, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2011–0468, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: blakley.pamela@epa.gov.*
3. *Fax:* (312) 692–2450.
4. *Mail:* Pamela Blakley, Chief, Control Strategies Section (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Pamela Blakley, Chief, Control Strategies Section (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2011–0468. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The http://*www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Carolyn Persoon, Environmental Engineer, at (312) 353–8290 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Carolyn Persoon, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8290, *persoon.carolyn@epa.gov.*

SUPPLEMENTARY INFORMATION: This supplementary information section is arranged as follows:

I. What should I consider as I prepare my comments for EPA?
II. What actions is EPA proposing to take?
III. What is the background for these actions?
IV. What are the criteria for redesignation to attainment?
V. What is EPA's analysis of the state's request?
1. Attainment
2. The Area Has Met All Applicable Requirements Under Section 110 and Part D and Has a Fully Approved SIP Under Section 110(k) (Sections 107(d)(3)(E)(v) and 107(d)(3)(E)(ii)).
3. The Improvement in Air Quality Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions (Section 107(d)(3)(E)(iii))
4. Ohio Has a Fully Approved Maintenance Plan Pursuant to Section 175A of the CAA (Section 107(d)(3)(E)(iv))
5. Insignificance Determination for the Mobile Source Contribution to $PM_{2.5}$ and NO_X
6. 2005 Comprehensive Emissions Inventory
7. Summary of Proposed Actions
VI. What are the effects of EPA's proposed actions?
VII. Statutory and Executive Order Reviews

I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—The EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

II. What actions is EPA proposing to take?

EPA is proposing to take several actions related to redesignation of the Ohio portion of the Huntington-Ashland area to attainment for the 1997 annual $PM_{2.5}$ NAAQS. EPA is proposing to find that Ohio meets the requirements for redesignation of the Huntington-Ashland area to attainment of the 1997 $PM_{2.5}$ NAAQS under section 107(d)(3)(E) of the CAA. EPA is thus proposing to approve Ohio's request to change the legal designation of its portion of the Huntington-Ashland area from nonattainment to attainment for the 1997 annual $PM_{2.5}$ NAAQS. This action would not change the legal designation of the Kentucky or West Virginia portions of the area.

Second, EPA is proposing to approve Ohio's annual $PM_{2.5}$ maintenance plan for the Huntington-Ashland area as a revision to the Ohio SIP, including the insignificance determination for $PM_{2.5}$ and NO_X for the mobile source contribution of the Ohio portion of the Huntington-Ashland OH-KY-WV 1997 annual $PM_{2.5}$ area. EPA's analysis for this proposed action is discussed in Section V. of today's proposed rulemaking.

Finally, EPA is proposing to approve the 2005 primary $PM_{2.5}$, nitrogen oxide and sulfur dioxide (SO_2) emissions inventories as satisfying the requirement in section 172(c)(3) for a current, accurate and comprehensive emission inventory. Further discussion of the basis for these actions is provided below.

III. What is the background for these actions?

Fine particulate pollution can be emitted directly from a source (primary $PM_{2.5}$) or formed secondarily through chemical reactions in the atmosphere involving precursor pollutants emitted from a variety of sources. Sulfates are a type of secondary particulate formed from SO_2 emissions from power plants and industrial facilities. Nitrates, another common type of secondary particulate, are formed from combustion emissions of NO_X from power plants, mobile sources, and other combustion sources.

The first air quality standards for $PM_{2.5}$ were promulgated on July 18, 1997, at 62 FR 38652. EPA promulgated an annual standard at a level of 15 micrograms per cubic meter ($\mu g/m^3$) of ambient air, based on a three-year average of the annual mean $PM_{2.5}$ concentrations at each monitoring site. In the same rulemaking, EPA promulgated a 24-hour $PM_{2.5}$ standard at 65 $\mu g/m^3$, based on a three-year average of the annual 98th percentile of 24-hour $PM_{2.5}$ concentrations at each monitoring site.

On January 5, 2005, at 70 FR 944, EPA published air quality area designations for the 1997 annual $PM_{2.5}$ standard based on air quality data for calendar years 2001–2003. In that rulemaking, EPA designated the Huntington-Ashland (OH-KY-WV) area, as nonattainment for the 1997 annual $PM_{2.5}$ standard.

On October 17, 2006, at 71 FR 61144, EPA retained the annual $PM_{2.5}$ standard at 15 $\mu g/m^3$ (2006 annual $PM_{2.5}$ standard), but revised the 24-hour standard to 35 $\mu g/m^3$, based again on the three-year average of the annual 98th percentile of the 24-hour $PM_{2.5}$ concentrations. In response to legal challenges of the 2006 annual $PM_{2.5}$ standard, the U.S. Court of Appeals for District of Columbia Circuit (DC Circuit) remanded this standard to EPA for further consideration. See *American Farm Bureau Federation and National Pork Producers Council, et al.* v. *EPA,* 559 F.3d 512 (DC Cir. 2009). However, given that the 1997 and 2006 annual $PM_{2.5}$ standards are essentially identical, attainment of the 1997 annual $PM_{2.5}$ standard would also indicate attainment of the remanded 2006 annual standard. Since the Huntington-Ashland area is designated as nonattainment for the 1997 annual $PM_{2.5}$ standard, today's proposed action addresses redesignation to attainment only for this standard.

On September 7, 2011, EPA issued a final determination that the entire Huntington-Ashland area has attained the 1997 $PM_{2.5}$ standard. 76 FR 55542.

IV. What are the criteria for redesignation to attainment?

The CAA sets forth the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the CAA allows for redesignation provided that: (1) The Administrator determines that the area has attained the applicable NAAQS based on current air quality data; (2) the Administrator has fully approved an applicable state implementation plan for the area under section 110(k) of the CAA; (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable emission reductions resulting from implementation of the applicable SIP, Federal air pollution control regulations, and other permanent and enforceable emission reductions; (4) the Administrator has fully approved a maintenance plan for the area meeting the requirements of section 175A of the CAA; and (5) the state containing the area has met all requirements applicable to the area for purposes of redesignation under section 110 and part D of the CAA.

V. What is EPA's analysis of the State's request?

EPA is proposing to approve the redesignation of the Ohio portion of the Huntington-Ashland area to attainment of the 1997 annual $PM_{2.5}$ NAAQS and is proposing to approve Ohio's maintenance plan for the area and other related SIP revisions. The bases for these actions follow.

1. Attainment

As noted above, in a rulemaking published on September 7, 2011, EPA determined that the Huntington-Ashland area has attained the 1997 annual $PM_{2.5}$ NAAQS. The basis and effect of this determination were discussed in the notices of proposed and final rulemaking. The determination was based on quality-assured air quality monitoring data for 2007–2009 and 2008–2010 showing the area has met the standard. The data have been certified by the respective states.

Preliminary data for 2011 are consistent with continued attainment, and thus EPA proposes to determine that the Huntington-Ashland area

continues to attain the 1997 annual $PM_{2.5}$ standard.

2. The Area Has Met All Applicable Requirements Under Section 110 and Part D and Has a Fully Approved SIP Under Section 110(k) (Sections 107(d)(3)(E)(v) and 107(d)(3)(E)(ii))

We believe that Ohio has met all currently applicable SIP requirements for purposes of redesignation for the Ohio portion of the Huntington-Ashland area under section 110 of the CAA (general SIP requirements). We are also proposing to find that the Ohio SIP meets all SIP requirements currently applicable for purposes of redesignation under part D of title I of the CAA, in accordance with section 107(d)(3)(E)(v). In addition, with the exception of the emissions inventory under section 172(c)(3), we are proposing to find that all applicable requirements of the Ohio SIP for purposes of redesignation have been or will be approved, in accordance with section 107(d)(3)(E)(ii). As discussed below, in this action EPA is proposing to approve Ohio's 2005 emissions inventories as meeting the section 172(c)(3) comprehensive emissions inventory requirement.

In making these proposed determinations, we have ascertained which SIP requirements are applicable for purposes of redesignation, and concluded that there are SIP measures meeting those requirements and that they are or by the time of final designation will be fully approved under section 110(k) of the CAA.

a. Ohio Has Met All Applicable Requirements for Purposes of Redesignation of the Ohio Portion of the Area Under Section 110 and Part D of the CAA

i. Section 110 General SIP Requirements

Section 110(a) of title I of the CAA contains the general requirements for a SIP. Section 110(a)(2) provides that the implementation plan submitted by a state must have been adopted by the state after reasonable public notice and hearing, and, among other things, must: Include enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the CAA; provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor ambient air quality; provide for implementation of a source permit program to regulate the modification and construction of any stationary source within the areas covered by the plan; include provisions for the implementation of part C, Prevention of Significant Deterioration (PSD) and part D, New Source Review (NSR) permit programs; include criteria for stationary source emission control measures, monitoring, and reporting; include provisions for air quality modeling; and provide for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires that SIPs contain measures to prevent sources in a state from significantly contributing to air quality problems in another state. EPA believes that the requirements linked with a particular nonattainment area's designation are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. Thus, we believe that these requirements should not be construed to be applicable requirements for purposes of redesignation.

Further, we believe that the other section 110 elements described above that are not connected with nonattainment plan submissions and not linked with an area's attainment status are also not applicable requirements for purposes of redesignation. A state remains subject to these requirements after an area is redesignated to attainment. We conclude that only the section 110 and part D requirements that are linked with a particular area's designation are the relevant measures which we may consider in evaluating a redesignation request. This approach is consistent with EPA's existing policy on applicability of conformity and oxygenated fuels requirements for redesignation purposes, as well as with section 184 ozone transport requirements. See Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176, October 10, 1996) and (62 FR 24826, May 7, 1997); Cleveland-Akron-Lorain, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking (60 FR 62748, December 7, 1995). See also the discussion on this issue in the Cincinnati, Ohio 1-hour ozone redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh, Pennsylvania 1-hour ozone redesignation (66 FR 50399, October 19, 2001).

We have reviewed the Ohio SIP and have concluded that it meets the general SIP requirements under section 110 of the CAA to the extent they are applicable for purposes of redesignation. EPA has previously approved provisions of Ohio's SIP addressing section 110 requirements (including provisions addressing particulate matter), at 40 CFR 52.1870, respectively).

On December 5, 2007, and September 4, 2009, Ohio made submittals addressing ''infrastructure SIP'' elements required under CAA section 110(a)(2). EPA proposed approval of the December 5, 2007 submittal on April 28, 2011, at 76 FR 23757 and published final approval on July 14, 2011, at 76 FR 41075. EPA disapproved the element of the September 4, 2009, submittal that addresses section 110(a)(2)(D)(i) on February 4, 2011 at 76 FR 92618, but has not taken rulemaking action on the remainder of the submittal.

The requirements of section 110(a)(2), however, are statewide requirements that are not linked to the $PM_{2.5}$ nonattainment status of the Huntington-Ashland area. Therefore, EPA believes that these SIP elements are not applicable requirements for purposes of review of the state's $PM_{2.5}$ redesignation request.

ii. Part D Requirements

EPA is proposing to determine that, upon approval of the base year emissions inventories discussed in section V.6. of this rulemaking, the Ohio SIP will meet the SIP requirements for the Ohio portion of the Huntington-Ashland area applicable for purposes of redesignation under part D of the CAA. Subpart 1 of part D, found in sections 172–176 of the CAA, sets forth the basic nonattainment requirements applicable to all nonattainment areas.

Subpart 1 Section 172 Requirements.

For purposes of evaluating this redesignation requests, the applicable section 172 SIP requirements for the Ohio portion of the Huntington-Ashland area are contained in sections 172(c)(1)–(9). A thorough discussion of the requirements contained in section 172 can be found in the General Preamble for Implementation of title I (57 FR 13498, April 16, 1992).

Section 172(c)(1) requires the plans for all nonattainment areas to provide for the implementation of all Reasonably Achievable Control Measures (RACM) as expeditiously as practicable and to provide for attainment of the primary NAAQS. EPA interprets this requirement to impose a duty on all nonattainment areas to consider all available control measures and to adopt and implement such measures as are reasonably available for implementation in each area as components of the area's attainment demonstration. Because attainment has been reached, no additional measures are needed to provide for attainment,

and section 172(c)(1) requirements are no longer considered to be applicable as long as the area continues to attain the standard until redesignation. (40 CFR 51.1004(c).)

The Reasonable Further Progress (RFP) requirement under section 172(c)(2) is defined as progress that must be made toward attainment. This requirement is not relevant for purposes of redesignation because the Huntington-Ashland area has monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS. (General Preamble, 57 FR 13564). *See also* 40 CFR 51.918. In addition, because the Huntington-Ashland area has attained the 1997 annual $PM_{2.5}$ NAAQS and is no longer subject to an RFP requirement, the requirement to submit the section 172(c)(9) contingency measures is not applicable for purposes of redesignation. *Id.*

Section 172(c)(3) requires submission and approval of a comprehensive, accurate and current inventory of actual emissions. Ohio submitted a 2005 base year emissions inventory along with their redesignation requests. As discussed below in section V.6., EPA is approving the 2005 base year inventories as meeting the section 172(c)(3) emissions inventory requirement for the Ohio portion of the Huntington-Ashland area.

Section 172(c)(4) requires the identification and quantification of allowable emissions for major new and modified stationary sources in an area, and section 172(c)(5) requires source permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA approved Ohio's current NSR program on January 10, 2003 (68 FR 1366). Nonetheless, since PSD requirements will apply after redesignation, the area need not have a fully-approved NSR program for purposes of redesignation, provided that the area demonstrates maintenance of the NAAQS without part D NSR. A detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' Ohio has demonstrated that the Huntington-Ashland area will be able to maintain the standard without part D NSR in effect; therefore, the state need not have a fully approved part D NSR program prior to approval of the redesignation request. The state's PSD program will become effective in the Huntington-Ashland area upon redesignation to attainment. *See* rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

Section 172(c)(6) requires the SIP to contain control measures necessary to provide for attainment of the standard. Because attainment has been reached, no additional measures are needed to provide for attainment.

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted above, we believe the Ohio's SIP meets the requirements of section 110(a)(2) applicable for purposes of redesignation.

Subpart 1 Section 176(c)(4)(D) Conformity SIP Requirements.

The requirement to determine conformity applies to transportation plans, programs and projects developed, funded or approved under title 23 of the U.S. Code and the Federal Transit Act (transportation conformity) as well as to all other Federally-supported or funded projects (general conformity).

Section 176(c) of the CAA was amended by provisions contained in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), which was signed into law on August 10, 2005 (Public Law 109–59). Among the changes Congress made to this section of the CAA were streamlined requirements for state transportation conformity SIPs. State transportation conformity regulations must be consistent with Federal conformity regulations and address three specific requirements related to consultation, enforcement, and enforceability. EPA believes that it is reasonable to interpret the transportation conformity SIP requirements as not applying for purposes of evaluating the redesignation request under section 107(d) for two reasons.

First, the requirement to submit SIP revisions to comply with the transportation conformity provisions of the CAA continues to apply to areas after redesignation to attainment since such areas would be subject to a section 175A maintenance plan. Second, EPA's Federal conformity rules require the performance of conformity analyses in the absence of Federally-approved state rules. Therefore, because areas are subject to the transportation conformity requirements regardless of whether they are redesignated to attainment and, because they must implement conformity under Federal rules if state rules are not yet approved, EPA believes it is reasonable to view these requirements as not applying for purposes of evaluating a redesignation request. *See Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), upholding this interpretation. *See* also 60 FR 62748, 62749–62750 (Dec. 7, 1995) (Tampa, Florida).

Ohio has an approved transportation conformity SIP (72 FR 20945). Ohio is in the process of updating its approved transportation conformity SIP, and EPA will review its provisions when they are submitted.

b. The Ohio Portion of the Huntington-Ashland Area Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

Upon final approval of Ohio's comprehensive 2005 emissions inventory, EPA will have fully approved the Ohio SIP for the Ohio portion of the Huntington-Ashland area under section 110(k) of the CAA for all requirements applicable for purposes of redesignation to attainment for the 1997 annual $PM_{2.5}$ standard. EPA may rely on prior SIP approvals in approving a redesignation request (*See* page 3 of the September 4, 1992, John Calcagni memorandum entitled ''Procedures for Processing Requests to Redesignate Areas to Attainment,''; *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984, 989–990 (6th Cir. 1998); *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001)) plus any additional measures it may approve in conjunction with a redesignation action. *See* 68 FR 25413, 25426 (May 12, 2003). Since the passage of the CAA of 1970, Ohio has adopted and submitted, and EPA has fully approved, provisions addressing various required SIP elements under particulate matter standards. In this action, EPA is proposing to approve Ohio's 2005 base year emissions inventory for the Huntington-Ashland area as meeting the requirement of section 172(c)(3) of the CAA for the 1997 annual $PM_{2.5}$ standard.

c. Nonattainment Requirements

Under section 172, states with nonattainment areas must submit plans providing for timely attainment and meeting a variety of other requirements. On July 16, 2008 Ohio submitted a state-wide attainment demonstration for $PM_{2.5}$, including the Huntington-Ashland area. However, pursuant to 40 CFR 51.1004(c) EPA's determination that the area has attained the 1997 $PM_{2.5}$ annual standard suspends the requirement to submit certain planning SIPs related to attainment, including attainment demonstration requirements, the Reasonably Achievable Control

Technology (RACT)–RACM requirement of section 172(c)(1) of the CAA, the RFP and attainment demonstration requirements of sections 172(c)(2) and (6) and 182(b)(1) of the CAA, and the requirement for contingency measures of section 172(c)(9) of the CAA).

As a result, the only remaining requirement under section 172 to be considered is the emissions inventory required under section 172(c)(3). As discussed in a later section, EPA is proposing to approve the inventory that Ohio submitted as part of its maintenance plan as satisfying this requirement.

No SIP provisions applicable for redesignation of the Ohio portion of the Huntington-Ashland area are currently disapproved, conditionally approved, or partially approved. If EPA approves Ohio's Huntington-Ashland area $PM_{2.5}$ emissions inventories as proposed, Ohio will have a fully approved SIP for all requirements applicable for purposes of redesignation.

3. The Improvement in Air Quality Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions (Section 107(d)(3)(E)(iii))

EPA believes that Ohio has demonstrated that the observed air quality improvement in the Huntington-Ashland area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal measures, and other state-adopted measures.

In making this demonstration, Ohio has calculated the change in emissions between 2005, one of the years used to designate the Huntington-Ashland area as nonattainment, and 2008, one of the years the Huntington-Ashland area monitored attainment. The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of regulatory control measures that the Huntington-Ashland area and contributing areas have implemented in recent years.

a. Permanent and Enforceable Controls Implemented

The following is a discussion of permanent and enforceable measures that have been implemented in the area:

i. Federal Emission Control Measures

Reductions in fine particle precursor emissions have occurred statewide and in upwind areas as a result of Federal emission control measures, with additional emission reductions expected to occur in the future. Federal emission control measures include the following.

Tier 2 Emission Standards for Vehicles and Gasoline Sulfur Standards. These emission control requirements result in lower NO_X and SO_2 emissions from new cars and light duty trucks, including sport utility vehicles. The Federal rules were phased in between 2004 and 2009. The EPA has estimated that, by the end of the phase-in period, new vehicles will emit the following percentages less NO_X: Passenger cars (light duty vehicles)—77%; light duty trucks, minivans, and sports utility vehicles—86%; and, larger sports utility vehicles, vans, and heavier trucks—69 to 95%. EPA expects fleet wide average emissions to come to decline by similar percentages as new vehicles replace older vehicles. The Tier 2 standards also reduced the sulfur content of gasoline to 30 parts per million (ppm) beginning in January 2006. Most gasoline sold in Ohio prior to January 2006 had a sulfur content of about 500 ppm.

Heavy-Duty Diesel Engine Rule. EPA issued this rule in July 2000. This rule includes standards limiting the sulfur content of diesel fuel, which went into effect in 2004. A second phase took effect in 2007 which reduced fine particle emissions from heavy-duty highway engines and further reduced the highway diesel fuel sulfur content to 15 ppm. The total program is estimated to achieve a 90% reduction in direct $PM_{2.5}$ emissions and a 95% reduction in NO_X emissions for these new engines using low sulfur diesel, compared to existing engines using higher sulfur content diesel. The reduction in fuel sulfur content also yielded an immediate reduction in sulfate particle emissions from all diesel vehicles.

Nonroad Diesel Rule. In May 2004 EPA promulgated a new rule for large nonroad diesel engines, such as those used construction, agriculture, and mining equipment, to be phased in between 2008 and 2014. The rule also reduces the sulfur content in nonroad diesel fuel by over 99%. Prior to 2006, nonroad diesel fuel averaged approximately 3,400 ppm sulfur. This rule limited nonroad diesel sulfur content to 500 ppm by 2006, with a further reduction to 15 ppm by 2010. The combined engine and fuel rules will reduce NO_X and PM emissions from large nonroad diesel engines by over 90%, compared to current nonroad engines using higher sulfur content diesel. It is estimated that compliance with this rule will cut NO_X emissions from nonroad diesel engines by up to 90%. This rule achieved some emission reductions by 2008 and was fully implemented by 2010. The reduction in fuel sulfur content also yielded an immediate reduction in sulfate particle emissions from all diesel vehicles.

Nonroad Large Spark-Ignition Engine and Recreational Engine Standards. In November 2002 EPA promulgated emission standards for groups of previously unregulated nonroad engines. These engines include large spark-ignition engines such as those used in forklifts and airport ground-service equipment; recreational vehicles using spark-ignition engines such as off-highway motorcycles, all-terrain vehicles, and snowmobiles; and recreational marine diesel engines. Emission standards from large spark-ignition engines were implemented in two tiers, with Tier 1 starting in 2004 and Tier 2 in 2007. Recreational vehicle emission standards are being phased in from 2006 through 2012. Marine Diesel engine standards were phased in from 2006 through 2009. With full implementation of the entire nonroad spark-ignition engine and recreational engine standards an 80% reduction in NO_X expected by 2020. Some of these emission reductions occurred by the 2008–2010 period used to demonstrate attainment, and additional emission reductions will occur during the maintenance period.

i. Control Measures in Contributing Areas

Given the significance of sulfates and nitrates in the Huntington-Ashland area, the area's air quality is strongly affected by regulation of SO_2 and NO_X emissions from power plants.

NO_X SIP Call. On October 27, 1998 (63 FR 57356), EPA issued a NO_X SIP Call requiring the District of Columbia and 22 states to reduce emissions of NO_X. Affected states were required to comply with Phase I of the SIP Call beginning in 2004, and Phase II beginning in 2007. Emission reductions resulting from regulations developed in response to the NO_X SIP Call are permanent and enforceable.

Clean Air Interstate Rule (CAIR). EPA proposed CAIR on January 30, 2004, at 69 FR 4566, promulgated CAIR on May 12, 2005, at 70 FR 25162, and promulgated associated Federal Implementation Plans (FIPs) on April 28, 2006, at 71 FR 25328, in order to reduce SO_2 and NO_X emissions and improve air quality in many areas across Eastern United States. However, on July 11, 2008, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit or Court) issued its decision to vacate and remand both CAIR and the associated CAIR FIPs in their entirety (*North Carolina* v. *EPA,*

531 F.3d 836 (DC Cir. 2008)). EPA petitioned for a rehearing, and the Court issued an order remanding CAIR and the CAIR FIPs to EPA without vacatur (*North Carolina* v. *EPA,* 550 F.3d 1176 (DC Cir. 2008)). The Court, thereby, left CAIR in place in order to ''temporarily preserve the environmental values covered by CAIR'' until EPA replaced it with a rule consistent with the Court's opinion (*id.* at 1178). The Court directed EPA to ''remedy CAIR's flaws'' consistent with the July 11, 2008, opinion, but declined to impose a schedule on EPA for completing this action (*id*).

On August 8, 2011, at 76 FR 48208, EPA promulgated the Cross-State Air Pollution Rule (also known as the Transport Rule) to address interstate transport of emissions and resulting secondary air pollutants and to replace CAIR. The CAIR, among other things, required NO_X and SO_2 emission reductions that contributed to the air quality improvement in the Huntington-Ashland nonattainment area. The CAIR emission reduction requirements limit emissions through 2011; the Transport Rule requires similar or greater emission reductions in the relevant areas in 2012 and beyond. The Transport Rule requires substantial reductions of SO_2 and NO_X emissions from Electric Generating Units (EGUs or power plants) across most of Eastern United States, with implementation beginning on January 1, 2012. In particular, this rule requires reduction of these emissions to levels well below the levels that led to attainment of the 1997 annual $PM_{2.5}$ standard in the Huntington-Ashland nonattainment area. Because the emission reduction requirements of CAIR are enforceable through the 2011 control period, and because the Transport Rule has now been promulgated to address the requirements previously addressed by CAIR and gets similar or greater reductions in the relevant areas in 2012 and beyond, EPA has determined that the EGU emission reductions that helped lead to attainment in the Huntington-Ashland area can now be considered permanent and enforceable and that the requirement of CAA section 107(d)(3)(E)(iii) has now been met.

b. Emission Reductions

Ohio developed emissions inventories for NO_X, direct $PM_{2.5}$, and SO_2 for 2005, one of the years used to designate the area as nonattainment, and 2008, one of the years the Huntington-Ashland area monitored attainment of the standard.

EGU SO_2 and NO_X emissions were derived from EPA's Clean Air Market's acid rain database. These emissions reflect Ohio, Kentucky and West Virginia NO_X emission budgets resulting from EPA's NO_X SIP call. The 2008 emissions from EGUs reflect Ohio's emission caps under CAIR. All other point source emissions were obtained from Ohio's source facility emissions reporting.

Area source emissions the Huntington-Ashland area for 2005 were taken from periodic emissions inventories.[1] These 2005 area source emission estimates were extrapolated to 2008. Source growth factors were supplied by the Lake Michigan Air Directors Consortium (LADCO).

Nonroad mobile source emissions were extrapolated from nonroad mobile source emissions reported in EPA's 2005 National Emissions Inventory (NEI). Contractors were employed by LADCO to estimate emissions for commercial marine vessels and railroads.

On-road mobile source emissions were calculated using EPA's mobile source emission factor model, MOVES2010a, in conjunction with transportation model results developed by local Metropolitan Planning Organization (MPO), KYOVA.

All emissions estimates discussed below were documented in the submittal and appendices of Ohio's redesignation request submittal from May 4, 2011. For these data and additional emissions inventory data, the reader is referred to EPA's digital docket for this rule, *http://www.regulations.gov,* for docket numbers EPA–R05–OAR–2011–0468, which include digital copies of Ohio's submittal.

Emissions data in tons per year (tpy) for the entire Huntington-Ashland area (OH-KY-WV) are shown in Tables 1, and 2, below.

TABLE 1—SUMMARY OF 2005 EMISSIONS FOR THE HUNTINGTON-ASHLAND (KY-OH-WV) AREA BY SOURCE TYPE

[tpy]

	SO_2	NO_X	$PM_{2.5}$
Point (EGU)	357,165.49	121,991.60	5,005.11
Non-EGU	11,039.74	11,854.66	1,686.15
On-road	192.92	12,813.39	500.72
Nonroad	127.85	1,566.88	158.65
Area	2,836.09	2,034.76	1,829.08
MAR	927.29	12,221.82	404.61
Total Huntington-Ashland	372,289.38	162,483.11	9,584.32

TABLE 2—COMPARISON OF 2005 EMISSIONS FROM THE NON-ATTAINMENT YEAR AND 2008 EMISSIONS FOR AN ATTAINMENT YEAR FOR THE HUNTINGTON-ASHLAND (KY-OH-WV) AREA

[tpy]

	2005	2008	Net change (2005–2008)
$PM_{2.5}$	9,584.32	10,253.89	669.48
NO_X	162,483.11	146,972.25	−15,510.86
SO_2	372,289.38	234,901.09	−137,388.63

[1] Periodic emission inventories are derived by States every three years and reported to the EPA. These periodic emission inventories are required by the Federal Consolidated Emissions Reporting Rule, codified at 40 CFR Subpart A. EPA revised these and other emission reporting requirements in a final rule published on December 17, 2008, at 73 FR 76539.

Table 2 shows that the entire Huntington-Ashland area reduced NO_X emissions by 15,510.86 tpy, and SO_2 emissions by 137,388.63 tpy between 2005, a nonattainment year and 2008, an attainment year.

Because $PM_{2.5}$ concentrations in the Huntington-Ashland area are significantly impacted by the transport of sulfates and nitrates, the area's air quality is strongly affected by regulation of SO_2 and NO_X emissions from power plants. Table 3, below, present's statewide EGU emissions data compiled by EPA's Clean Air Markets Division for the years 2002 and 2008 for the several states that were found to contribute to air quality in the Huntington-Ashland area. Emissions for 2008 reflect implementation of CAIR.

Table 3. Comparison of 2002 and 2008 statewide EGU NO_X and SO_2 emissions (tpy) for states impacting the Huntington-Ashland area

	NOx			SO_2		
State	2002	2008	Net Change 2002-2008	2002	2008	Net Change 2002-2008
Alabama	161,559	112,625	-48,934	448,248	357,546	-90,702
Illinois	174,247	119,930	-54,317	353,699	257,357	-96,342
Indiana	281,146	190,092	-91,054	778,868	565,459	-213,409
Kentucky	198,599	157,903	-40,696	482,653	344,356	-138,297
Michigan	132,623	107,624	-25,000	342,999	326,501	-16,498
Missouri	139,799	88,742	-51,057	235,532	258,269	22,737
Ohio	370,497	235,049	-135,448	1,132,069	709,444	-422,625
Pennsylvania	200,909	183,658	-17,251	889,766	831,915	-57,851
Tennessee	155,996	85,641	-70,356	336,995	208,069	-128,926
West Virginia	225,371	99,484	-125,887	507,110	301,574	-205,536
Wisconsin	88,970	47,794	-41,175	191,257	129,694	-61,563
Total	2,129,716	1,428,541	-701,175	5,699,195	4,290,184	-1,409,011

Table 3 shows that states impacting the Huntington-Ashland area reduced NO_X and SO_2 emissions from EGUs by 701,175 tpy and 1,409,011 tpy, respectively, between 2002 and 2008.

Based on the information summarized above, Ohio has adequately demonstrated that the improvement in air quality is due to permanent and enforceable emissions reductions. While these reductions were estimates of the impact of CAIR, these reductions are expected to continue and may be considered permanent and enforceable as a result of the Transport Rule being promulgated.

4. Ohio Has a Fully Approved Maintenance Plan Pursuant to Section 175A of the CAA (Section 107(d)(3)(E)(iv))

In conjunction with Ohio's request to redesignate the Ohio portion of the Huntington-Ashland nonattainment area to attainment status, Ohio has submitted a SIP revision to provide for maintenance of the 1997 annual $PM_{2.5}$ NAAQS in the area through 2022.

a. What is required in a maintenance plan?

Section 175A of the CAA sets forth the required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after EPA approves a redesignation to attainment. Eight years after redesignation, the state must submit a revised maintenance plan which demonstrates that attainment will continue to be maintained for ten years following the initial ten-year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures with a schedule for implementation as EPA deems necessary to assure prompt correction of any future annual $PM_{2.5}$ violations.

The September 4, 1992, memorandum from John Calcagni, entitled ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' provides additional guidance on the content of a maintenance plan. The memorandum states that a maintenance plan should address the following items: The attainment emissions inventories, a maintenance demonstration showing maintenance for the ten years of the maintenance period, a commitment to maintain the existing monitoring network, factors and procedures to be used for verification of continued attainment of the NAAQS, and a contingency plan to prevent or correct future violations of the NAAQS.

b. Attainment Inventory

Ohio developed emissions inventories for NO_X, direct $PM_{2.5}$, and SO_2 for 2008, one of the years in the period during which the Huntington-Ashland area monitored attainment of the 1997 annual $PM_{2.5}$ standard, as described

previously. The attainment level of emissions is summarized in Tables 2 and 3, above.

c. Demonstration of Maintenance

Along with the redesignation request, Ohio submitted a revision to its $PM_{2.5}$ SIP to include a maintenance plan for the Huntington-Ashland area, as required by section 175A of the CAA. Ohio's plan demonstrates maintenance of the 1997 annual $PM_{2.5}$ standard through 2022 by showing that current and future emissions of NO_X, directly emitted $PM_{2.5}$ and SO_2 for the area remain at or below attainment year emission levels. A maintenance demonstration need not be based on modeling. *See Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), *Sierra Club* v. *EPA,* 375 F. 3d 537 (7th Cir. 2004). *See* also 66 FR 53094, 53099–53100 (October 19, 2001), 68 FR 25413, 25430–25432 (May 12, 2003).

Ohio uses emissions inventory projections for the years 2015 and 2022 to demonstrate maintenance for the entire Huntington-Ashland area. The projected emissions were estimated by Ohio, with assistance from LADCO and KYOVA using the MOVES2010a model. Projection modeling of inventory emissions was done for the 2015 interim year emissions using estimates based on the 2009 and 2018 LADCO modeling inventory, using LADCO's growth factors, for all sectors. The 2022 maintenance year is based on emissions estimates from the 2018 LADCO modeling. Table 4 shows the 2008 attainment base year emission estimates and the 2015 and 2022 emission projections for the entire tri-state Huntington-Ashland area that Ohio provided in its May 4, 2011, submission.

TABLE 4—COMPARISON OF 2008, 2015 AND 2022 NO_X, DIRECT $PM_{2.5}$, AND SO_2 EMISSION TOTALS (TPY) FOR THE HUNTINGTON-ASHLAND AREA (OH-KY-WV)

	SO_2	NO_X	$PM_{2.5}$
2008 (baseline)	234,901.09	146,972.25	10,253.89.
2015	149,647.27	95,137.30	10,100.29.
2022	113,654.75	71,097.29	9,928.94.
Change	−121,246.34	−75,874.96	−324.95.
2008–2022	52% decrease	52% decrease	3% decrease.

Table 4 shows that the entire Huntington-Ashland area reduced NO_X emissions by 75,874.96 tpy between 2008 and the maintenance projection to 2022, direct $PM_{2.5}$ emissions by 324.95 tpy, and reduced SO_2 emissions by 121,246.34 tpy between 2008 and 2022. Thus the emissions inventories set forth in Table 4 show that the area will continue to maintain the annual $PM_{2.5}$ standard during the maintenance period.

Maintenance of the 1997 annual $PM_{2.5}$ air quality standard in the Huntington-Ashland area is a function of regional as well as local emissions trends. The regional impacts are dominated by the impacts of SO_2 and NO_X emissions. The previous section showed that the Transport Rule could be expected to provide for substantial SO_2 and NO_X emission reductions through 2014 for Ohio, West Virginia, and Kentucky. Regionally, multiple upwind states can contribute precursors to $PM_{2.5}$ to the Huntington-Ashland area; however, projected emissions under the Transport Rule for all the states contributing to particulate matter concentrations this area show emissions well below the attainment year of 2008 (Table 5 and Table 6). Table 5 and Table 6 show that under the Transport Rule regional emissions will not affect the maintenance of the annual $PM_{2.5}$ standard.

TABLE 5—COMPARISON OF 2008 AND 2014 AND BEYOND STATEWIDE EGU SO_2 EMISSIONS (TPY) FOR PROJECTED YEARS FROM STATES THAT IMPACT THE HUNTINGTON-ASHLAND AREA

State	Attainment year 2008	Transport rule 2014 and beyond	Net change 2008–2014
Alabama	357,546	173,231	−184,315
Illinois	257,357	128,143	−129,214
Indiana	565,458	128,143	−437,315
Kentucky	344,356	116,912	−227,444
Michigan	326,500	158,394	−168,106
Missouri	258,268	177,359	−80,909
Ohio	709,444	150,784	−558,660
Pennsylvania	831,914	123,224	−708,690
Tennessee	208,069	64,716	−143,353
West Virginia	301,574	83,235	−218,339
Wisconsin	129,693	44,139	−85,554
Total	4,290,179	1,348,280	−2,941,899

TABLE 6—COMPARISON OF 2008 AND 2014 AND BEYOND NO_X EMISSIONS TOTALS (TPY) FROM EGUS FOR 2008 (ATTAINMENT) 2014 AND BEYOND FROM STATES IMPACTING THE HUNTINGTON-ASHLAND AREA

State	Attainment year 2008	Transport rule 2014 and beyond	Net change 2008–2014
Alabama	112,625	68,119	−44,506

TABLE 6—COMPARISON OF 2008 AND 2014 AND BEYOND NO_X EMISSIONS TOTALS (TPY) FROM EGUS FOR 2008 (ATTAINMENT) 2014 AND BEYOND FROM STATES IMPACTING THE HUNTINGTON-ASHLAND AREA—Continued

State	Attainment year 2008	Transport rule 2014 and beyond	Net change 2008–2014
Illinois	119,929	48,533	−71,396
Indiana	190,092	109,392	−80,700
Kentucky	157,902	76,026	−81,876
Michigan	107,623	57,311	−50,312
Missouri	88,745	48,888	−39,857
Ohio	235,048	84,126	−150,922
Pennsylvania	183,657	116,994	−66,663
Tennessee	85,640	20,490	−65,150
West Virginia	99,483	53,335	−46,148
Wisconsin	47,794	29,688	−18,106
Total	1,428,538	712,902	−715,636

Tables 5 and 6 show that NO_X emissions from EGUs are projected to decrease by 715,636 tpy from 2008 to 2014 and beyond and SO_2 emissions from EGUSs are projected to decrease by 2,941,899 tpy in states impacting the Huntington-Ashland area.

Based on the information summarized above, Ohio has adequately demonstrated maintenance of the $PM_{2.5}$ standard in this area for a period extending in excess of ten years from expected final action on Ohio's redesignation request.

d. Monitoring Network

Ohio's maintenance plan includes additional elements. Ohio's plan includes a commitment to continue to operate its EPA-approved monitoring network, as necessary to demonstrate ongoing compliance with the NAAQS. Ohio currently operates a $PM_{2.5}$ monitor in Lawrence County to monitor the Huntington-Ashland area. Kentucky and West Virginia are also currently operating one monitor in each state for the Huntington-Ashland area.

e. Verification of Continued Attainment

Ohio remains obligated to continue to quality-assure monitoring data and enter all data into the Air Quality System in accordance with Federal guidelines. Ohio will use these data, supplemented with additional information as necessary, to assure that the area continues to attain the standard. Ohio will also continue to develop and submit periodic emission inventories as required by the Federal Consolidated Emissions Reporting Rule (67 FR 39602, June 10, 2002) to track future levels of emissions. Both of these actions will help to verify continued attainment in accordance with 40 CFR part 58.

f. Contingency Plan

The contingency plan provisions are designed to promptly correct or prevent a violation of the NAAQS that might occur after redesignation of an area to attainment. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to assure that the state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation of the contingency measures, and a time limit for action by the state. The state should also identify specific indicators to be used to determine when the contingency measures need to be adopted and implemented. The maintenance plan must include a requirement that the state will implement all measures with respect to control of the pollutant(s) that were contained in the SIP before redesignation of the area to attainment. See section 175A(d) of the CAA. Ohio's contingency measures include a Warning Level Response and an Action Level Response. An initial Warning Level Response is triggered when the average weighted annual mean for one year exceeds 15.5 $\mu g/m^3$. In that case, a study will be conducted to determine if the emissions trends show increases; if action is necessary to reverse emissions increases, Ohio will follow the same procedures for control selection and implementation as for an Action Level Response.

The Action Level Response will be prompted by any one of the following: A Warning Level Response study that shows emissions increases, a weighted annual mean over a two-year average that exceeds the standard, or a violation of the standard. If an Action Level Response is triggered, Ohio will adopt and implement appropriate control measures within 18 months from the end of the year in which monitored air quality triggering a response occurs.

Ohio's candidate contingency measures include the following:

i. ICI Boilers—SO_2 and NO_X controls;

ii. Process heaters;

iii. EGUS;

iv. Internal combustion engines;

v. Combustion turbines;

vi. Other sources > 100 TPY;

vii. Fleet vehicles;

viii. Concrete manufacturers; and

ix. Aggregate processing plants

Ohio further commits to conduct ongoing review of its data, and if monitored concentrations or emissions are trending upward, Ohio commits to take appropriate steps to avoid a violation if possible. Ohio commits to continue implementing SIP requirements upon and after redesignation.

EPA believes that Ohio's contingency measures, as well as the commitment to continue implementing any SIP requirements, satisfy the pertinent requirements of section 175A(d).

As required by section 175A(b) of the CAA, Ohio commits to submit to the EPA an updated $PM_{2.5}$ maintenance plan eight years after redesignation of the Huntington-Ashland area to cover an additional ten-year period beyond the initial ten-year maintenance period. As required by section 175A of the CAA, Ohio has also committed to retain the $PM_{2.5}$ control measures contained in the SIP prior to redesignation.

For all of the reasons set forth above, EPA is proposing to approve Ohio's 1997 annual $PM_{2.5}$ maintenance plan for the Huntington-Ashland area as meeting the requirements of CAA section 175A.

5. Insignificance Determination for the Mobile Source Contribution to $PM_{2.5}$ and NO_X

Under section 176(c) of the CAA, transportation plans and transportation improvement programs (TIPs) must conform to applicable SIP goals. This means that such actions will not: (1) Cause or contribute to violations of a NAAQS; (2) worsen the severity of an existing violation; or (3) delay timely attainment of a NAAQS or any interim milestone. Actions involving Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) funding or approval are subject to the transportation conformity rule (40 CFR part 93 subpart A.) Under this rule, MPOs in nonattainment and maintenance areas coordinate with state air quality and transportation agencies, EPA, FHWA and FTA to demonstrate that their metropolitan transportation plans (''plans'') and TIPs conform to applicable SIPs. This is typically determined by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the motor vehicle emissions budgets (MVEBs) contained in a SIP.

For budgets to be approvable, they must meet, at a minimum, EPA's adequacy criteria (40 CFR 93.118(e)(4)). However, the conformity rule at 40 CFR 93.109(m) allows areas to forgo establishment of a budget(s) where it is demonstrated that regional motor vehicle emissions for a particular pollutant or precursor pollutant are an insignificant contributor to the air quality problem in the area. The general criteria for insignificance determinations per 40 CFR 93.109(m) are based on a number of factors, including (1) The percentage of motor vehicle emissions in context of the total SIP inventory; (2) the current state of air quality as determined by monitoring data for that NAAQS; (3) the absence of SIP motor vehicle control measures; and (4) historical trends and future projections of the growth of motor vehicle emissions in the area.

EPA previously reviewed the attainment demonstration that Ohio submitted for its portion of the Huntington-Ashland area and made an insignificance finding through the transportation conformity adequacy process for NO_X and directly emitted $PM_{2.5}$ for the Ohio portion of the Huntington-Ashland $PM_{2.5}$ nonattainment area on December 7, 2009 (74 FR 64075). That insignificance finding was effective on December 22, 2009. As a result of EPA's insignificance finding, the Ohio portion of the Huntington-Ashland $PM_{2.5}$ area was no longer required to perform regional emissions analyses for either directly emitted $PM_{2.5}$ or NO_X as part of future $PM_{2.5}$ conformity determinations for the 1997 $PM_{2.5}$ NAAQS until such time as EPA reviewed and took action on the Huntington-Ashland $PM_{2.5}$ area's attainment demonstration or acted on a submitted maintenance plan for the Ohio portion of the area (the subject of today's proposed action).

As part of the On May 4, 2011, redesignation request and maintenance plan Ohio EPA requested that EPA find that on-road emissions of direct $PM_{2.5}$ and NO_X emissions are insignificant for conformity purposes. On May 5, 2011, EPA initiated an adequacy review of the finding of insignificance that Ohio included in its redesignation submittal. As such, a notice of the submission of this finding was posted on its adequacy web page (*http://www.epa.gov/otaq/stateresources/transconf/currsips.htm*). The public comment period closed June 6, 2011. There were no public comments. EPA is acting on making these findings final.

Consistent with EPA's adequacy review of Ohio's redesignation request and maintenance plan and the Agency's thorough review of the entire SIP submission, EPA is proposing to approve Ohio's insignificance determination for the on-road motor vehicle contribution of NO_X and $PM_{2.5}$ emissions to the overall $PM_{2.5}$ emissions in the Huntington-Ashland $PM_{2.5}$ area.

Because EPA finds that Ohio's submitted maintenance plan and redesignation request meets the criteria in the conformity rule for an insignificance finding for motor vehicle emissions of NO_X and $PM_{2.5}$ in the Ohio portion of the Huntington-Ashland $PM_{2.5}$ area, it is not necessary to establish $PM_{2.5}$ and NO_X budgets for the Ohio portion of the Huntington-Ashland $PM_{2.5}$ area. That is, EPA finds that the submittal demonstrates that, for NO_X and $PM_{2.5}$, regional motor vehicle emissions are an insignificant contributor to the annual $PM_{2.5}$ air quality problem in the Ohio portion of the area. This finding is based on the following: Ohio's inventory shows that on-road emissions in the Ohio portion of the area are currently contribute to 3.21% of the total NO_X, and 0.97% $PM_{2.5}$, as shown in Table 7.

TABLE 7—HUNTINGTON-ASHLAND AREA EMISSION PROJECTIONS FOR ON-ROAD MOBILE SOURCES (TPY)

	NO_X	$PM_{2.5}$
On-road Mobile Source emissions for Ohio portion		
2015	1,824.73	56.65
2022	924.15	32.23
Total Ohio portion emissions		
2015	56,838.94	5,837.13
2022	37,858.02	5,758.93

Motor vehicle emissions in general, for the maintenance period of 2015 and 2022, are low and declining in the Ohio portion of the area, contributing only 2.44 and 0.56% of Ohio's emissions for NO_X, and $PM_{2.5}$, respectively, with the decrease due to Federal regulations on motor vehicle rules such as Heavy-duty Highway Vehicle standards and Tier 2 vehicle and fuel standards. Also, there have been no SIP requirements for motor vehicle control measures for the Ohio portion of the area and it is unlikely that motor vehicle control measures will be implemented for $PM_{2.5}$ in this area in the future.

Finally, as described above, the area has attained the 1997 annual $PM_{2.5}$ NAAQS and we are proposing to approve the maintenance plan and redesignation request for the Ohio portion of the area. Therefore motor vehicle emissions budgets for $PM_{2.5}$ and NO_X are not required for the Huntington-Ashland area to maintain the 1997 annual $PM_{2.5}$ NAAQS. EPA is proposing to approve the inventory and the findings of insignificant contribution by motor vehicles, resulting in no proposed motor vehicle

emissions budgets for the Ohio portion of the Huntington-Ashland area for 2015 and 2022 projected maintenance years. On-road emissions were calculated using the EPA required MOVES2010a model.

With regard to on-road emissions of SO_2, volatile organic compounds and ammonia, Ohio did not provide emission budgets (or an insignificance demonstration) because it concluded, consistent with EPA's presumptions regarding these $PM_{2.5}$ precursors, that emissions of these precursors from motor vehicles are not significant contributors to the area's $PM_{2.5}$ air quality problem.

6. 2005 Comprehensive Emissions Inventory

As discussed above, section 172(c)(3) of the CAA requires areas to submit a comprehensive emissions inventory. Ohio submitted a 2005 base year emissions inventories that meets this requirement. Emissions contained in the submittals cover the general source categories of point sources, area sources, on-road mobile sources, and nonroad mobile sources.

For the point source sector, EGU SO_2 and NO_X emissions were derived from EPA's Clean Air Market's database. All other point source emissions were obtained from Ohio's source facility emissions reporting.

Area source emissions were extrapolated from Ohio's 2005 periodic emissions inventories. Source growth factors were supplied by LADCO.

Nonroad mobile source emissions were extrapolated from nonroad mobile source emissions reported in EPA's 2005 NEI. LADCO estimated emissions for commercial marine vessels and railroads.

On-road mobile source emissions were calculated using EPA's mobile source emission factor model, MOVES2010a, in conjunction with roadway network traffic information prepared by KYOVA.

All emissions discussed in Table 1 were documented in the submittal and the Appendices of Ohio's redesignation request submittal. EPA has reviewed Ohio's documentation of the emissions inventory techniques and data sources used for the derivation of the 2005 emissions estimates and has found that Ohio has thoroughly documented the derivation of these emissions inventories. The submittal from the state shows that the 2005 emissions inventory is currently the most complete emissions inventories for $PM_{2.5}$ and $PM_{2.5}$ precursors in the Huntington-Ashland area. Based upon EPA's review, we propose to find that the 2005 emissions inventories are as complete and accurate as possible given the input data available to the Ohio, and we are proposing to approve them under CAA section 172(c)(3).

7. Summary of Proposed Actions

EPA has previously determined that the Huntington-Ashland area has attained the 1997 annual $PM_{2.5}$ NAAQS. EPA is proposing to determine that the entire Huntington-Ashland area continues to attain the 1997 annual $PM_{2.5}$ standard and that the Ohio portion of the area has met the requirements for redesignation under section 107(d)(3)(E) of the CAA. EPA is proposing to approve the request from Ohio to change the legal designation of the Ohio portion of the Huntington-Ashland area from nonattainment to attainment for the 1997 annual $PM_{2.5}$ NAAQS. EPA is proposing to approve Ohio's $PM_{2.5}$ maintenance plan for the Huntington-Ashland area as a revision to the Ohio SIP because the plan meets the requirements of section 175A of the CAA. EPA is proposing to approve the 2005 emissions inventories for primary $PM_{2.5}$, NO_X, and SO_2, documented in Ohio's May 4, 2011, submittal as satisfying the requirement in section 172(c)(3) of the CAA for a comprehensive, current emission inventory. Finally, for transportation conformity purposes EPA is also proposing to approve Ohio's determination that on-road emissions of $PM_{2.5}$ and NO_X are insignificant contributors to $PM_{2.5}$ concentrations in the area.

VI. What are the effects of EPA's proposed actions?

If finalized, approval of the redesignation request would change the official designation of the Ohio portion of the Huntington-Ashland area for the 1997 annual $PM_{2.5}$ NAAQS, found at 40 CFR part 81, from nonattainment to attainment. If finalized, EPA's proposal would approve as a revision to the Ohio SIP for the Huntington-Ashland area, the maintenance plan for the 1997 annual $PM_{2.5}$ standard as well as the 2005 emissions inventories included with the redesignation request.

VII. Statutory and Executive Order Reviews.

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, these actions:

- Are not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Do not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct

costs on tribal governments or preempt tribal law.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Particulate matter.

40 CFR Part 81

Air pollution control, Environmental protection, National Parks, Wilderness.

Dated: December 14, 2011.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2011–32819 Filed 12–21–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[EPA–HQ–OW–2009–0596; FRL–9611–1]

RIN 2040–AF36

Effective Date for the Water Quality Standards for the State of Florida's Lakes and Flowing Waters

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to extend the March 6, 2012 effective date of the ''Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Final Rule'' (inland waters rule) for ninety days to June 4, 2012. EPA's inland waters rule included an effective date of March 6, 2012 for the entire regulation except for the site-specific alternative criteria provision, which took effect on February 4, 2011. This proposal to revise the effective date for the inland waters rule does not affect or change the February 4, 2011 effective date for the site-specific alternative criteria provision. In this proposal, EPA is requesting comment on extending the effective date for the ''Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Final Rule.''

DATES: Comments must be received on or before January 23, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2009–0596, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *Email: ow-docket@epa.gov.*

3. *Mail to:* Water Docket, U.S. Environmental Protection Agency, Mail code: 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, Attention: Docket ID No. EPA–HQ–OW–2009–0596.

4. *Hand Delivery:* EPA Docket Center, EPA West Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004, Attention Docket ID No. EPA–HQ–OW–2009–0596. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2009–0596. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.regulations.gov* to view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. For additional information about EPA's public docket, visit EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyright material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Docket Facility. The Office of Water (OW) Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket Center telephone number is (202) 566–1744 and the Docket address is OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

FOR FURTHER INFORMATION CONTACT: For information concerning this rulemaking, contact: Tracy Bone, U.S. EPA, Office of Water, Mailcode 4305T, 1200 Pennsylvania Avenue NW., Washington, DC, 20460; telephone number (202) 564–5257; email address: *bone.tracy@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

Does this action apply to me?

Citizens concerned with water quality in Florida may be interested in this rulemaking. Entities discharging nitrogen or phosphorus to lakes and flowing waters of Florida could be indirectly affected by this rulemaking because water quality standards (WQS) are used in determining National Pollutant Discharge Elimination System (NPDES) permit limits. Categories and entities that may ultimately be affected include:

Category	Examples of potentially affected entities
Industry	Industries discharging pollutants to lakes and flowing waters in the State of Florida.

Category	Examples of potentially affected entities
Municipalities	Publicly-owned treatment works discharging pollutants to lakes and flowing waters in the State of Florida.
Stormwater Management Districts	Entities responsible for managing stormwater runoff in Florida.

This table is not intended to be exhaustive, but rather provides a guide for entities that may be directly or indirectly affected by this action. This table lists the types of entities of which EPA is now aware that potentially could be affected by this action. Other types of entities not listed in the table, such as nonpoint source contributors to nitrogen/phosphorus pollution in Florida's waters may be affected through implementation of Florida's water quality standards program (*i.e.,* through Basin Management Action Plans (BMAPs)). Any parties or entities conducting activities within watersheds of the Florida waters covered by this rule, or who rely on, depend upon, influence, or contribute to the water quality of the lakes and flowing waters of Florida, may be affected by this rule. To determine whether your facility or activities may be affected by this action, you should carefully examine the language in 40 CFR 131.43, which is the final rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Background

On December 6, 2010, EPA's final inland waters rule, entitled ''Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Final Rule'', was published in the **Federal Register** at 75 FR 75762, and codified at 40 CFR 131.43. The final inland waters rule established numeric nutrient criteria in the form of total nitrogen, total phosphorus, nitrate+nitrite, and Chlorophyll a for the different types of Florida's inland waters to assure attainment of the State's applicable water quality designated uses. More specifically, the numeric nutrient criteria translate Florida's narrative nutrient provision at Subsection 62–302–530(47)(b), Florida Administrative Code (F.A.C.), into numeric values that apply to lakes and springs throughout Florida and flowing waters outside of the South Florida Region. (EPA has distinguished the South Florida Region as those areas south of Lake Okeechobee and the Caloosahatchee River watershed to the west of Lake Okeechobee and the St. Lucie watershed to the east of Lake Okeechobee.) This final action seeks to improve water quality, protect public health and aquatic life, and achieve the long-term recreational uses of Florida's waters, which are a critical part of the State's economy.

As stated in 40 CFR 131.43(f), 75 FR 75807, the rule is scheduled to take effect on March 6, 2012, except for the site-specific alternative criteria (SSAC) provision at 40 CFR 131.43(e), which took effect on February 4, 2011. EPA selected the March 6, 2012 effective date for the criteria part of the rule to allow time for EPA to work with stakeholders and the Florida Department of Environmental Protection (FDEP) on important implementation issues, to help the public and all affected parties better understand the final criteria and the bases for those criteria, and for EPA to engage and support, in full partnership with FDEP, the general public, stakeholders, local governments, and sectors of the regulated community across the State in a process of public outreach education, discussion, and constructive planning. 75 FR 75787.

III. Proposed Effective Date

A. Current Inland Waters Rule Effective Date and Rationale

The current effective date for the inland waters rule is March 6, 2012 except, as noted earlier, for the site-specific alternative criteria (SSAC) provision, which became effective February 4, 2011. As mentioned earlier, in the December 6, 2010, preamble for the final rule (75 FR 75762, 75787), the Agency noted its desire to actively engage in partnership with the Florida Department of the Environment (FDEP) to support FDEP's implementation of the new criteria before the criteria take effect. The 15-month period between publication and the effective date was to allow for education and outreach efforts targeted at the major interest sectors and geographic locations throughout the State of Florida, including training and guidance concurrent with data synthesis and analysis to support potential SSAC development; public comment and response period to allow development of effective guidance, training and possible workshops to run concurrent with SSAC submittals; finalizing guidance materials along with development of rollout strategies concurrent with notice and comment of SSAC guidance; and finally statewide education and training on guidance and contingency planning. These actions were considered reasonably necessary to ensure application of programs to achieve criteria in a manner to make the most efficient use of limited resources and to gain the broadest possible support for timely and effective action upon reaching the effective date of the criteria.

Since December of 2010, EPA at both the Headquarters and Regional levels has worked in collaboration with the State on outreach and education efforts including: participating in multiple meetings with a wide variety of local officials from Florida, conducting various webinars and meetings with respect to the final rule, including the SSAC provision, and participating in technical meetings with various stakeholder groups. EPA has met with a wide range of stakeholders and local officials, including: State, county and city representatives, utility managers and water districts, and representatives from industry and agriculture. Between November 2010 and March 2011, EPA conducted five webinars discussing various aspects of the final rule for lakes, streams and springs and its implementation, with participation by over 750 people from a wide range of stakeholder groups in Florida. EPA met with and/or held conference calls with local officials from Palm Beach County, Jacksonville, Gainesville, Polk County and several of the State's Water Management Districts. EPA hosted officials from the Florida League of Cities and the Association of Counties for a day-long meeting to address questions and concerns from those officials. EPA also participated in conferences sponsored by organizations such as the League of Cities, Association of Counties, Florida Stormwater Association, Air and Water Managers Association, and the Florida Engineering Society. EPA has been coordinating closely with FDEP on issues related to implementation of the rule and supporting State efforts to develop State-adopted numeric nutrient criteria.

B. Rationale for Extending the March 6, 2012 Effective Date

EPA is proposing to extend the effective date of the inland waters rule (with the exception of the SSAC provision, which is already in effect) for

ninety days, to June 4, 2012, for the reasons discussed in this section.

Since the promulgation of the December 6, 2010 final rule for Florida's inland waters, EPA has continued to work in close coordination with the State of Florida as the State develops its own rulemaking for numeric nutrient criteria that are consistent with requirements of the CWA, address the water quality needs of the State, and support effective permit implementation, water body assessment and listing, and development of TMDLs. On November 10, 2011, FDEP proposed numeric nutrient criteria and related provisions for inland as well as a number of estuarine waters for the State, which were published in the *Florida Administrative Weekly* (Volume 37, number 45, pages 3753–3775). On December 8, 2011, the State's Environmental Review Commission (ERC) approved these proposed rules with additional amendments. On December 9, 2011, it is EPA's understanding that FDEP submitted the ERC-approved rules and amendments to the Florida Legislature for ratification during the 2012 legislative session. Since the ERC approved additional amendments to the rules that were proposed on November 10, 2011, EPA understands that FDEP must publish a notice of change, which is expected to be included in the December 23, 2011 edition of the *Florida Administrative Weekly.*

At the time of today's proposed effective date extension, the State rulemaking and legislative process is ongoing and its ultimate resolution is uncertain. Nonetheless, final State action in this area could have significant implications for many interested parties and members of the public in the State on the need to move forward with implementation of EPA's inland water numeric criteria in the event that alternative Florida numeric nutrient criteria are established that assure attainment of State water quality designated uses consistent with applicable CWA provisions. Successful State action on this issue could also affect the obligations and expectations of a wide range of affected stakeholders whose actions relate to the discharge or contribution of nitrogen and phosphorus pollution to State waters. The last day of Florida's 2012 regular legislative session is March 9, 2012. Extending the effective date of EPA's inland waters rule would avoid the confusion and inefficiency that may occur should Federal criteria become effective while State criteria are being finalized by the State and reviewed by EPA. If the State decides to not proceed with final numeric nutrient criteria before EPA finalizes this proposal to extend the effective date, EPA anticipates not finalizing an extension of the March 6, 2012, effective date.

However, if the State rulemaking process continues as planned toward FDEP's submission of new or revised water quality standards to EPA for review pursuant to CWA section 303(c), EPA anticipates and proposes extending the March 6, 2012 effective date by ninety days to June 4, 2012, to allow the State to complete its process. Should the State decide not to proceed with final numeric nutrient criteria after the ninety-day extension is finalized, EPA anticipates the inland waters rule would become effective at the end of the ninety days, on June 4, 2012. If, however, the State rulemaking process results in final and effective numeric nutrient criteria after EPA has finalized the ninety-day extension, EPA would expect to propose a further extension of the effective date of the inland waters rule, to allow FDEP to submit the rule to EPA for review and action under section 303(c) of the CWA, for EPA to complete its review of the State rule, and for EPA to withdraw any Federal numeric nutrient criteria corresponding to any State-adopted numeric nutrient criteria that have been approved by EPA.

Should EPA decide to extend the effective date of the inland waters rule, the Agency will continue to work with Florida towards implementation of Federal or State numeric nutrient criteria. As EPA stated in the preamble to the final inland waters rule, the opportunity that is presented by numeric nutrient criteria—for substantial nitrogen and phosphorus loadings reductions in the State—''would be greatly facilitated and expedited by strongly coordinated and well-informed stakeholder engagement, planning, and support before a rule of this significance and broad scope begins to take effect and be implemented through the State's regulatory programs.'' 75 FR 75787.

EPA solicits comments regarding the proposed extension of ninety days, to June 4, 2012, for the effective date of the inland waters rule. EPA also requests comment on whether a longer extension should be provided to allow Florida more time to complete the State rulemaking process.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993), since it merely extends the effective date of an already promulgated rule, and is therefore not subject to review under Executive Order 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This action does not impose any information collection burden, reporting or record keeping requirements on anyone.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this action on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

This proposed rule does not establish any requirements that are applicable to small entities, but rather merely extends the date of already promulgated requirements. Thus, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local,

and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives, and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or Tribal governments or the private sector. This proposed rule does not regulate or affect any entity and, therefore, is not subject to the requirements of sections 202 and 205 of UMRA.

E. Executive Order 13132 (Federalism)

This action does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action merely extends the effective date of an already promulgated regulation.

F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has Tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by Tribal governments, or EPA consults with Tribal officials early in the process of developing the proposed regulation and develops a Tribal summary impact statement. However, the rule will neither impose substantial direct compliance costs on Tribal governments, nor preempt Tribal law.

In the State of Florida, there are two Indian Tribes, the Seminole Tribe of Florida and the Miccosukee Tribe of Indians of Florida, with lakes and flowing waters. Both Tribes have been approved for treatment in the same manner as a State (TAS) status for CWA sections 303 and 401 and have federally-approved WQS in their respective jurisdictions. These Tribes are not subject to this proposed rule. This rule will not impact the Tribes because it merely extends the date of already promulgated requirements.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866 and because the Agency does not believe this action includes environmental health risks or safety risks that would present a risk to children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (E.O.) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. This action is not subject to E.O. 12898 because this action merely extends the effective date for already promulgated requirements.

List of Subjects in 40 CFR Part 131

Environmental protection, Water quality standards, Nitrogen/phosphorus pollution, Nutrients, Florida.

Dated: December 16, 2011.

Lisa P. Jackson,

Administrator.

[FR Doc. 2011–32793 Filed 12–21–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 52

[WC Docket No. 07–244; CC Docket No. 95–116; DA 11–1954]

Local Number Portability Porting Interval and Validation Requirements; Telephone Number Portability

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; comments requested.

SUMMARY: In this document, the Commission seeks comment on a submission by the North American Numbering Council (NANC)

recommending that a transferring service provider may only require the following information when the new service provider requests a CSR: any working telephone number associated with the customer's account; a positive indication that the new service provider has the authority from the customer; and the date the customer gave that authority. The Commission seeks comment on whether it should adopt the recommendation as a rule.

DATES: Comments must be filed on or before January 23, 2012 and reply comments on or before February 21, 2012.

ADDRESSES: Interested parties may submit comments, identified by WC Docket No. 07–244 and CC Docket No. 95–116, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *Email: ecfs@fcc.gov,* and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response. Include the docket number(s) in the subject line of the message.
- *Mail:* Secretary, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554.
- *Hand Delivery/Courier:* FCC Headquarters building located at 445 12th Street SW., Room TW–A325, Washington, DC 20554.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY: (202) 418–0432.

All submissions received must include the agency name and WC Docket No. 07–244 and CC Docket No. 95–116. All comments received will be posted without change to *http://www.fcc.gov/cgb/ecfs.* For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Marilyn Jones, *marilyn.jones@fcc.gov* or Melissa Kirkel, *melissa.kirkel@fcc.gov,* of the Competition Policy Division, Wireline Competition Bureau, at (202) 418–1580.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice, DA 11–1954, released November 29, 2011. The full text of this document is available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St. SW., Room CY–A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488–5300, facsimile (202) 488–5563, TTY (202) 488–5562, email *fcc@bcpiweb.com.*

On October 3, 2011, the NANC submitted a report on local number portability (LNP) Best Practice 70. The Report notes that there is currently no industry-wide standard on what information the transferring service provider may require from a new service provider when the new provider requests a Customer Service Record (CSR). Best Practice 70 provides that the transferring service provider may only require the following information when the new service provider requests a CSR: any working telephone number associated with the customer's account; a positive indication that the new service provider has the authority from the customer; and the date the customer gave that authority. The Commission seeks comment on Best Practice 70 and on whether the Commission should adopt it as a rule.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).

This matter shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule § 1.1206(b). In proceedings governed by rule § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc,

.xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Federal Communications Commission.

Sharon E. Gillett,

Chief, Wireline Competition Bureau.

[FR Doc. 2011–32823 Filed 12–21–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 53

[FAR Case 2011–022; Docket 2011–0093; Sequence 1]

RIN 9000–AM15

Federal Acquisition Regulation; Clarification of Standards for Computer Generation of Forms

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to remove any reference to Federal Information Processing Standard (FIPS) 161 and codify requirements for standards already in use.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before February 21, 2012 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2011–022 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2011–022'' under the heading ''Enter Keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''FAR Case 2011–022.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''FAR Case 2011–022'' on your attached document.
- *Fax:* (202) 501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), Attn: Hada Flowers, 1275 First Street NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAR Case 2011–022, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Lague, Procurement Analyst, at (202) 694–8149 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAR Case 2011–022.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement the removal of FIPS 161. FIPS 161 is being removed based on the notice posted in the **Federal Register** (73 FR 51276) on September 2, 2008, by the Department of Commerce. This FIPS requirement was withdrawn by the Secretary of Commerce because it was obsolete, and had not been updated to adopt current voluntary industry standards, Federal specifications, Federal data standards, or current good practices for information security. The withdrawal of this standard created a gap in the FAR. This proposed case, if adopted, closes that gap by clarifying the use of American National Standards Institute X12, as the valid standard to use for computer-generated forms. FAR 53.105 is being amended; it will continue allowing agencies and the public to generate standard and optional forms on their computers.

In addition to clarifying that FIPS 161 is no longer in use, public comments are invited to identify other voluntary industry standards, Federal specifications, Federal data standards, or current good practices for the computer generation of forms.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because it is removing FIPS 161 which is obsolete or has not been updated to adopt current voluntary industry standards, Federal specifications, Federal data standards, or current good practices for information security. This is a technical change acknowledging the removal by the Department of Commerce of FIPS 161. Small businesses will continue to be able to generate forms by computer. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2011–022), in correspondence.

IV. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 53

Government procurement.

Dated: December 15, 2011.

William Clark,

Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR part 53 as set forth below:

PART 53—FORMS

1. The authority citation for 48 CFR part 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Revise section 53.105 to read as follows:

53.105 Computer generation.

(a) The forms prescribed by this part may be computer generated without exception approval (see 53.103), provided—

(1) There is no change to the name, content, or sequence of the data elements, and the form carries the Standard or Optional Form number and edition date (see 53.111); or

(2) The form is in an electronic format covered by the American National Standards Institute (ANSI) X12 Standards published by the Accredited Standards Committee X12 on Electronic Data Interchange or a format that can be translated into one of those standards.

(b) The standards listed in paragraph (a)(2) above may also be used for submission of data set forth in other parts for which specific forms have not been prescribed.

[FR Doc. 2011–32722 Filed 12–21–11; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 111207734–1733–01]

RIN 0648–BB50

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Adjustment to 2012 Annual Catch Limits

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: This action proposes to reduce the 2012 annual catch limits (ACLs) for the Atlantic herring (herring) fishery to account for catch overages in 2010 and to prevent overfishing.

DATES: Public comments must be received no later than 5 p.m., Eastern Standard Time, on January 6, 2012.

ADDRESSES: Copies of supporting documents, the 2010–2012 Herring Specifications and Amendment 4 to the Herring Fishery Management Plan (FMP), are available from: Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950, telephone (978) 465–0492. These documents are also accessible via the Internet at *http://www.nero.nmfs.gov.*

You may submit comments, identified by NOAA–NMFS–2011–0275, by any one of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2011–0275 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.
- *Mail:* NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on Adjustment to 2012 Herring Catch Limits.''
- *Fax:* (978) 281–9135, Attn: Carrie Nordeen.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF formats only.

FOR FURTHER INFORMATION CONTACT: Carrie Nordeen, Fishery Policy Analyst, (978) 281–9272, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

The Atlantic herring harvest in the United States is managed under the Herring FMP developed by the New England Fishery Management Council (Council), and implemented by NMFS, in 2000. The Council developed herring specifications for 2010–2012, which were approved by NMFS on August 12, 2010 (75 FR 48874). Although herring is not overfished and is not experiencing overfishing, the herring annual acceptable biological catch for fishing years 2010–2012 (106,000 mt) was reduced from previous years (145,000 mt in 2009) due to concerns about a retrospective pattern in the 2009 herring stock assessment that over-estimates biomass.

The stock-wide herring ACL (91,200 mt) is divided among three management areas, one of which has two sub-areas. Area 1 is located in the Gulf of Maine (GOM) and is divided into an inshore section (Area 1A) and an offshore section (Area 1B). Area 2 is located in the coastal waters between Massachusetts and North Carolina, and Area 3 is on Georges Bank (GB). The herring stock complex is considered to be a single stock, but there are inshore (GOM) and offshore (GB) stock components. The GOM and GB stock components segregate during spawning and mix during feeding and migration. Each management area has its own sub-ACL to allow greater control of the fishing mortality on each stock component. While the stock-wide herring ACL for 2010–2012 was not reduced below the 2008 catch level, the management area sub-ACLs were reduced from 2009 levels by 20 to 60 percent. The management area sub-ACLs established for 2010–2012 were: 26,546 mt for Area 1A, 4,362 mt for Area 1B, 22,146 mt for Area 2, and 38,146 mt for Area 3.

Amendment 4 to the Herring FMP (Amendment 4) (76 FR 11373, March 2, 2011) revised the specification-setting process, bringing the Herring FMP into compliance with ACL and accountability measure (AM) requirements of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Under the FMP, if NMFS determines catch will reach 95 percent of the sub-ACL allocated to a management area or seasonal period, then NMFS prohibits vessels from fishing for, possessing, catching, transferring, or landing more than 2,000 lb (907.2 kg) of herring per trip from that area or period. This AM slows catch to prevent or minimize catch in excess of a management area or seasonal period sub-ACL. As a way to account for ACL overages in the herring fishery, Amendment 4 established an AM that provided for overage deductions. If the catch of herring in any given fishing year exceeds any ACL or sub-ACL, the overage will subsequently be deducted from the corresponding ACL/sub-ACL.

Fishing year 2010 was the first year that NMFS monitored herring catch against the recently reduced management area sub-ACLs. NMFS experienced difficulty determining when to implement the 2,000-lb (907.2-kg) possession limit in Area 1B because of a pulse of fishing effort in that area. NMFS had similar difficulties

determining when to implement the possession limit in Area 1A because catch rates were highly variable. Ultimately, catch from Areas 1B and 1A exceeded their allocations by 1,639 mt and 1,878 mt, respectively. These experiences demonstrated that more timely catch reporting was needed to better monitor catch against sub-ACLs and to allow catch to achieve, but not exceed, management area sub-ACLs. Therefore, in September 2011, NMFS revised vessels reporting requirements to obtain more timely catch reports (76 FR 54385, September 1, 2011). As a result of that rulemaking, limited access herring vessels are required to report herring catch daily via vessel monitoring systems, open access herring vessels are required report catch weekly via the interactive voice response system, and all herring-permitted vessels are required to submit vessel trip reports (VTRs) weekly.

Proposed Measures

In accordance with regulations at § 648.201(a)(3), this action proposes to deduct the 2010 overages from 2012 catch limits. Therefore, in 2012, the sub-ACL for Area 1A would be 24,668 mt (reduced from 26,546 mt) and the sub-ACL for Area 1B would be 2,723 mt (reduced from 4,362 mt). The sub-ACLs for Areas 2 and 3 would remain unchanged at 22,146 mt for Area 2 and 38,146 mt for Area 3.

NMFS determined 2010 herring landings based on dealer reports (Federal and state) containing herring purchases, supplemented with VTRs (Federal and State of Maine) containing herring landings. NMFS compared dealer reports to VTRs for all trips that landed herring in 2010. Because VTRs are generally a hail weight or estimate of landings, with an assumed 10 percent margin of error, dealer reports are a more accurate source of landings data. However, if the amount of herring reported via VTR exceeded the amount of herring reported by the dealer by 10-percent or more, it was assumed that the dealer report for that trip was in error. In those instances, the amount of herring reported via VTR was used to determine the amount of herring landed on that trip. Herring landings in the VTR database were checked for accuracy against the scanned image of the paper VTRs submitted by the owner/operator of the vessel. VTR landings were also verified by comparing reported landings to harvesting potential and applicable possession limits for each vessel. Federal dealer reports for 2010 were finalized in June 2011 and state dealer reports for 2010 were finalized in September 2011.

Herring landings reported on the VTRs were assigned to herring management areas using latitude and longitude coordinates. VTRs with missing or invalid latitude/longitude coordinates were manually corrected using the statistical area reported on the VTR. If no statistical area was reported on the VTR, then a combination of recent fishing activity and a review of the scanned images of the original VTR were used to assign landings to herring management area. Dealer reports without corresponding VTRs were prorated to herring management area using the proportion of total herring landings stratified by week, gear type, and management area.

As NMFS was reviewing the 2010 herring data, and comparing individual VTRs with individual dealer reports, it resolved data errors resulting from misreporting. Common dealer reporting issues were: Missing dealer reports; incorrect or missing VTR serial numbers; incorrect or missing vessel permit numbers; and incorrect dates. VTRs had similar errors. Common VTR reporting issues were: Missing VTRs; missing or incorrect dealer information; incorrect amounts of landed herring; incorrect dates; and missing or incorrect statistical area. The quality of herring landings data is affected by unresolved data errors; therefore, NMFS strongly encourages vessel owner/operators and dealers to double check reports for accuracy and ensure reports are submitted on a timely basis.

Discards of herring in 2010 were determined by extrapolating Northeast Fisheries Observer Program (observer) data to the entire herring fishery. The amount of observed herring discards (''Atlantic herring'' and ''herring unidentified'') was divided by the amount of observed fish landed. That discard ratio was then multiplied by the amount of all fish landed for each trip to calculate total amount of herring discards in 2010. The amount of discards was determined for each management area and gear type. Observer data for 2010 were finalized in April 2011.

NMFS calculated the total herring catch for 2010 by adding the amount of herring landings to the amount of herring discarded. The methodology used by NMFS to calculate the amount of landed herring and the amount of discarded herring was reviewed by the Council's Herring Plan Development Team (PDT). NMFS convened a Herring PDT conference call on October 19, 2011, to review landed catch and discard methodology. The Herring PDT recommended that prorated dealer reports should account for fishing effort and seasonality in its calculations. Based on the Herring PDT's recommendations, NMFS revised its methodologies to include stratification by week, gear type, and area for dealer reports that were prorated to management area. Additionally, the Herring PDT recommended that the extrapolation of discards be stratified by gear type and area. NMFS revised its discard methodology accordingly. NMFS convened a follow-up Herring PDT conference call on November 3, 2011, and updated the PDT on its revised methodology. The Herring PDT concluded that the methodologies used by NMFS to calculate the total amount of herring catch (landings and discards) in 2010 were appropriate.

The following chart contains information on the 2010 herring fishery:

TOTAL CATCH OF ATLANTIC HERRING IN 2010

Management area	Sub-ACL (mt)	Landed herring (mt)	Discarded herring (mt)	Total herring catch (mt)	Herring catch as percentage of Sub-ACL
1A	26,546	28,364	60	28,424	107
1B	4,362	5,997	3	6,001	138
2	22,146	20,781	50	20,831	94
3	38,146	17,573	23	17,596	46

Classification

Pursuant to section 304 (b)(1)(A) of the MSA, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Atlantic Herring FMP, other provisions of the MSA, and other applicable law, subject to further consideration after public comment.

The National Environmental Policy Act analysis to support this action was completed in Amendment 4 (76 FR 11373, March 2, 2011).

This proposed rule has been determined to be not significant for purposes of Executive Orders 12866. This proposed rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

In 2010, there were catch limit overages in herring management areas 1A and 1B equal to 1,878 mt and 1,639 mt, respectively. In accordance with regulations at § 648.201(a)(3), this action proposes to deduct the 2010 overages from 2012 catch limits. Therefore, in 2012, the sub-ACL for Area 1A would be 24,668 mt (reduced from 26,546 mt) and the sub-ACL for Area 1B would be 2,723 mt (reduced from 4,362 mt).

Amendment 4 analyzed the effects of deducting ACL/sub-ACL overages from the subsequent corresponding ACL/sub-ACL. During a year when the ACL/sub-ACL is exceeded, fishery participants may benefit economically from higher catch. In the subsequent year, when the amount of the overage is deducted from that ACL/sub-ACL and the amount of harvest is lower, fishery participants may experience negative economic impacts. Since deductions are the same magnitude as the overages, there would be no overall change to the amount of fish available for harvest. Therefore, if participants are active in the fishery during the overage year and the deduction year, the total economic impact on participants would be neutral.

In 2010, 101 vessels were issued limited access herring permits and 2, 258 were issued open access herring permits. All participants in the herring fishery are small entities as defined by the SBA under the Regulatory Flexibility Act, as none grossed more than $4 million annually, so there would be no disproportionate economic impacts on small entities.

Total herring revenue in 2010 equaled approximately $18.8 million for limited access vessels and $150,000 for open access vessels. Because most vessels that harvest herring participate in other fisheries, revenue generated by herring catch is only a portion of their income. Herring revenue averaged 20 percent of total fisheries revenue for limited access vessels in 2010 and less than 1 percent of total fisheries revenue for open access vessels in 2010. The reduced sub-ACLs in Areas 1A and 1B are estimated to equal $1 million in lost revenue in 2012. Absent the sub-ACL reductions in Areas 1A and 1B, the total potential herring revenue in 2012 is estimated to be $26.4 million. The sub-ACL reductions in Areas 1A and 1B would reduce the total potential herring revenue by 4 percent in 2012. While this action reduces the amount of fish available for harvest, both the fishery-wide and individual-vessel economic effects are anticipated to be minimal because the reduction is relatively minor and herring vessels generate most of their revenue participating in other fisheries.

For all the reasons described above, an initial regulatory flexibility analysis is not required and none has been prepared.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 19, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2011–32846 Filed 12–21–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 110901552–1736–01]

RIN 0648–BB34

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Amendment 17

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement measures in Amendment 17 to the Northeast Multispecies Fishery Management Plan. This action would amend the Northeast Multispecies Fishery Management Plan to explicitly define and facilitate the effective operation of state-operated permit banks. As proposed in Amendment 17, state-operated permit banks would be allocated an annual catch entitlement and specifically authorized to provide their annual catch entitlement and/or days-at-sea to approved groundfish sectors for the purpose of enhancing the fishing opportunities available to sector members. This action also includes a provision that would allow NMFS to issue a days-at-sea credit to a vessel that cancels a fishing trip prior to setting or hauling fishing gear and the vessel, therefore, does not catch or land fish at any time on the trip.

DATES: Comments must be received by January 23, 2012.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2011–0186, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2011–0186 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.
- *Mail:* Submit written comments to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Comments on NE Multispecies Amendment 17.''
- *Fax:* (978) 281–9135, Attn: William Whitmore

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected

information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the Amendment 17 document, including an environmental assessment and a regulatory impact review, are available from the Northeast Regional Office of the National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. This document is also accessible via the Internet at *http://www.nero.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: William Whitmore, Fishery Policy Analyst, (978) 281–9182; fax: (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

The final rule implementing Amendment 13 to the Northeast (NE) Multispecies Fishery Management Plan (FMP) (69 FR 22906; April 27, 2004) specified a process for forming sectors within the NE multispecies fishery, implemented restrictions applicable to all sectors, and authorized the allocation of a total allowable catch (TAC) for specific groundfish species to a sector. As approved in Amendment 13, each sector must prepare a sector operations plan, which must be submitted to NMFS along with signed sector member contracts. Each sector operations plan must contain certain elements, including rules that sector members agree to abide by to avoid exceeding their sector's TAC. An environmental assessment (EA), or other appropriate analysis, must be prepared that analyzes the individual and cumulative impacts of all proposed sector operations. Additionally, the public must be provided an opportunity to comment on the proposed sector operations plans, sector contracts, and EA. Amendment 13 also implemented the first operational sector. A second sector was approved in Framework Adjustment (FW) 42 (71 FR 62156; October 23, 2006).

Amendment 16 (74 FR 18262; April 9, 2010) expanded sector management measures and authorized 17 new sectors, for a total of 19 sectors. The amendment defined a sector as ''[a] group of persons (three or more persons, none of whom have an ownership interest in the other two persons in the sector) holding limited access vessel permits who have voluntarily entered into a contract and agree to certain fishing restrictions for a specified period of time, and which has been granted a TAC(s) [*sic*] in order to achieve objectives consistent with applicable FMP goals and objectives.'' A sector's TAC is referred to as an annual catch entitlement (ACE). Each sector's ACE for a particular stock represents a share of that stock's annual catch limit (ACL) available to commercial NE multispecies vessels, based upon the potential sector contribution (PSC) of permits participating in that sector. Regional Administrator (RA) approval is required for a sector to be authorized to fish and to be allocated an ACE for stocks of regulated NE multispecies during each fishing year. Each sector is responsible for monitoring its catch, reporting catch to NMFS, and ensuring it does not exceed its ACE.

In 2009 and 2010, NOAA provided nearly $6 million in funding through Federal grants to the states of Maine, New Hampshire, Massachusetts, and Rhode Island for the express purpose of establishing several ''permit banks'' of NE multispecies fishing vessel permits. The permit banks were developed jointly by the states and NMFS, through memoranda of agreement (MOA), to help promote the effective implementation of catch share programs in New England and to mitigate some of the potential adverse socio-economic impacts to fishing communities and small-scale fishing businesses. The intent of the permit bank program is for states to use the funding to obtain fishing vessel permits and then to provide the fishing opportunities associated with those permits in the form of ACE and/or days-at-sea (DAS) to qualified fishermen.

Currently, state-operated permit banks are not recognized under the provisions of the NE Multispecies FMP, and the only entities allocated and authorized to transfer a sector's ACE to approved sectors are other approved sectors. The only mechanism currently available for a state-operated permit bank to operate (*i.e.,* transfer ACE to fishermen in sectors) is for the state permit bank to either join an existing sector as a member or to form a sector with other permit holders.

Although FW 45 (76 FR 23042; April 25, 2011) authorized five additional sectors, including the Maine Permit Bank Sector, the State of Rhode Island Permit Banking Sector, the State of New Hampshire Permit Bank Sector, and the Commonwealth of Massachusetts Permit Bank Sector. Only the Maine Permit Bank Sector fulfilled the necessary roster requirements and gained approval by the RA for operation during FY 2011 (76 FR 23076; April 25, 2011). Several states have been hesitant to enroll in or form a sector due to sector liability issues. As a result, the other state-operated permit banks have been unable to utilize any Federal funding to allocate ACE to qualifying sectors.

This action proposes to amend the NE Multispecies FMP to explicitly define and facilitate the effective operation of state-operated permit banks. This action would also amend the regulations implementing the NE Multispecies, Monkfish, and Atlantic Sea Scallop FMPs to include a provision that would allow NMFS to issue a DAS credit to a vessel that canceled a fishing trip prior to setting or hauling fishing gear and the vessel, therefore, did not catch or land fish at any time on the trip.

Proposed Measures

The following summarizes the measures proposed by the New England Fishery Management Council (Council) in Amendment 17 and contained in this proposed rule. These measures build upon the provisions implemented by previous management actions and are intended to either supplement or replace existing regulations that would otherwise apply to state-operated permit banks. This proposed rule also includes revisions to regulations that are not specifically identified in Amendment 17, but are necessary to clarify existing provisions, as described further below. The proposed regulations implementing measures in Amendment 17 were deemed by the Council to be consistent with the amendment, and necessary to implement such provisions pursuant to section 303(c) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), through a September 7, 2011, letter from the Council Chairman to the RA.

1. Definition of a State-Operated Permit Bank

In Amendment 17, NMFS proposes to define a state-operated permit bank as a permit depository established through an agreement between NOAA and one or more states in which Federal grant funds are used by the state(s) to establish a bank of Federal fishing vessel permits so that the fishing access privileges associated with those permits may be allocated by the state(s) to qualifying commercial fishermen and sectors according to criteria to which NOAA and the state(s) have mutually agreed through an MOA. State-operated permit banks would be separate entities from the groundfish sectors. As proposed, state-operated permit banks would no longer be subject to the requirement that three or more persons be included in a sector, which the states claim inhibits the development of their permit banks.

State-operated permit banks shall be deemed to meet the definition above, and therefore qualify to operate as intended in this proposed action, so long as the state-operated permit bank was initially established using a Federal grant award from NOAA for this purpose and the state maintains a valid MOA with NMFS. The MOA between NMFS and each state establishes the parameters that the state must follow in order to receive Federal grant funding that is then applied towards purchasing NE multispecies permitted vessels and transferring the ACE allocated to the permit bank to approved sectors. A state-operated permit bank must have a valid MOA in order to operate.

2. Clarification and Streamlining of Administrative Procedures and Requirements for State-Operated Permit Banks

Under this amendment, state-operated permit banks would be allocated ACE and specifically authorized to provide ACE to approved groundfish sectors and/or DAS for the purpose of enhancing the fishing opportunities available to sector members. State-operated permit banks would be required to comply with the terms and conditions of any applicable Federal grant agreement (*i.e.,* a Federal grant award provided to a state for the purpose of establishing, enhancing, or operating a permit bank), as well as meet the requirements specified in an MOA established with NMFS for administering the permit bank.

State-operated permit banks would be required to report to the Council annually on the performance of the permit bank. Such reports would include, to the extent that the information does not conflict with any regulations regarding the protection of personal and/or proprietary information, all reporting requirements within the MOA. State-operated permit banks would be exempt from many of the sector reporting requirements because state-operated permit banks are prohibited from actively fishing. For example, at-sea monitoring and weekly catch reports would be unnecessary since the permit bank would not actually be fishing and would be unable to exceed its ACE (it cannot transfer out more ACE than it was initially allocated).

State-operated permit banks would not be authorized to acquire additional ACE or DAS for a fishing year through a transfer from a sector or other vessels because the purpose of the state-operated permit banks is to transfer out ACE and DAS to sector fishermen in need of additional allocation, not to accumulate ACE or DAS. However, if a sector receives a transfer of ACE, or a vessel receives DAS from a state-operated permit bank but wishes to return either the (unused) ACE or DAS to the permit bank, NMFS could, upon written agreement by both parties, void the initial transfer, thereby returning the ACE or DAS to the permit bank. The state permit bank would then be free to redistribute the available ACE or DAS to another sector or vessel. In addition, and subject to the terms and conditions of the states' permit bank MOAs with NMFS, state-operated permit banks would be authorized to transfer ACE, on a stock-by-stock basis, to other state-operated permit banks for the purpose of maximizing the fishing opportunities made available by the permit banks to sector members. For example, the Rhode Island state permit bank could transfer Gulf of Maine cod to the Maine state permit bank in exchange for Southern New England/Mid-Atlantic yellowtail flounder.

If more funds become available to the state-operated permit banks, the use of those additional funds in state-operated permit banks must first be reviewed by the Council for consistency with the goals and objectives of the NE Multispecies FMP prior to the state-operated permit bank using those funds outside of the sector process. A state would not be authorized to acquire a permit that would be used in a state-operated permit bank, or to allocate or transfer any ACE that may be associated with new permits obtained as a result of the additional funds, unless the state either (1) provides the Council the opportunity to review the implications of the expanded permit bank to the goals and objectives of the Northeast Multispecies FMP, or (2) forms or joins an approved groundfish sector.

NMFS is interested in specific public comment on whether state-operated permit banks should be prohibited from using additional funds to acquire permits prior to Council review. NMFS is concerned with the consistency of this measure with other groundfish sector measures, because there is nothing in the current regulations that prohibits any interested party, including a state-operated permit bank, from acquiring a permit. For example, under current regulations, a state could purchase a permit and lease out the DAS without forming a state-operated permit bank or a sector. While Amendment 17 does not contain exact language prohibiting state-operated permit banks from acquiring additional permits with additional funding prior to Council review, the Council argues that the proposed measure is consistent with the Council's intent.

NMFS is also interested in specific public comment on whether state-operated permit banks should be allowed to carry-over unused ACE and DAS from one fishing year into the next. Sectors may carry-over up to 10 percent of their unused ACE from one fishing year into the next; however, whether state-operated permit banks should be able to carry-over ACE or DAS was not discussed by the Council or contemplated in Amendment 17. In a letter to the RA dated September 7, 2011, deeming the proposed regulations pursuant to section 303(c) of the Magnuson-Stevens Act, the Council claimed that ''state-operated permit banks are allowed to make the use of carry-over provisions, subject to the current restrictions on the amount of DAS or ACE that can be carried over.'' The Council contends that this is the only equitable approach and will facilitate efficient operations of these entities. NMFS is concerned that allowing state-operated permit banks to carry-over unused ACE or DAS could potentially encourage state-operated permit banks to hold ACE or DAS instead of transferring it out to sectors and fishermen to be used.

The regulations proposed in this action would allow state-operated permit banks to carry-over ACE and would prohibit state-operated permit banks from acquiring a permit to be used in a state-operated permit bank with additional funds until the state-operated permit bank provides the Council the opportunity to review the potential implications of purchasing the permit.

3. Canceled Trip DAS Credit

This proposed rule includes a provision, not related to Amendment 17, that would allow NMFS to credit DAS to a vessel that cancels a fishing trip prior to setting or hauling fishing gear and the vessel, therefore, does not catch or land fish at any time on the trip. This provision would apply to all fisheries that operate under a DAS management system, specifically the NE multispecies, monkfish, and Atlantic sea scallop fisheries. Because this DAS credit would only be granted for situations in which no fishing activity occurs, it would not likely have a negative impact on fishing-related mortality in the DAS fisheries. If approved, this measure would be applied retroactively for the 2011 fishing year.

To ensure the enforceability of this provision, vessels seeking a DAS credit would be required to send a notification

to NMFS Office of Law Enforcement (OLE) to coordinate a monitored landing event. Vessels that are required to use a vessel monitoring system (VMS) would be required to send a VMS email to OLE at the earliest opportunity prior to crossing the VMS demarcation line upon return to port. Vessels not required to use a VMS would be required to use the interactive voice response (IVR) line to make the notification. Additionally, both VMS and IVR vessels would also have to submit a written DAS credit form along with the vessel trip report for the canceled trip to NMFS.

The following information would be required to be submitted on the written DAS credit request form: Owner/corporation name; vessel name; permit number; U.S. Coast Guard documentation number or state registration number; vessel operator name; trip departure and landing date; date and time VMS email was sent or IVR backup line was called; and reason for canceling the trip. Forms would be required to be submitted within 30 days from the day the vessel returned to port on the canceled trip.

For DAS credits that are requested near the end of the fishing year, if approved, the credited DAS would apply to the year in which the canceled trip occurred. Credited DAS that remain unused at the end of the fishing year or are not credited until the following fishing year could be carried over into the next fishing year, provided they do not to exceed the maximum number of DAS allowed to be carried over for the fishery being credited.

This rule requires NMFS receive approval to modify currently approved information collections. Because of the Paperwork Reduction Act (PRA) requirements to which this provision is subject, it is likely that Amendment 17, if approved, would be implemented before the PRA requirements would be approved by the Office of Management and Budget (OMB). If so, in the interim, to allow the industry to utilize this provision, NMFS would accept and, if warranted, approve DAS credit requests for the current fishing year without requiring the reporting requirements specified under this provision.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has made a preliminary determination that this proposed rule is consistent with the NE Multispecies, Monkfish, and Atlantic Sea Scallop FMPs, Amendment 17, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment. Pursuant to the procedures established to implement section 6 of E.O. 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Amendment 17 would amend the NE Multispecies FMP to formally define, and facilitate the effective operation of, NOAA-sponsored, state-operated permit banks. The purpose of this amendment is to: (1) Define a NOAA-sponsored, state-operated permit bank and distinguish this type of entity from that of a groundfish sector; and (2) clarify and streamline the administrative procedures and requirements to which NOAA-sponsored, state-operated permit banks must comply in order to operate outside of the sector process (*i.e.,* be allocated ACE and provide ACE and/or DAS to approved groundfish sectors). This rule also proposes to implement a provision that is unrelated to Amendment 17, allowing NMFS to credit DAS to a vessel that cancels a fishing trip prior to setting or hauling fishing gear and the vessel, therefore, does not catch or land fish at any time on the trip.

A notice of availability (NOA) for Amendment 17 was published on in the **Federal Register** on December 12, 2011 (76 FR 77200). Public comments are being solicited on the amendment through the end of the comment period on January 23, 2012.

Public comments on the proposed rule must be received by the end of the comment period on the amendment, as published in the NOA, to be considered in the decision to approve or disapprove the amendment. All comments received by the end of the comment period on the amendment, whether specifically directed to the amendment or the proposed rule, will be considered in the approval/disapproval decision. Comments received after that date will not be considered in the approval/disapproval decision on the amendment, but may be considered in the development of the final rule. To be considered, comments must be received by close of business on the last day of the comment period; that does not mean postmarked or otherwise transmitted by that date.

Pursuant to section 605 of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–12, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that, as proposed, Amendment 17 would not have a significant economic impact on a substantial number of small entities; therefore, an Initial Regulatory Flexibility Analysis (IRFA) has not been prepared. The factual basis for this determination is explained below.

If implemented, this rule would authorize state-operated fishery permit banks to obtain and distribute DAS and ACE to vessels and sectors, and also allow NMFS to credit DAS to vessels that cancel fishing trips prior to setting or hauling fishing gear. This rule would directly impact the state fishery management agencies subject to the administrative procedures for operating permit banks and vessels with DAS credits.

The state-operated permit bank provisions have no direct impacts on any small fishing entities or businesses. There are currently four state agencies that would be directly affected by this action: The State of Maine Department of Marine Resources; the State of New Hampshire Fish and Game Department; the Commonwealth of Massachusetts Department of Marine Fisheries; and the State of Rhode Island Department of Environmental Management. Should NOAA provide additional funding to other Northeast region states for the same purpose (establishing and operating permit banks for the Northeast multispecies fishery), the number of entities directly affected by this action could expand to as many as 12 (all coastal states from North Carolina through Maine that are represented on either the Mid-Atlantic or New England Fishery Management Councils). However, none of these state agencies would be considered ''small entities'' for the purpose of the RFA, which limits consideration of government jurisdictions to those with fewer than 50,000 residents.

The DAS credit provision will affect a maximum of 1,908 small entities that have DAS allocations. The rule's impact, however, is expected to be positive for all such entities. This new provision is not a restriction, but rather provides a mechanism for small entities to regain lost DAS due to circumstances beyond their control. It would allow vessels that cancel a fishing trip before engaging in fishing activity to regain their DAS for that trip, providing another opportunity to profit from the DAS that would have otherwise been lost. However, due to the limited nature of this provision, and because this behavior is not reflective of normal fishing operations, the positive economic gain, if any, from this provision is expected to be minimal.

The RFA also requires Federal agencies to consider disproportionality and profitability to determine the significance of regulatory impacts. If

either criterion is met for a substantial number of small entities, then the action should not be certified. The criterion is not met because there are no small entities disproportionately affected relative to large entities. Further, no reductions in profit are expected for any small entities, so the profitability criterion is not met. Also, state government agencies operating on grant funding directly affected by this action, may not ''profit'' from the operation of the permit banks. Any revenue generated by the state through the operation of the permit bank (*e.g.,* through an auction bid, cost-recovery fee, landings tax, *etc.*) is considered ''program income'' under Department of Commerce regulations (15 CFR 24.25) and may only be used by the state to offset costs incurred in the administration and operation of the permit bank program, or must be returned to NOAA to defray the amount of the initial grant award. No assumptions are necessary to conduct the analyses in support of this conclusion.

As a result of the above analysis, an IRFA is not required and none has been prepared.

This proposed rule contains collection-of-information requirements subject to review and approval by OMB under the PRA. These requirements have been submitted to OMB for approval under the 0648–0202 and 0648–1212 families of forms. Under the proposed action, vessel owners would be required to provide NMFS with an initial notification as well as the submission of a DAS credit request form. The public burden for requesting a DAS credit is estimated to average 15 minutes per application, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Based upon permit type, a maximum of 1,908 permits holders could possibly apply for a DAS credit. With an average response time of 15 minutes, the total burden for applying for a DAS credit is 478 hours. This analysis was conducted assuming each permitted vessel requests one DAS credit per fishing year. Of the 1,908 permit holders, 845 are VMS vessels and the remaining 1,063 are assumed to be either IVR vessels or inactive vessels. Although the notification method depends upon the vessels reporting requirements, the associated time burdens will be similar.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to the Regional Administrator (see **ADDRESSES**), and email to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 50 CFR Part 648

Fish, Fisheries, Reporting and recordkeeping requirements.

Dated: December 16, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 648 as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In Section 648.2, revise the definition for ''Annual catch entitlement (ACE)'' and add a new definition for ''state-operated permit bank'' in alphabetical order to read as follows:

§ 648.2 Definitions

* * * * *

Annual catch entitlement (ACE), with respect to the NE multispecies fishery, means the share of the annual catch limit (ACL) for each NE multispecies stock that is allocated to an individual sector or state-operated permit bank based upon the cumulative fishing history attached to each permit participating in that sector or held by a state-operated permit bank in a given year. This share may be adjusted due to penalties for exceeding the sector's ACE for a particular stock in earlier years, or due to other violations of the FMP, including the yearly sector operations plan. When a sector's or state-operated permit bank's share of a NE multispecies stock, as determined by the fishing histories of vessels participating in that sector or permits held by a state-operated permit bank, is multiplied by the available catch, the result is the amount of ACE (live weight in pounds) that can be harvested (landings and discards) by participants in that sector or transferred by a state-operated permit bank, during a particular fishing year.

* * * * *

State-operated permit bank means a depository established and operated by a state through an agreement between NMFS and a state in which Federal grant funds have been used by the state to obtain Federal fishing vessel permits so that the fishing access privileges associated with those permits may be allocated to qualified persons and that meets the requirement of § 648.87(e).

* * * * *

3. In § 648.53, revise paragraph (f) to read as follows:

§ 648.53 Acceptable biological catch (ABC), annual catch limits (ACL), annual catch targets (ACT), DAS allocations, and individual fishing quotas (IFQ).

* * * * *

(f) *DAS credits*—(1) *Good Samaritan credit.* A limited access vessel operating under the DAS program and that spend time at sea assisting in a USCG search and rescue operation or assisting the USCG in towing a disabled vessel, and that can document the occurrence through the USCG, will not accrue DAS for the time documented.

(2) *Canceled trip DAS credit.* A limited access vessel operating under the DAS program and that ends a fishing trip prior to setting and/or hauling fishing gear for any reason may request a cancelled trip DAS credit for the trip based on the following conditions and requirements:

(i) There is no fish onboard the vessel and no fishing operations on the vessel were initiated, including setting and/or hauling fishing gear;

(ii) The owner or operator of the vessel fishing under a DAS program and required to use a VMS as specified under § 648.10(b) makes an initial trip cancelation notification from sea, at the time the trip was canceled, or at the earliest opportunity prior to crossing the demarcation line as defined at § 648.10(a). These reports are in the form of an email to NMFS Office of Law Enforcement and include at least the following information: Operator name; vessel name; vessel permit number; port where vessel will return; date trip started; estimated date/time of return to port; and a statement by the operator that no fish were onboard and no fishing activity occurred;

(iii) The owner or operator of the vessel operating under the DAS program required to use the IVR call in as specified under § 648.10(h) makes an initial trip cancelation notification to NMFS by calling the IVR back at the time the trip was canceled, or at the earliest opportunity prior to returning to port. This request must include at least the following information: Operator name; vessel name; vessel permit number; port where vessel will return; date trip started; estimated date/time of return to port; and a statement from the operator that no fish were onboard and no fishing activity occurred; and

(iv) The owner or operator of the vessel requesting a canceled trip DAS credit, in addition to the requirements in paragraphs (f)(2)(ii) and (iii) of this section, submits a written DAS credit request form to NMFS within 30 days of the vessel's return to port from the canceled trip. This application must include at least the following information: Date and time when the vessel canceled the fishing trip; date and time of trip departure and landing; operator name; owner/corporation name; permit number; hull identification number; vessel name; date and time notification requirements specified under paragraphs (f)(2)(ii) and (iii) of this section were made; reason for canceling the trip; and owner/operator signature and date; and

(v) The vessel trip report for the canceled trip as required under § 648.7(b) is submitted along with the DAS credit request form; and

(vi) For DAS credits that are requested near the end of the fishing year as defined at § 648.2, and approved by the Regional Administrator, the credited DAS apply to the fishing year in which the canceled trip occurred. Credited DAS that remain unused at the end of the fishing year or that are not credited until the following fishing year may be carried over into the next fishing year, not to exceed the maximum number of carryover DAS as specified under paragraph (d) of this section.

* * * * *

4. In § 648.82, revise paragraph (f) and reserve paragraph (m) to read as follows:

§ 648.82 Effort-control program for NE multispecies limited access vessels.

* * * * *

(f) *DAS credits*—(1) *Good Samaritan credit.* A limited access vessel fishing under the DAS program and that spends time at sea assisting in a USCG search and rescue operation or assisting the USCG in towing a disabled vessel, and that can document the occurrence through the USCG, shall not accrue DAS for the time documented.

(2) *Canceled trip DAS credit.* A limited access vessel operating under the DAS program and that ends a fishing trip prior to setting and/or hauling fishing gear for any reason may request a cancelled trip DAS credit for the trip based on the following conditions and requirements:

(i) There is no fish onboard the vessel and no fishing operations on the vessel were initiated, including setting and/or hauling fishing gear;

(ii) The owner or operator of the vessel fishing under a DAS program and required to use a VMS as specified under § 648.10(b) makes an initial trip cancelation notification from sea, at the time the trip was canceled, or at the earliest opportunity prior to crossing the demarcation line as defined at § 648.10(a). These reports are in the form of an email to NMFS Office of Law Enforcement and include at least the following information: Operator name; vessel name; vessel permit number; port where vessel will return; date trip started; estimated date/time of return to port; and a statement from the operator must that no fish were onboard and no fishing activity occurred; and

(iii) The owner or operator of the vessel operating under the DAS program required to use the IVR call in as specified under § 648.10(h) makes an initial trip cancelation notification to NMFS by calling the IVR back at the time the trip was canceled, or at the earliest opportunity prior to returning to port. This request must include at least the following information: Operator name; vessel name; vessel permit number; port where vessel will return; date trip started; estimated date/time of return to port; and a statement from the operator that no fish were onboard and no fishing activity occurred; and

(iv) The owner or operator of the vessel requesting a canceled trip DAS credit, in addition to the requirements in paragraphs (f)(2)(ii) and (iii) of this section, submits a written DAS credit request form to NMFS within 30 days of the vessel's return to port from the canceled trip. This application must include at least the following information: Date and time when the vessel canceled the fishing trip; date and time of trip departure and landing; operator name; owner/corporation name; permit number; hull identification number; vessel name; date and time notification requirements specified under paragraphs (f)(2)(ii) and (iii) of this section were made; reason for canceling the trip; and owner/operator signature and date; and

(v) The vessel trip report for the canceled trip as required under § 648.7(b) is submitted along with the DAS credit request form; and

(vi) For DAS credits that are requested near the end of the fishing year as defined at § 648.2, and approved by the Regional Administrator, the credited DAS apply to the fishing year in which the canceled trip occurred. Credited DAS that remain unused at the end of the fishing year or are not credited until the following fishing year and may be carried over into the next fishing year, not to exceed the maximum number of carryover DAS as specified under paragraph (a)(1) of this section.

(3) *DAS credit for standing by entangled whales.* A limited access vessel fishing under the DAS program that reports and stands by an entangled whale may request a DAS credit for the time spent standing by the whale. The following conditions and requirements must be met to receive this credit:

(i) At the time the vessel begins standing by the entangled whale, the vessel operator must notify the USCG and the Center for Coastal Studies, or another organization authorized by the Regional Administrator, of the location of the entangled whale and that the vessel is going to stand by the entangled whale until the arrival of an authorized response team;

(ii) Only one vessel at a time may receive credit for standing by an entangled whale. A vessel standing by an entangled whale may transfer its stand-by status to another vessel while waiting for an authorized response team to arrive, provided it notifies the USCG and the Center for Coastal Studies, or another organization authorized by the Regional Administrator, of the transfer. The vessel to which stand-by status is transferred must also notify the USCG and the Center for Coastal Studies or another organization authorized by the Regional Administrator of this transfer and comply with the conditions and restrictions of this part;

(iii) The stand-by vessel must be available to answer questions on the condition of the animal, possible species identification, severity of entanglement, *etc.,* and take photographs of the whale, if possible, regardless of the species of whale or whether the whale is alive or dead, during its stand-by status and after terminating its stand-by status. The stand-by vessel must remain on scene until the USCG or an authorized response team arrives, or the vessel is informed that an authorized response team will not arrive. If the vessel receives notice that a response team is not available, the vessel may discontinue standing-by the entangled

whale and continue fishing operations; and

(iv) To receive credit for standing by an entangled whale, a vessel must submit a written request to the Regional Administrator. This request must include at least the following information: Date and time when the vessel began its stand-by status; date of first communication with the USCG; and date and time when the vessel terminated its stand-by status. DAS credit shall not be granted for the time a vessel fishes when standing by an entangled whale. Upon a review of the request, NMFS shall consider granting the DAS credit based on information available at the time of the request, regardless of whether an authorized response team arrives on scene or a rescue is attempted. NMFS shall notify the permit holder of any DAS adjustment that is made or explain the reasons why an adjustment will not be made.

* * * * *

5. In § 648.87, add paragraph (e) to read as follows:

§ 648.87 Sector allocation.

* * * * *

(e) *State-operated permit bank.* A state-operated permit bank must meet and is subject to the following requirements and conditions:

(1) The state-operated permit bank must be initially established using a Federal grant award from NOAA through a valid Memorandum of Agreement (MOA) with NMFS and the state must maintain and comply with such MOA. The MOA must contain and the state must comply with at least the following requirements and conditions:

(i) The state may not associate a state-operated permit bank permit with a vessel engaged in any fishing or other on-the-water activities;

(ii) The state must establish the minimum eligibility criteria to determine whether a sector and its associated vessels are qualified to receive either ACE or DAS from the state-operated permit bank;

(iii) The state must identify a program contact person for the state agency administering the state-operated permit bank;

(iv) The state must provide to NMFS a list of all permits held by the state under the aegis of the state-operated permit bank, and declare which permits will be used in the coming fishing year for exclusively DAS leasing to common pool vessels and which permits are to be used exclusively for transferring ACE to sectors (including the leasing of DAS to sector vessels for the purpose of complying with the requirements of other FMPs); and

(v) The state must prepare and submit an annual performance report to NMFS, and that said performance report must include, at a minimum, the following elements:

(A) A comprehensive listing of all permits held by the state-operated permit bank, identifying whether a permit was used for ACE transfers to sectors (including DAS leases to the sector members) or DAS leases to common pool vessels, the total amount of ACE, by stock, and DAS available to the state-operated permit bank for transfers and leases to sectors and common-pool vessels;

(B) A comprehensive listing of all sectors to which ACE was transferred from the state-operated permit bank, including the amount, by stock, of ACE transferred to each sector, including a list of all vessels that harvested the ACE transferred to the sector and the amounts harvested;

(C) A comprehensive listing of all sector vessels to which DAS were leased from the state-operated permit bank, including the number of DAS leased to each sector vessel; and

(D) A comprehensive listing of all common pool vessels to which DAS were leased from the state-operated permit bank, including the number of DAS leased to each common pool vessel.

(2) *Eligibility.* If a state is issued a permit that meets sector eligibility requirements, as defined in paragraph (a)(3) of this section, such permit may be held by a state-operated permit bank.

(3) *Allocation and utilization of ACE*—(i) *Allocation of ACE.* The amount of ACE allocated to a state-operated permit bank shall be derived from the permits appropriately declared by the state to be ''ACE permits,'' pursuant to paragraph (e)(1)(i)(v) of this section, for the fishing year and allocated on a stock-by-stock basis pursuant to paragraph (b)(1)(i) of this section.

(ii) *Acquiring ACE.* Except as provided in this paragraph, a state-operated permit bank may not acquire ACE for a fishing year through a transfer from a sector. If ACE is transferred to a sector from a state-operated permit bank, NMFS may authorize the return of the unused portion of such ACE (up to the total originally transferred) to the state-operated permit bank upon written agreement by both parties. The state-operated permit bank may then redistribute the available ACE to another qualifying sector during that fishing year.

(iii) *Transferring ACE.* Subject to the terms and conditions of the state-operated permit bank's MOAs with NMFS, as well as ACE transfer restrictions described in paragraph (b)(1)(viii) of this section, a state-operated permit bank may transfer ACE, on a stock-by-stock basis, to other state-operated permit banks.

(4) *Allocation and utilization of days-at-sea*—(i) *Allocation of DAS.* The number of DAS available for a state-operated permit bank to provide to sector or common pool vessels shall be the accumulated NE Multispecies Category A DAS assigned to the fishing vessel permits held by the state and appropriately declared by the state pursuant to paragraph (e)(1)(i)(v) of this section to be either ''ACE permits'' or ''common pool permits'' for that fishing year, consistent with the terms of the state's permit bank MOA.

(ii) *Acquiring DAS.* A state-operated permit bank may not acquire DAS through a lease from a vessel permit (including permits held by other state-operated permit banks), as described in § 684.82(k). If a vessel leases DAS from a state-operated permit bank, NMFS may authorize the return of the unused portion of such DAS to the state-operated permit bank upon written agreement by both parties, provided none of the DAS had been used. The state-operated permit bank may then redistribute the available DAS to another vessel during the same fishing year.

(5) *Annual report.* A state-operated permit bank shall report to the Council annually on the performance of the state-operated permit bank. Such reports shall include at a minimum and to the extent that the information does not conflict with any regulations regarding the protection of personal and/or proprietary information, all elements listed in paragraph (e)(1)(v) of this section.

(6) *Use of additional funds.* If additional funds from any source become available to a state-operated permit bank, the state-operated permit bank may not acquire a permit that will be used in a state operated permit bank, or allocate or transfer any ACE that may be associated with new permit, with such additional funds, until the state-operated permit bank provides the Council the opportunity to review the implications of the expanded state-operated permit bank to the goals and objectives of the NE Multispecies FMP.

(7) *Violation of the terms and conditions applicable to a state-operated permit bank.* If a state or state-operated permit bank violates or fails to comply with any of the requirements

and conditions specified in this section or in the MOA referenced in paragraph (e)(1) of this section, the state or state-operated permit bank is subject to the actions and penalties specified in § 648.4(n) or the MOA.

6. In § 648.90, revise paragraph (a)(2)(iii) to read as follows:

§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.

* * * * *

(a) * * *

(2) * * *

(iii) Based on this review, the PDT shall recommend ACLs and develop options necessary to achieve the FMP goals and objectives, which may include a preferred option. The PDT must demonstrate through analyses and documentation that the options they develop are expected to meet the FMP goals and objectives. The PDT may review the performance of different user groups or fleet sectors in developing options. The range of options developed by the PDT may include any of the management measures in the FMP, including, but not limited to: ACLs, which must be based on the projected fishing mortality levels required to meet the goals and objectives outlined in the FMP for the 12 regulated species and ocean pout if able to be determined; identificating and distributing ACLs and other sub-components of the ACLs among various segments of the fishery; AMs; DAS changes; possession limits; gear restrictions; closed areas; permitting restrictions; minimum fish sizes; recreational fishing measures; describing and identifying EFH; fishing gear management measures to protect EFH; designating habitat areas of particular concern within EFH; and changing the Northeast Region SBRM, including the CV-based performance standard, the means by which discard data are collected/obtained, fishery stratification, reports, and/or industry-funded observers or observer set-aside programs. In addition, the following conditions and measures may be adjusted through future framework adjustments: Revisions to DAS measures, including DAS allocations (such as the distribution of DAS among the four categories of DAS), future uses for Category C DAS, and DAS baselines, adjustments for steaming time, *etc.;* modifications to capacity measures, such as changes to the DAS transfer or DAS leasing measures; calculation of area-specific ACLs, area management boundaries, and adoption of area-specific management measures; sector allocation requirements and specifications, including the establishment of a new sector, the disapproval of an existing sector, the allowable percent of ACL available to a sector through a sector allocation, and the calculation of PSCs; sector administration provisions, including at-sea and dockside monitoring measures; sector reporting requirements; state-operated permit bank administrative provisions; measures to implement the U.S./Canada Resource Sharing Understanding, including any specified TACs (hard or target); changes to administrative measures; additional uses for Regular B DAS; reporting requirements; the GOM Inshore Conservation and Management Stewardship Plan; adjustments to the Handgear A or B permits; gear requirements to improve selectivity, reduce bycatch, and/or reduce impacts of the fishery on EFH; SAP modifications; revisions to the ABC control rule and status determination criteria, including, but not limited to, changes in the target fishing mortality rates, minimum biomass thresholds, numerical estimates of parameter values, and the use of a proxy for biomass may be made either through a biennial adjustment or framework adjustment; and any other measures currently included in the FMP.

* * * * *

7. In § 648.92, revise paragraph (b)(4) to read as follows:

§ 648.92 Effort-control program for monkfish limited access vessels.

* * * * *

(b) * * *

(4) *DAS credits*—(i) *Good Samaritan credit.* A limited access vessels fishing under the DAS program and that spends time at sea assisting in a USCG search and rescue operation or assisting the USCG in towing a disabled vessel, and that can document the occurrence through the USCG, will not accrue DAS for the time documented

(ii) *Canceled trip DAS credit.* A limited access vessel operating under the DAS program and that ends a fishing trip prior to setting and/or hauling fishing gear for any reason may request a cancelled trip DAS credit for the trip based on the following conditions and requirements.

(A) There is no fish onboard the vessel and no fishing operations on the vessel were initiated, including setting and/or hauling fishing gear;

(B) The owner or operator of the vessel fishing under a DAS program and required to use a VMS as specified under § 648.10(b) makes an initial trip cancelation notification from sea, at the time the trip was canceled, or at the earliest opportunity prior to crossing the demarcation line as defined at § 648.10(a). These reports are in the form of an email to NMFS Office of Law Enforcement and include at least the following information: Operator name; vessel name; vessel permit number; port where vessel will return; date trip started; estimated date/time of return to port; and a statement from the operator must that no fish were onboard and no fishing activity occurred; and

(C) The owner or operator of the vessel operating under the DAS program required to use the IVR call in as specified under § 648.10(h) makes an initial trip cancelation notification to NMFS by calling the IVR back at the time the trip was canceled, or at the earliest opportunity prior to returning to port. This request must include at least the following information: Operator name; vessel name; vessel permit number; port where vessel will return; date trip started; estimated date/time of return to port; and a statement from the operator that no fish were onboard and no fishing activity occurred; and

(D) The owner or operator of the vessel requesting a canceled trip DAS credit, in addition to the requirements in paragraphs (b)(4)(ii)(B) and (C) of this section, submits a written DAS credit request form to NMFS within 30 days of the vessel's return to port from the canceled trip. This application must include at least the following information: Date and time when the vessel canceled the fishing trip; date and time of trip departure and landing; operator name; owner/corporation name; permit number; hull identification number; vessel name; date and time notification requirements specified under paragraphs (b)(4)(ii)(B) and (C) of this section were made; reason for canceling the trip; and owner/operator signature and date; and

(E) The vessel trip report for the canceled trip as required under § 648.7(b) is submitted along with the DAS credit request form; and

(F) For DAS credits that are requested near the end of the fishing year as defined at § 648.2, and approved by the Regional Administrator, the credited DAS apply to the fishing year in which the canceled trip occurred. Credited DAS that remain unused at the end of the fishing year or are not credited until the following fishing year and may be carried over into the next fishing year, not to exceed the maximum number of carryover DAS as specified under paragraph (a)(1) of this section.

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[FR Doc. 2011–32851 Filed 12–21–11; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 111207737–1735–01]

RIN 0648–XA711

Fisheries of the Exclusive Economic Zone Off Alaska; Gulf of Alaska; Proposed 2012 and 2013 Harvest Specifications for Groundfish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes 2012 and 2013 harvest specifications, apportionments, and Pacific halibut prohibited species catch limits for the groundfish fishery of the Gulf of Alaska (GOA). This action is necessary to establish harvest limits for groundfish during the 2012 and 2013 fishing years and to accomplish the goals and objectives of the Fishery Management Plan for Groundfish of the Gulf of Alaska. The intended effect of this action is to conserve and manage the groundfish resources in the GOA in accordance with the Magnuson-Stevens Fishery Conservation and Management Act.

DATES: Comments must be received by January 23, 2012.

ADDRESSES: Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, *Attn:* Ellen Sebastian. You may submit comments on this document, identified by NOAA–NMFS–2011–0228, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal at *http://www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2011–0228 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on that line.
- *Mail comments to:* P.O. Box 21668, Juneau, AK 99802–1668.
- *Fax comments to:* (907) 586–7557.
- *Hand deliver comments to the Federal Building at:* 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *http://www.regulations.gov* without change. All personal identifying information (e.g., name, address) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Electronic copies of the Alaska Groundfish Harvest Specifications Final Environmental Impact Statement (Final EIS), Supplementary Information Report (SIR) to the EIS, and the Initial Regulatory Flexibility Analysis (IRFA) prepared for this action may be obtained from *http://www.regulations.gov* or from the Alaska Region Web site at *http://alaskafisheries.noaa.gov.* The final 2010 Stock Assessment and Fishery Evaluation (SAFE) report for the groundfish resources of the GOA, dated November 2010, is available from the North Pacific Fishery Management Council (Council) at 605 West 4th Avenue, Suite 306, Anchorage, AK 99501, phone (907) 271–2809, or from the Council's Web site at *http://alaskafisheries.noaa.gov/npfmc.* The draft 2011 SAFE report for the GOA is available from the same source.

FOR FURTHER INFORMATION CONTACT: Tom Pearson, (907) 481–1780, or Obren Davis, (907) 586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the GOA groundfish fisheries in the exclusive economic zone (EEZ) of the GOA under the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP). The Council prepared the FMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801, *et seq.* Regulations governing U.S. fisheries and implementing the FMP appear at 50 CFR parts 600, 679, and 680.

These proposed harvest specifications are based in large part on the 2010 SAFE report (see **ADDRESSES**). On December 8, 2011, the Council considered the draft 2011 SAFE report as it developed its recommendations for the final 2012 and 2013 overfishing levels (OFLs), acceptable biological catch (ABC) amounts, and total allowable catch (TAC) limits. In addition to the proposed harvest specifications, this proposed rule identifies anticipated changes to the proposed harvest specifications that may result from the Council's review of the draft 2011 SAFE report.

The FMP and its implementing regulations require NMFS, after consultation with the Council, to specify the TACs for each target species, the sum of which must be within the optimum yield (OY) range of 116,000 to 800,000 metric tons (mt). Section 679.20(c)(1) further requires NMFS to publish and solicit public comment on proposed annual TACs, halibut prohibited species catch (PSC) amounts, and seasonal allowances of pollock and Pacific cod. The proposed harvest specifications in Tables 1 through 21 of this document satisfy these requirements. For 2012 and 2013, the sum of the proposed TAC amounts is 584,440 mt. Under § 679.20(c)(3), NMFS will publish the final 2012 and 2013 harvest specifications after (1) considering comments received within the comment period (see **DATES**), (2) consulting with the Council at its December 2011 meeting, and (3) considering information presented in the Final EIS (see **ADDRESSES**) and the final 2011 SAFE report prepared for the 2012 and 2013 groundfish fisheries.

Other Actions Affecting the 2012 and 2013 Harvest Specifications

Amendment 83 to the GOA FMP

NMFS prepared a final rule to implement Amendment 83 to the FMP, which was published on December 1, 2011 (76 FR 74670). Amendment 83 allocates the Pacific cod TAC in the Western and Central regulatory areas of the GOA among various gear and operational sectors, and eliminates inshore and offshore allocations in these two regulatory areas. These allocations apply to both annual and seasonal limits of Pacific cod for the applicable sectors. These apportionments are discussed in detail in a subsequent section of this proposed rule. Amendment 83 is intended to reduce competition among sectors and to support stability in the Pacific cod fishery. The final rule implementing Amendment 83 limits access to the Federal Pacific cod TAC fisheries prosecuted in State of Alaska (State) waters adjacent to the Western and Central regulatory areas in the GOA, otherwise known as parallel fisheries. Amendment 83 does not change the existing annual Pacific cod TAC allocation between the inshore and offshore processing components in the

Eastern regulatory area of the GOA. A full description of Amendment 83 is contained in the proposed rule for that action (76 FR 44700, July 26, 2011).

In the Central GOA, NMFS must allocate the Pacific cod TAC among vessels using jig gear, catcher vessels (CVs) less than 50 feet (15.24 meters) length overall using hook-and-line gear, CVs equal to or greater than 50 feet (15.24 meters) length overall using hook-and-line gear, catcher/processors (C/Ps) using hook-and-line gear, CVs using trawl gear, C/Ps using trawl gear, and vessels using pot gear. In the Western GOA, NMFS must allocate the Pacific cod TAC among vessels using jig gear, CVs using hook-and-line gear, C/Ps using hook-and-line gear, CVs using trawl gear, and vessels using pot gear. Table 3 lists the proposed amounts of these seasonal allowances. For the Pacific cod sector splits and associated management measures to become effective in the GOA at the beginning of the 2012 fishing year, NMFS intends to publish a final rule in late December 2011 to revise the final 2012 harvest specifications for Pacific cod (76 FR 11111, March 1, 2011).

If the implementation of Amendment 83 was delayed, NMFS would have managed the Pacific cod fisheries in the GOA with existing fisheries management measures. The Pacific cod TACs would have been apportioned among the inshore and offshore components in the Western and Central GOA management areas, rather than among the various fishing sectors described previously. The Pacific cod fishery would have been subject to existing fisheries management measures until the approval and implementation of the Pacific cod sector splits embodied in Amendment 83.

Halibut Prohibited Species Catch Limits Revisions

At its October 2011 meeting, the Council decided to pursue possible revisions to the GOA halibut PSC limits through an FMP amendment and an associated regulatory amendment. The alternatives being analyzed include no change from the current halibut PSC limits, and reductions of 5, 10, or 15 percent from the current halibut PSC limits apportioned between trawl gear and hook-and-line gear. Apportionment of trawl PSC limits between the deep-water and shallow-water fisheries, limits for non-exempt American Fisheries Act (AFA) CVs using trawl gear, Rockfish Program halibut PSC limits for the C/P and CV sectors, and halibut PSC limits for Amendment 80 Program vessels could be affected. The Council intends to schedule initial review and final action for the proposed amendment during the first half of 2012 for implementation in the latter half of 2012 or at the beginning of 2012, pending approval by the Secretary of Commerce (Secretary).

Pelagic Shelf Rockfish Species Group Revisions

At the October 2011 meeting, the Council recommended removing widow and yellowtail rockfish from the pelagic shelf rockfish (PSR) species group and including these two species in the ''other rockfish'' species group. The remaining species in the PSR species group, dusky rockfish, would be managed as a separate, individual species. Extensive GOA trawl survey data and other information now exist that indicate dusky rockfish does not generally share the same geographic distribution and habitat with the other two PSR species, yellowtail and widow rockfish.

There has been no directed fishing for the ''other rockfish'' species group in many years, and present catches are all taken as incidental catch in other directed fisheries. In these proposed harvest specifications, the PSR species group would consist of a single species, dusky rockfish.

NMFS intends to propose FMP and regulatory amendments to dissolve the PSR species group and substitute a description of the dusky rockfish target fishery, revise the description of the ''other rockfish'' fishery in the FMP, and substitute dusky rockfish for PSR throughout the regulations at 50 CFR part 679. The management measures associated with PSR and dusky rockfish would be identical.

Based on the 2010 SAFE report this action would reduce the proposed 2012 and 2013 OFLs and ABCs for PSR by 121 mt and 91 mt, respectively. NMFS proposes to add these amounts to the 2012 and 2013 OFLs and ABCs for ''other rockfish.'' These amounts are listed in Table 1.

Rockfish Program Renewal

The existing Central GOA Rockfish Pilot Program will expire December 31, 2011. For that reason, NMFS did not include 2012 allocations to the Rockfish Pilot Program in the final 2011 and 2012 harvest specifications for groundfish (76 FR 11111, March 1, 2011). NMFS published a proposed rule to implement Amendment 88 to the GOA FMP on August 19, 2011 (76 FR 52148). If approved by the Secretary, Amendment 88 would establish the Central GOA Rockfish Program (Rockfish Program), which would be effective from January 1, 2012, through December 31, 2021. This proposed program would allocate exclusive harvest privileges to License Limitation Program (LLP) license holders who used trawl gear to target Pacific ocean perch, PSR, and northern rockfish during specific qualifying years. These are the three primary rockfish species in the Rockfish Program.

The incidentally harvested groundfish taken in the primary rockfish fisheries are allocated under the proposed Rockfish Program as secondary species. The secondary species are Pacific cod, rougheye rockfish, shortraker rockfish, thornyhead rockfish, and sablefish. Also, the proposed Rockfish Program would allocate a portion of the halibut PSC limit from the third season deep-water species fishery allowance for the GOA trawl fisheries to Rockfish Program participants. The proposed Rockfish Program would allocate a fixed amount of the trawl PSC allowance to the Rockfish Program: 117 mt to the CV sector and 74 mt to the C/P sector. It also would permanently retire 27 mt of the halibut PSC limit from being re-allocated to any fishery.

The proposed Rockfish Program would continue to assign quota share and cooperative quota to participants for primary and secondary species, allow a participant holding an LLP license with rockfish quota share to form a rockfish cooperative with other persons, and allow holders of C/P LLP licenses to opt-out of participating in a rockfish cooperative on an annual basis. An entry level fishery for rockfish primary species also would continue for vessels using longline gear. Additionally, the proposed Rockfish Program continues to establish sideboard limits to limit the ability of harvesters operating under the Rockfish Program from increasing their participation in other, non-Rockfish Program fisheries. This proposed rule includes those elements of the proposed Rockfish Program which could be included in the final 2012 and 2013 harvest specifications for the GOA.

If Amendment 88 is not implemented or the implementation of the Rockfish Program is delayed, the Central GOA rockfish fisheries would be managed under applicable LLP groundfish regulations. These regulations govern the general groundfish fisheries in the GOA, and include permitting, recordkeeping, and other management requirements. Rockfish cooperatives would not be permitted to form, and NMFS would resume the management of the primary rockfish species allocated under the Rockfish Program, rather than having cooperatives be responsible for managing their cooperative quota. NMFS does not consider it likely that

the implementation of Amendment 88 will be delayed. If implementation were delayed into early 2012, the primary species managed under the Rockfish Program could still be allocated and caught in 2012, as these rockfish fisheries typically commence in the summer months.

Other Actions Affecting Prohibited Species Catch (PSC) in the GOA

NMFS has submitted Amendment 93 to the FMP for review by the Secretary. NMFS has published a proposed rule to implement Amendment 93 (76 FR 77757, December 14, 2011). If approved, Amendment 93 would establish an annual PSC limit of 25,000 Chinook salmon for the pollock fisheries in the Central and Western GOA, increase observer coverage requirements for vessels under 60 feet length overall until superseded by pending changes to the North Pacific Groundfish Observer Program, and require full retention of all salmon taken in the Central and Western GOA pollock fisheries until they can be counted and sampled. The annual 25,000 Chinook salmon PSC limit would be apportioned between the Western GOA (6,684 salmon) and the Central GOA (18,316 salmon).

If Amendment 93 is approved and implemented in 2012 prior to the start of pollock C season on August 25, 2012, NMFS could establish a Chinook salmon PSC limit in the C and D pollock seasons of 5,598 fish in the Western GOA and 8,929 fish in the Central GOA. If the annual Chinook salmon PSC limits are reached in either reporting area, directed fishing for pollock in the applicable reporting area would be closed for the remainder of the fishing year. However, if the implementing rulemaking is not completed prior to the start of the pollock C season, then NMFS would delay the establishment of Chinook salmon PSC limits until 2013. Until the approval and implementation of Amendment 93 occurs, there are no applicable Chinook salmon PSC limits in effect in the GOA.

Proposed ABC and TAC Specifications

In October 2011, the Council, its Scientific and Statistical Committee (SSC), and its Advisory Panel (AP) reviewed most recent biological and harvest information about the condition of groundfish stocks in the GOA. This information was compiled by the Plan Team and presented in the final 2010 SAFE report for the GOA groundfish fisheries, dated November 2010 (see **ADDRESSES**). The amounts proposed for the 2012 and 2013 ABCs are based on the 2010 SAFE report, with the exception of the PSR and ''other rockfish'' species group, as discussed previously in the preamble. The AP and Council recommended that the proposed 2012 and 2013 TACs be set equal to ABCs for all species and species groups. The proposed ABCs and TACs could be changed in the final harvest specifications depending on the most recent scientific information contained in the final 2011 SAFE report. The SAFE report contains a review of the latest scientific analyses and estimates of each species' biomass and other biological parameters, as well as summaries of the available information on the GOA ecosystem and the economic condition of the groundfish fisheries off Alaska. From these data and analyses, the Plan Team estimates an OFL and ABC for each species or species group.

In November 2011, the Plan Team updated the 2010 SAFE report to include new information collected during 2011, such as NMFS stock surveys, revised stock assessments, and catch data. The Plan Team compiled this information and produced the draft 2011 SAFE report for presentation at the December 2011 Council meeting. The Council will consider information in the draft 2011 SAFE report, recommendations from the November 2011 Plan Team meeting and December 2011 SSC and AP meetings, public testimony, and relevant written public comments in making its recommendations for the final 2012 and 2013 harvest specifications. Pursuant to section 3.2.3.4.1 of the FMP, the Council could recommend adjusting the TACs if ''warranted on the basis of bycatch considerations, management uncertainty, or socioeconomic considerations, or if required in order to cause the sum of the TACs to fall within the OY range.''

In previous years the largest changes from the proposed to the final harvest specifications have been based on the most recent NMFS stock surveys, which provide updated estimates of stock biomass and spatial distribution, and changes to the models used for making stock assessments. NMFS scientists presented updated and new survey results, changes to assessment models, and accompanying stock estimates at the September Plan Team meeting, and the SSC reviewed this information at the October 2011 Council meeting. In November 2011, the Plan Team considered updated stock assessments for groundfish, which were included in the draft 2011 SAFE report.

If the draft 2011 SAFE report indicates that the stock biomass trend is increasing for a species, then the final 2012 and 2013 harvest specifications for that species may reflect an increase from the proposed harvest specifications. The draft 2011 SAFE reports indicate that the biomass trend for pollock, Pacific cod, sablefish, shortraker rockfish, big skates, and sculpins may be increasing. Conversely, if the draft 2011 SAFE report indicates that the stock biomass trend is decreasing for a species, then the final 2012 and 2013 harvest specifications may reflect a decrease from the proposed harvest specifications. The draft 2011 SAFE reports indicate that the biomass trend for shallow-water flatfish, deep-water flatfish, flathead sole, northern rockfish, rougheye rockfish, demersal shelf rockfish, pelagic shelf rockfish (dusky rockfish), thornyhead rockfish, longnose skates, and other skates may be decreasing. The biomass trends for species not listed above are relatively level and stable or cannot be determined.

The proposed ABCs and TACs are based on the best available biological and socioeconomic information, including projected biomass trends, information on assumed distribution of stock biomass, and revised methods used to calculate stock biomass. The FMP specifies the formulas, or tiers, to be used to compute ABCs and OFLs. The formulas applicable to a particular stock or stock complex are determined by the level of reliable information available to the fisheries scientists. This information is categorized into a successive series of six tiers to define OFL and ABC amounts, with tier one representing the highest level of information quality available and tier six representing the lowest level of information quality available.

The SSC adopted the proposed 2012 and 2013 OFLs and ABCs recommended by the Plan Team for all groundfish species. The Council adopted the SSC's OFL and ABC recommendations and the AP's TAC recommendations. These amounts are unchanged from the final 2012 harvest specifications published in the **Federal Register** on March 1, 2011 (76 FR 11111), with the exception of certain species categories that are discussed in the following section.

Comparison of Final 2011 TAC Amounts With Proposed 2012 and 2013 ABC and TAC Amounts

The proposed 2012 and 2013 ABCs for pollock, deep-water flatfish, flathead sole, and ''other rockfish'' are higher than the final harvest specifications established for 2011. In contrast, the proposed 2012 and 2013 ABCs for Pacific cod, sablefish, rex sole, arrowtooth flounder, Pacific ocean perch, northern rockfish, and pelagic

shelf rockfish are lower than those established for 2011. These differences reflect the stock projections and trends made for these species during the final GOA harvest specifications process in November 2010. For the remaining target species, the Council recommended and NMFS proposes ABC levels that are unchanged from 2011. More information on these changes is included in the final 2010 SAFE report (see **ADDRESSES**). The most recent stock assessment information will be included in the 2011 SAFE report, which will be available for Council approval at its December 2011 meeting.

In the GOA, the total proposed 2012 and 2013 TAC amounts are 584,440 mt, an increase of 84 percent from the 2011 TAC total of 318,288 mt. As discussed below, the TAC increases proposed for 2012 and 2013 are due almost entirely to increases for flatfish species, ''other rockfish'', and Atka mackerel. The following table compares the final 2011 TACs to the proposed 2012 and 2013 TACs.

COMPARISON OF FINAL 2011 AND PROPOSED 2012 AND 2013 TOTAL ALLOWABLE CATCH (TAC) AMOUNTS IN THE GULF OF ALASKA

[Values are in metric tons]

Species	Final 2011 TACs	Proposed 2012 and 2013 TACS
Pollock	96,215	121,649
Pacific cod	65,100	58,650
Sablefish	11,290	10,345
Shallow water flatfish	20,062	56,242
Deep-water flatfish	6,305	6,486
Rex sole	9,565	9,396
Arrowtooth flounder	43,000	211,027
Flathead sole	10,587	50,591
Pacific ocean perch	16,997	16,187
Northern rockfish	4,854	4,614
Shortraker rockfish	914	914
Other rockfish	1,195	3,842
Pelagic shelf rockfish	4,754	4,347
Rougheye rockfish	1,312	1,312
Demersal shelf rockfish	300	300
Thornyhead rockfish	1,770	1,770
Atka mackerel	2,000	4,700
Big skates	3,328	3,328
Longnose skates	2,852	2,852
Other skates	2,093	2,093
Squids	1,148	1,148
Sharks	6,197	6,197
Octopuses	954	954
Sculpins	5,496	5,496
Total	318,288	584,440

Specification and Apportionment of TAC Amounts

The Council recommended proposed 2012 and 2013 TACs that are equal to proposed ABCs for all species and species groups, with the exception of Pacific cod. The Pacific cod TACs are set to accommodate the State's Guideline Harvest Levels (GHL) for Pacific cod so that the ABCs are not exceeded. The Council's rationale for increases for flatfish species, ''other rockfish'', and Atka mackerel TACs was that the sum of the proposed TACs is well below the OY limit of 800,000 mt. In addition, the Council noted that NMFS prohibits retention of a species when its TAC is reached, even when ABC levels are significantly above TAC levels. Public testimony indicated that the 2011 harvest of some species, such as arrowtooth flounder in the Central regulatory area of the GOA, were expected to close for directed fishing given the relatively small 2011 TAC compared to the ABC. Therefore, an increase in these TACs could help prevent regulatory discards. Testifiers also noted that several of the current 2012 flatfish ABCs are significantly higher than their respective TACs, which means that the TACs for these flatfish species could be increased under the OY and the buffer available between TACs and ABCs.

NMFS does not anticipate any difficulty managing the increased TACs for flatfish, ''other rockfish,'' and Atka mackerel within bounds and constraints of existing fisheries management measures applicable to these GOA fisheries. NMFS believes that harvest of most GOA flatfish species will continue to be constrained by halibut PSC limits and that 2012 harvests of these species will approximate 2011 harvests. In addition, per its standard management practices, NMFS will continue to assess whether the TAC established for each of these species will support a directed fishery. If so, NMFS will then calculate a directed fishing allowance (DFA) for a given species that is below the TAC. The difference between TAC and the DFA is the amount that is available for incidental catch of a particular species in other groundfish fisheries. At its October 2011 meeting, the Council expressed an interest in reducing the final 2012 and 2013 TACs for flatfish, ''other rockfish,'' and Atka mackerel to amounts consistent with the November 2011 SAFE report and anticipated future harvests. This issue may be addressed at the Council's December 2011 meeting.

The ABC for the pollock stock in the combined Western, Central, and West Yakutat Regulatory Areas (W/C/WYK) has been adjusted to reflect the GHL established by the State for the Prince William Sound (PWS) pollock fishery since its inception in 1995. Genetic studies revealed that the pollock in PWS was not a separate stock from the combined W/C/WYK population. Accordingly, the Council recommended decreasing the W/C/WYK pollock ABC

to account for the State's PWS GHL. For 2012, the PWS GHL for pollock is 2,7700 mt, per the recommendation of State of Alaska fisheries managers.

The apportionment of annual pollock TAC among the Western and Central Regulatory Areas of the GOA reflects the seasonal biomass distribution and is discussed in greater detail below. The annual pollock TAC in the Western and Central Regulatory Areas of the GOA is apportioned among Statistical Areas 610, 620, and 630, and divided equally among each of the following four seasons: The A season (January 20 through March 10), the B season (March 10 through May 31), the C season (August 25 through October 1), and the D season (October 1 through November 1) (50 CFR 679.23(d)(2)(i) through (iv), and 679.20(a)(5)(iv)(A) and (B)). These amounts are listed in Table 2.

The AP, SSC, and Council recommended apportionment of the ABC for Pacific cod in the GOA among regulatory areas based on the three most recent NMFS summer trawl surveys. The proposed 2012 and 2013 Pacific cod TACs are affected by the State waters fishery for Pacific cod in the Western and Central Regulatory Areas, as well as in PWS. The Plan Team, SSC, AP, and Council recommended that the sum of all State and Federal water Pacific cod removals from the GOA not exceed ABC recommendations. Accordingly, the Council recommended reducing the proposed 2012 and 2013 Pacific cod TACs from the proposed ABCs for the Eastern, Central, and Western Regulatory Areas to account for State GHLs. Therefore, the proposed 2012 and 2013 Pacific cod TACs are less than the proposed ABCs by the following amounts: (1) Eastern GOA, 587 mt; (2) Central GOA, 12,121 mt; and (3) Western GOA, 6,842 mt. These amounts reflect the sum of the State's 2012 and 2013 GHLs in these areas, which are 25 percent of the Eastern, Central, and Western GOA proposed ABCs. These are the same percentage amounts used to apportion the Pacific cod ABCs to State waters GHLs that were used in 2011.

NMFS also is proposing seasonal apportionments of the annual Pacific cod TACs in the Western and Central Regulatory Areas. Sixty percent of the annual TAC is apportioned to the A season for hook-and-line, pot, or jig gear from January 1 through June 10, and for trawl gear from January 20 through June 10. Forty percent of the annual TAC is apportioned to the B season for hook-and-line, pot, or jig gear from September 1 through December 31, and for trawl gear from September 1 through November 1 (§§ 679.23(d)(3) and 679.20(a)(12)).

The Council's recommendation for sablefish area apportionments also takes into account the prohibition on the use of trawl gear in the SEO District of the Eastern Regulatory Area and makes available five percent of the combined Eastern Regulatory Area TACs to trawl gear for use as incidental catch in other directed groundfish fisheries in the WYK District (§ 679.20(a)(4)(i)). These amounts are listed in Tables 4 and 5.

The sum of the proposed TACs for all GOA groundfish is 584,440 mt for 2012 and 2013, which is within the OY range specified by the FMP. The sums of the proposed 2012 and 2013 TACs are higher than the final 2012 TACs currently specified for the GOA groundfish fisheries (76 FR 11111, March 1, 2011). The proposed 2012 and 2013 TACs are higher for shallow water flatfish, arrowtooth flounder, flathead sole, other rockfish, and Atka mackerel. The proposed 2012 and 2013 TACs are lower for rex sole and pelagic shelf rockfish, as a result of NMFS incorrectly specifying the TAC for rex sole in the SEO District and the assignment of widow and yellowtail rockfish from the pelagic shelf rockfish species group to the ''other rockfish'' species group.

In the final 2012 harvest specifications (76 FR 11111, March 1, 2011), NMFS incorrectly specified the 2012 ABC and TAC for rex sole in the Southeast Outside (SEO) District as 889 mt. Based on the 2010 SAFE report and the Council's recommendation for the 2012 rex sole TACs, this action proposes to correct this amount to 869 mt. For 2012 and 2013, the Council recommended and NMFS proposes the ABCs and TACs listed in Table 1. The proposed ABCs reflect harvest amounts that are less than the specified overfishing levels. The sum of the proposed 2012 and 2013 ABCs for all assessed groundfish is 603,990 mt, which is higher than the final 2011 ABC total of 590,121 mt (76 FR 11111, March 1, 2011).

Table 1 lists the proposed 2012 and 2013 OFLs, ABCs, TACs, and area apportionments of groundfish in the GOA. These amounts are consistent with the biological condition of groundfish stocks as described in the 2010 SAFE report, and adjusted for other biological and socioeconomic considerations, including maintaining the total TAC within the required OY range. These proposed amounts are subject to change pending the completion of the draft 2011 SAFE report and the Council's recommendations for the final 2012 and 2013 harvest specifications during its December 2011 meeting.

TABLE 1—PROPOSED 2012 AND 2013 ABCS, TACS, AND OFLS OF GROUNDFISH FOR THE WESTERN/CENTRAL/WEST YAKUTAT (W/C/WYK), WESTERN (W), CENTRAL (C), EASTERN (E) REGULATORY AREAS, AND IN THE WEST YAKUTAT (WYK), SOUTHEAST OUTSIDE (SEO), AND GULFWIDE (GW) DISTRICTS OF THE GULF OF ALASKA

[Values are rounded to the nearest metric ton]

Species	Area [1]	OFL	ABC	TAC
Pollock [2]	Shumagin (610)	n/a	34,932	34,932
	Chirikof (620)	n/a	48,293	48,293
	Kodiak (630)	n/a	26,155	26,155
	WYK (640)	n/a	3,024	3,024
	W/C/WYK (subtotal)	151,030	112,404	112,404
	SEO (650)	12,326	9,245	9,245
	Total	163,356	121,649	121,649
Pacific cod [3]	W	n/a	27,370	20,528
	C	n/a	48,484	36,362
	E	n/a	2,346	1,760
	Total	92,300	78,200	58,650
Sablefish [4]	W	n/a	1,484	1,484
	C	n/a	4,343	4,343
	WYK	n/a	1,818	1,818

TABLE 1—PROPOSED 2012 AND 2013 ABCS, TACS, AND OFLS OF GROUNDFISH FOR THE WESTERN/CENTRAL/WEST YAKUTAT (W/C/WYK), WESTERN (W), CENTRAL (C), EASTERN (E) REGULATORY AREAS, AND IN THE WEST YAKUTAT (WYK), SOUTHEAST OUTSIDE (SEO), AND GULFWIDE (GW) DISTRICTS OF THE GULF OF ALASKA—Continued

[Values are rounded to the nearest metric ton]

Species	Area [1]	OFL	ABC	TAC
	SEO	n/a	2,700	2,700
	E (WYK and SEO) (subtotal)	n/a	4,518	4,518
Shallow-water flatfish [6]	Total	12,232	10,345	10,345
	W	n/a	23,681	23,681
	C	n/a	29,999	29,999
	WYK	n/a	1,228	1,228
	SEO	n/a	1,334	1,334
Deep-water flatfish [5]	Total	67,768	56,242	56,242
	W	n/a	541	541
	C	n/a	3,004	3,004
	WYK	n/a	2,144	2,144
	SEO	n/a	797	797
Rex sole	Total	8,046	6,486	6,486
	W	n/a	1,490	1,490
	C	n/a	6,184	6,184
	WYK	n/a	853	853
	SEO	n/a	869	869
Arrowtooth flounder	Total	12,279	9,396	9,396
	W	n/a	33,975	33,975
	C	n/a	143,119	143,119
	WYK	n/a	22,327	22,327
	SEO	n/a	11,606	11,606
Flathead sole	Total	248,576	211,027	211,027
	W	n/a	17,960	17,960
	C	n/a	28,938	28,938
	WYK	n/a	2,125	2,125
	SEO	n/a	1,568	1,568
Pacific ocean perch [7]	Total	63,202	50,591	50,591
	W	3,068	2,665	2,665
	C	11,379	9,884	9,884
	WYK	n/a	1,845	1,845
	SEO	n/a	1,793	1,793
	E (WYK and SEO) (subtotal)	4,188	3,638	3,638
Northern rockfish [8,9]	Total	18,635	16,187	16,187
	W	n/a	2,446	2,446
	C	n/a	2,168	2,168
	E	n/a	0	0
Shortraker rockfish [11]	Total	5,498	4,614	4,614
	W	n/a	134	134
	C	n/a	325	325
	E	n/a	455	455
Other rockfish [9,12]	Total	1,219	914	914
	W	n/a	224	224
	C	n/a	566	566
	WYK	n/a	283	283
	SEO	n/a	2,769	2,769
Pelagic shelf rockfish [13]	Total	5,002	3,842	3,842
	W	n/a	558	558
	C	n/a	2,791	2,791
	WYK	n/a	372	372
	SEO	n/a	626	626
Rougheye rockfish [10]	Total	5,266	4,347	4,347
	W	n/a	81	81
	C	n/a	868	868
	E	n/a	363	363
Demersal shelf rockfish [14]	Total	1,579	1,312	1,312
	SEO	479	300	300

TABLE 1—PROPOSED 2012 AND 2013 ABCS, TACS, AND OFLS OF GROUNDFISH FOR THE WESTERN/CENTRAL/WEST YAKUTAT (W/C/WYK), WESTERN (W), CENTRAL (C), EASTERN (E) REGULATORY AREAS, AND IN THE WEST YAKUTAT (WYK), SOUTHEAST OUTSIDE (SEO), AND GULFWIDE (GW) DISTRICTS OF THE GULF OF ALASKA—Continued

[Values are rounded to the nearest metric ton]

Species	Area [1]	OFL	ABC	TAC
Thornyhead rockfish	W	n/a	425	425
	C	n/a	637	637
	E	n/a	708	708
	Total	2,360	1,770	1,770
Atka mackerel	GW	6,200	4,700	4,700
Big skates [15]	W	n/a	598	598
	C	n/a	2,049	2,049
	E	n/a	681	681
	Total	4,438	3,328	3,328
Longnose skates [16]	W	n/a	81	81
	C	n/a	2,009	2,009
	E	n/a	762	762
	Total	3,803	2,852	2,852
Other skates [17]	GW	2,791	2,093	2,093
Squids	GW	1,530	1,148	1,148
Sharks	GW	8,263	6,197	6,197
Octopus	GW	1,272	954	954
Sculpins	GW	7,328	5,496	5,496
Total		743,422	603,990	584,440

[1] Regulatory areas and districts are defined at § 679.2. (W=Western Gulf of Alaska; C=Central Gulf of Alaska; E=Eastern Gulf of Alaska; WYK=West Yakutat District; SEO=Southeast Outside District; GW=Gulf-wide).

[2] Pollock is apportioned in the Western/Central Regulatory Areas among three statistical areas. Table 2 lists the proposed 2012 and 2013 seasonal apportionments. In the West Yakutat and Southeast Outside Districts of the Eastern Regulatory Area, pollock is not divided into seasonal allowances.

[3] The annual Pacific cod TAC is apportioned 60% to the A season and 40% to the B season in the Western and Central Regulatory Areas of the GOA. Pacific cod is allocated 90% for processing by the inshore component and 10% for processing by the offshore component. Table 3 lists the proposed 2012 and 2013 Pacific cod seasonal apportionments.

[4] Sablefish is allocated to hook-and-line and trawl gear in 2012 and trawl gear in 2013. Tables 4 and 5 list the proposed 2012 and 2013 allocations of sablefish TACs.

[5] "Deep-water flatfish" means Dover sole, Greenland turbot, Kamchatka flounder, and deepsea sole.

[6] "Shallow-water flatfish" means flatfish not including "deep-water flatfish," flathead sole, rex sole, or arrowtooth flounder.

[7] "Pacific ocean perch" means *Sebastes alutus.*

[8] "Northern rockfish" means *Sebastes polyspinous.* For management purposes the 3 mt apportionment of ABC to the WYK District of the Eastern Gulf of Alaska has been included in the slope rockfish species group.

[9] "Slope rockfish" means *Sebastes aurora* (aurora), *S. melanostomus* (blackgill), *S. paucispinis* (bocaccio), *S. goodei* (chilipepper), *S. crameri* (darkblotch), *S. elongatus* (greenstriped), *S. variegatus* (harlequin), *S. wilsoni* (pygmy), *S. babcocki* (redbanded), *S. proriger* (redstripe), *S. zacentrus* (sharpchin), *S. jordani* (shortbelly), *S. brevispinis* (silvergrey), *S. diploproa* (splitnose), *S. saxicola* (stripetail), *S. miniatus* (vermilion), *S. reedi* (yellowmouth), *S. entomelas* (widow), and *S. flavidus* (yellowtail). In the Eastern GOA only, slope rockfish also includes northern rockfish, *S. polyspinous.*

[10] "Rougheye rockfish" means *Sebastes aleutianus* (rougheye) and *Sebastes melanostictus* (blackspotted).

[11] "Shortraker rockfish" means *Sebastes borealis.*

[12] "Other rockfish" in the Western and Central Regulatory Areas and in the West Yakutat District means slope rockfish and demersal shelf rockfish. The "other rockfish" species group in the SEO District means slope rockfish.

[13] "Pelagic shelf rockfish" means, *Sebastes variabilis* (dusky).

[14] "Demersal shelf rockfish" means *Sebastes pinniger* (canary), *S. nebulosus* (china), *S. caurinus* (copper), *S. maliger* (quillback), *S. helvomaculatus* (rosethorn), *S. nigrocinctus* (tiger), and *S. ruberrimus* (yelloweye).

[15] "Big skate" means *Raja binoculata.*

[16] "Longnose skate" means *Raja rhina.*

[17] "Other skates" means *Bathyraja* spp.

Proposed Apportionment of Reserves

Section 679.20(b)(2) requires NMFS to set aside 20 percent of each TAC for pollock, Pacific cod, flatfish, skates, sharks, squids, sculpins, and octopuses in reserves for possible apportionment at a later date during the fishing year. In 2011, NMFS apportioned all of the reserves in the final harvest specifications. For 2012 and 2013, NMFS proposes reapportionment of all the reserves for pollock, Pacific cod, flatfish, skates, sharks, squids, sculpins, and octopuses. Table 1 reflects the apportionment of reserve amounts for these species and species groups. Each proposed TAC for the above mentioned species categories contains the full TAC recommended by the Council, since no reserve was created from the relevant species categories.

Proposed Apportionments of Pollock TAC Among Seasons and Regulatory Areas, and Allocations for Processing by Inshore and Offshore Components

In the GOA, pollock is apportioned by season and area, and is further allocated between inshore and offshore processing components. Pursuant to § 679.20(a)(5)(iv)(B), the annual pollock TAC specified for the Western and Central Regulatory Areas of the GOA is apportioned into four equal seasonal allowances of 25 percent. As established

by § 679.23(d)(2)(i) through (iv), the A, B, C, and D season allowances are available from January 20 through March 10, March 10 through May 31, August 25 through October 1, and October 1 through November 1, respectively.

Pollock TACs in the Western and Central Regulatory Areas of the GOA are apportioned among Statistical Areas 610, 620, and 630, pursuant to § 679.20(a)(5)(iv)(A). In the A and B seasons, the apportionments are in proportion to the distribution of pollock biomass based on the four most recent NMFS winter surveys. In the C and D seasons, the apportionments are in proportion to the distribution of pollock biomass based on the four most recent NMFS summer surveys. For 2012 and 2013, the Council recommends, and NMFS proposes, averaging the winter and summer distribution of pollock in the Central Regulatory Area for the A season. The average is intended to reflect the distribution of pollock and the performance of the fishery in the area during the A season for the 2012 and 2013 fishing years. During the A season, the apportionment is based on an adjusted estimate of the relative distribution of pollock biomass of approximately 23 percent, 56 percent, and 21 percent in Statistical Areas 610, 620, and 630, respectively. During the B season, the apportionment is based on the relative distribution of pollock biomass at 23 percent, 67 percent, and 10 percent in Statistical Areas 610, 620, and 630, respectively. During the C and D seasons, the apportionment is based on the relative distribution of pollock biomass at 41 percent, 27 percent, and 32 percent in Statistical Areas 610, 620, and 630, respectively.

Within any fishing year, the amount by which a seasonal allowance is underharvested or overharvested may be added to, or subtracted from, subsequent seasonal allowances in a manner to be determined by the Regional Administrator (§ 679.20(a)(5)(iv)(B)). The rollover amount is limited to 20 percent of the unharvested seasonal apportionment for the statistical area. Any unharvested pollock above the 20 percent limit could be further distributed to the other statistical areas, in proportion to the estimated biomass in the subsequent season in those statistical areas (§ 679.20(a)(5)(iv)(B)). The proposed pollock TACs in the WYK District of 3,024 mt and SEO District of 9,245 mt for 2012 and 2013 are not allocated by season.

Section 679.20(a)(6)(i) requires the allocation of 100 percent of the pollock TAC in all regulatory areas and all seasonal allowances to vessels catching pollock for processing by the inshore component after subtraction of amounts that are projected by the Regional Administrator to be caught by, or delivered to, the offshore component incidental to directed fishing for other groundfish species. Thus, the amount of pollock available for harvest by vessels harvesting pollock for processing by the offshore component is that amount that will be taken as incidental catch during directed fishing for groundfish species other than pollock, up to the maximum retainable amounts allowed under § 679.20(e) and (f). At this time, these incidental catch amounts of pollock are unknown and will be determined during the fishing year as NMFS monitors the fishing activities in the offshore component.

Table 2 lists the proposed 2012 and 2013 seasonal biomass distribution of pollock in the Western and Central Regulatory Areas, area apportionments, and seasonal allowances. The amounts of pollock for processing by the inshore and offshore components are not shown.

TABLE 2—PROPOSED 2012 AND 2013 DISTRIBUTION OF POLLOCK IN THE CENTRAL AND WESTERN REGULATORY AREAS OF THE GULF OF ALASKA; SEASONAL BIOMASS DISTRIBUTION, AREA APPORTIONMENTS, AND SEASONAL ALLOWANCES OF ANNUAL TAC [1]

[Values are rounded to the nearest metric ton]

Season [2]	Shumagin (Area 610)		Chirikof (Area 620)		Kodiak (Area 630)		Total
A (Jan 20–Mar 10)	6,186	(22.62%)	15,374	(56.22%)	5,783	(21.15%)	27,345
B (Mar 10–May 31)	6,185	(22.62%)	18,394	(67.26%)	2,765	(10.11%)	27,345
C (Aug 25–Oct 1)	11,280	(41.25%)	7,262	(26.55%)	8,803	(32.19%)	27,345
D (Oct 1–Nov 1)	11,280	(41.25%)	7,262	(26.55%)	8,803	(32.19%)	27,345
Annual Total [3]	34,932	.....	48,293	.....	26,155	.....	109,380

[1] Area apportionments and seasonal allowances may not total precisely due to rounding.

[2] As established by § 679.23(d)(2)(i) through (iv), the A, B, C, and D season allowances are available from January 20 to March 10, March 10 to May 31, August 25 to October 1, and October 1 to November 1, respectively. The amounts of pollock for processing by the inshore and offshore components are not shown in this table.

[3] The WYK and SEO District pollock TACs are not allocated by season and are not included in the total pollock TACs shown in this table.

Proposed Annual and Seasonal Apportionments of Pacific Cod

As previously discussed in the preamble, NMFS intends to publish a final rule to implement Amendment 83 to the FMP, with effectiveness anticipated in January 2012. Amendment 83 allocates the Pacific cod TACs in the Western and Central regulatory areas of the GOA among gear and operational sectors. This rule also limits access to the Federal Pacific cod TAC fisheries prosecuted in State waters, known as parallel fisheries, adjacent to the Western and Central GOA. Per these sector allocations, NMFS proposes allocations of the annual Pacific cod TAC between the inshore and offshore components in the Eastern GOA; seasonally between vessels using jig gear, CVs less than 50 feet in length overall using hook-and-line gear, CVs equal to or greater than 50 in length overall using hook-and-line gear, C/Ps using hook-and-line gear, CVs using trawl gear, C/Ps using trawl gear, and vessels using pot gear in the Central GOA; and seasonally between vessels using jig gear, CVs using hook-and-line gear, C/Ps using hook-and-line gear, CVs using trawl gear, and vessels using pot gear in the Western GOA. The overall seasonal apportionments in the Western and Central GOA are 60 percent of the annual TAC to the A season and 40 percent of the annual TAC to the B season. Absent implementation of Amendment 83 in 2011, NMFS would continue to apportion Pacific cod in the Western and Central management areas to the inshore and offshore components pursuant to § 679.20(a)(6)(ii), rather than to specific sectors.

Under § 679.20(a)(12)(ii), any overage or underage of the Pacific cod allowance

from the A season will be subtracted from, or added to, the subsequent B season allowance. In addition, per the measures that will be implemented by Amendment 83 to the FMP, any portion of the hook-and-line, trawl, pot, or jig sector allocations that are determined by NMFS as likely to go unharvested by a sector may be reapportioned to other sectors for harvest during the remainder of the fishery year.

NMFS proposes to calculate the 2012 and 2013 Pacific cod TAC allocations in the following manner, according to the anticipated management changes that will be implemented by Amendment 83. First, the jig sector would receive 1.5 percent of the annual Pacific cod TAC in the Western GOA and 1.0 percent of the annual Pacific cod TAC in the Central GOA. The jig sector annual allocation would further be apportioned between the A (60 percent) and B (40 percent) seasons. Should the jig sector harvest 90 percent or more of its allocation in an area during the fishing year, then this allocation would increase by one percent in the subsequent fishing year, up to six percent of the annual TAC. NMFS proposes to allocate the remainder of the annual Pacific cod TAC based on gear type, operation type, and vessel length overall in the Western and Central GOA. Table 3 lists the seasonal apportionments and allocations of the proposed 2012 and 2013 Pacific cod TACs.

TABLE 3—PROPOSED 2012 AND 2013 SEASONAL APPORTIONMENTS AND ALLOCATIONS OF PACIFIC COD TAC AMOUNTS TO GEAR TYPES, OPERATIONAL TYPES, AND VESSEL LENGTH OVERALL IN THE WESTERN AND CENTRAL GULF OF ALASKA AND ALLOCATIONS FOR PROCESSING BY THE INSHORE AND OFFSHORE COMPONENTS IN THE EASTERN GULF OF ALASKA

[Values are rounded to the nearest metric ton]

Regulatory area and sector	Annual allocation (mt)	A Season		B Season	
		Sector % of annual non-jig TAC	Seasonal allowances (mt)	Sector % of annual non-jig TAC	Seasonal allowances (mt)
Western GOA					
Jig (1.5% of TAC)	308	N/A	185	N/A	123
Hook-and-line CV	283	0.70	142	0.70	142
Hook-and-line C/P	4,004	10.90	2,204	8.90	1,800
Trawl CV	7,764	27.70	5,601	10.70	2,164
Trawl C/P	485	0.90	182	1.50	303
All Pot CV and Pot C/P	7,684	19.80	4,004	18.20	3,680
Total	20,528	60.00	12,317	40.00	8,211
Central GOA					
Jig (1.0% of TAC)	364	N/A	218	N/A	146
Hook-and-line < 50 CV	5,257	9.32	3,354	5.29	1,903
Hook-and-line ≥ 50 CV	2,414	5.61	2,019	1.10	395
Hook-and-line C/P	1,838	4.11	1,478	1.00	359
Trawl CV	14,970	21.13	7,609	20.45	7,361
Trawl C/P	1,511	2.00	721	2.19	790
All Pot CV and Pot C/P	10,010	17.83	6,419	9.97	3,591
Total	36,363	60.00	21,818	40.00	14,545
Eastern GOA	1,760	Inshore (90% of Annual TAC) 1,584		Offshore (10% of Annual TAC) 176	

Proposed Allocations of the Sablefish TAC Amounts to Vessels Using Hook-and-Line and Trawl Gear

Section 679.20(a)(4)(i) and (ii) require allocations of sablefish TACs for each of the regulatory areas and districts to hook-and-line and trawl gear. In the Western and Central Regulatory Areas, 80 percent of each TAC is allocated to hook-and-line gear, and 20 percent of each TAC is allocated to trawl gear. In the Eastern Regulatory Area, 95 percent of the TAC is allocated to hook-and-line gear and five percent is allocated to trawl gear. The trawl gear allocation in the Eastern GOA may only be used to support incidental catch of sablefish in directed fisheries for other target species (§ 679.20(a)(4)(i)). In recognition of the trawl ban in the SEO District of the Eastern Regulatory Area, the Council recommended and NMFS proposes the allocation of five percent of the combined Eastern Regulatory Area sablefish TAC to trawl gear in the WYK District making the remainder of the WYK sablefish TAC available to vessels using hook-and-line gear. As a result, NMFS proposes to allocate 100 percent of the sablefish TAC in the SEO District to vessels using hook-and-line gear. This recommendation results in a proposed 2012 allocation of 226 mt to trawl gear and 4,292 mt to hook-and-line gear in the Eastern GOA. Table 4 lists the allocations of the proposed 2011 sablefish TACs to hook-and-line and trawl gear. Table 5 lists the allocations of the proposed 2013 sablefish TACs to trawl gear.

The Council recommended that the hook-and-line sablefish TAC be established annually to ensure that the Individual Fishery Quota (IFQ) fishery is conducted concurrent with the halibut IFQ fishery and is based on the most recent survey information. The Council also recommended that only the trawl sablefish TAC be established for two years so that retention of incidental catch of sablefish by trawl gear could commence in January in the second year of the groundfish harvest specifications. However, since there is an annual NMFS survey and assessment for sablefish and the final harvest specifications are expected to be published before the IFQ season begins (typically, in early March), the Council recommended that the sablefish TAC be

set on an annual basis so that the best and most recent scientific information could be considered in recommending the ABCs and TACs. Since sablefish is closed for directed fishing for trawl gear during the entire fishing year, except those vessels that were provided the Rockfish Program cooperative allocations, and given that fishing for groundfish with trawl gear is prohibited prior to January 20, it is not likely that the sablefish allocation to trawl gear would be reached before the effective date of the final harvest specifications.

TABLE 4—PROPOSED 2012 SABLEFISH TAC AMOUNTS IN THE GULF OF ALASKA AND ALLOCATIONS TO HOOK-AND-LINE AND TRAWL GEAR

[Values are rounded to the nearest metric ton]

Area/District	TAC	Hook-and-line allocation	Trawl allocation
Western	1,484	1,187	297
Central	4,343	3,474	869
West Yakutat [1]	1,818	1,457	361
Southeast Outside	2,700	2,700	0
Total	10,345	8,818	1,527

[1] The proposed trawl allocation is based on allocating five percent of the combined Eastern Regulatory Area (West Yakutat and Southeast Outside districts combined) sablefish TAC to trawl gear in the West Yakutat district.

TABLE 5—PROPOSED 2013 SABLEFISH TAC AMOUNTS IN THE GULF OF ALASKA AND ALLOCATION TO TRAWL GEAR [1]

[Values are rounded to the nearest metric ton]

Area/District	TAC	Hook-and-line allocation	Trawl allocation
Western	1,484	n/a	297
Central	4,343	n/a	869
West Yakutat [2]	1,818	n/a	361
Southeast Outside	2,700	n/a	0
Total	10,345	n/a	1,527

[1] The Council recommended that harvest specifications for the hook-and-line gear sablefish Individual Fishing Quota fisheries be limited to 1 year.

[2] The proposed trawl allocation is based on allocating five percent of the combined Eastern Regulatory Area (West Yakutat and Southeast Outside districts combined) sablefish TAC to trawl gear in the West Yakutat district.

Proposed Apportionments to the Central GOA Rockfish Program

Amendment 88 to the FMP would reauthorize the Central GOA Rockfish Program (Rockfish Program). As discussed previously in the preamble, NMFS published a proposed rule to implement Amendment 88 on August 19, 2011 (76 FR 52148), with anticipated effectiveness in 2012. If approved by the Secretary, NMFS would allocate the primary rockfish species (Pacific ocean perch, northern rockfish, and pelagic shelf rockfish), after deducting for incidental catch needs in other directed groundfish fisheries, to participants in the Rockfish Program. Potential participants in the proposed Rockfish Program include vessels in CV cooperatives, C/P cooperatives, and vessels in the entry-level longline category. Additionally, C/Ps may elect to opt out of the Rockfish Program. Absent implementation of Amendment 88, NMFS would manage the rockfish fisheries in the Central GOA management area under regulations in effect for the other GOA groundfish fisheries managed under the LLP, including permitting requirements at § 679.4(k) and general limitations at § 679.20.

NMFS proposes to allocate 5 mt of Pacific ocean perch, 5 mt of northern rockfish, and 30 mt of PSR to the entry level longline fishery in 2012 and 2013. Longline gear includes hook-and-line, jig, troll, and handline gear. The remainder of the TACs for the primary rockfish species would be allocated to the CV and C/P cooperatives. The allocation for the entry level longline fishery would increase incrementally each year if the sector harvests 90 percent or more of the allocation of a species. The incremental increase in the allocation would continue each year until it reaches the cap for the maximum percent of the TAC for that species. Table 6 lists the proposed 2012 and 2013 allocations for each rockfish primary species to the entry level longline fishery, the incremental increase for future years, and the cap for the entry level longline fishery.

TABLE 6—PROPOSED 2012 AND 2013 ALLOCATIONS OF ROCKFISH TO THE ENTRY LEVEL LONGLINE FISHERY IN THE CENTRAL GULF OF ALASKA

Rockfish primary species	Proposed 2012 and 2013 allocations	Incremental increase per season if ≥ 90 percent of allocation is harvested	Up to maximum percent of TAC
Pacific ocean perch	5 metric tons	5 metric tons	1
Northern rockfish	5 metric tons	5 metric tons	2
Pelagic shelf rockfish	30 metric tons	20 metric tons	5

NMFS proposes allocations of primary rockfish species among various components of the proposed Rockfish Program. Table 7 lists the proposed 2012 and 2013 allocations of rockfish in the Central GOA to longline gear in the

entry level rockfish fishery and other participants in the proposed program, which include CV and C/P cooperatives. NMFS also proposes setting aside incidental catch amounts (ICAs) for other directed fisheries in the Central GOA of 700 mt of Pacific ocean perch, 125 mt of northern rockfish, and 125 mt of PSR. These amounts are based on recent average incidental catches in the Central GOA by other groundfish fisheries. Allocations between vessels belonging to CV or C/P cooperatives are not included in these proposed harvest specifications. Rockfish Program applications for CV cooperatives, C/P cooperatives, and C/Ps electing to opt out of the program are not due to NMFS until March 1 of each calendar year, thereby preventing NMFS from calculating 2012 and 2013 allocations in conjunction with these proposed harvest specifications. NMFS will post these allocations on the Alaska Region Web site at (*http://alaskafisheries.noaa.gov/sustainablefisheries/goarat/default.htm)* when they become available after March 1.

TABLE 7—PROPOSED 2012 AND 2013 ALLOCATIONS OF ROCKFISH IN THE CENTRAL GULF OF ALASKA TO THE ENTRY-LEVEL LONGLINE FISHERY AND OTHER PARTICIPANTS IN THE ROCKFISH PROGRAM

[Values are rounded to the nearest metric ton]

Species	TAC	Incidental catch allowance	TAC minus ICA	Initial allocation to the entry level longline [1] fishery	Other rockfish program participants [2] allocation
Pacific ocean perch	9,884	700	9,184	5	9,179
Northern rockfish	2,168	125	2,043	5	2,038
Pelagic shelf rockfish	2,791	125	2,666	30	2,636
Total	14,843	700	13,893	40	13,853

[1] Longline gear includes hook-and-line, jig, troll, and handline gear.
[2] Other Rockfish Program participants include vessels in CV and C/P cooperatives.

Amendment 88, if approved, would also allocate secondary species to the Rockfish Program in the Central GOA. These species include sablefish from the trawl gear allocation, thornyhead rockfish, Pacific cod for the CV cooperatives, and rougheye and shortraker rockfish for the C/P cooperatives. Table 8 lists the proposed 2012 and 2013 apportionments of rockfish secondary species in the Central GOA to CV and C/P cooperatives.

TABLE 8—PROPOSED 2012 AND 2013 APPORTIONMENTS OF ROCKFISH SECONDARY SPECIES IN THE CENTRAL GOA TO CV AND C/P COOPERATIVES

[Values are in metric tons]

Species	Central GOA annual TAC	CV cooperatives		C/P cooperatives	
		Percentage of TAC	Apportionment (mt)	Percentage of TAC	Apportionment (mt)
Pacific cod	32,362	3.81	1,385	N/A	N/A
Sablefish (trawl)	869	6.78	59	3.51	31
Shortraker rockfish	325	N/A	N/A	40.00	130
Rougheye rockfish	868	N/A	N/A	58.87	511
Thornyhead rockfish	637	7.84	50	26.50	169

Proposed Halibut Prohibited Species Catch (PSC) Limits

Section 679.21(d) establishes annual halibut PSC limit apportionments to trawl and hook-and-line gear, and permits the establishment of apportionments for pot gear. In October 2011, the Council recommended that NMFS maintain the 2011 halibut PSC limits of 2,000 mt for trawl gear and 300 mt for hook-and-line gear for the 2012 and 2013 groundfish fisheries. As discussed previously in this preamble, the Council may take action to modify the GOA halibut PSC limits in 2012, which may lead to adjustments or reductions to the halibut PSC limits proposed in this action either in the latter half of 2012 or at the beginning of 2013.

Ten mt of the 300 mt hook-and-line limit is further allocated to the demersal shelf rockfish (DSR) fishery in the SEO District. The DSR fishery is defined at § 679.21(d)(4)(iii)(A). This fishery has been apportioned 10 mt in recognition of its small scale harvests. Most vessels in the DSR fishery are less than 60 ft (18.3 m) length overall and are exempt from observer coverage. Therefore, observer data are not available to verify actual bycatch amounts. NMFS estimates low halibut bycatch in the DSR fishery because (1) the duration of the DSR fisheries and the gear soak times are short, (2) the DSR fishery occurs in the winter when less overlap occurs in the distribution of DSR and halibut, and, (3) the directed commercial DSR fishery has a low DSR TAC. The Alaska Department of Fish and Game sets the GHL for the DSR fishery after estimates of incidental catch in all fisheries (including halibut and subsistence) and allocation to the sport fish fishery have been deducted. Of the 295 mt TAC for DSR in 2010, 89 mt were available for the directed commercial fishery, of which 22 mt were harvested.

The FMP authorizes the Council to exempt specific gear from the halibut PSC limit. NMFS, after consultation with the Council, proposes to exempt pot gear, jig gear, and the sablefish IFQ hook-and-line gear fishery categories from the non-trawl halibut PSC limit for 2012 and 2013. The Council recommended and NMFS is proposing these exemptions because (1) pot gear

fisheries have low annual halibut bycatch mortality (averaging 19 mt annually from 2001 through 2010), (2) IFQ program regulations prohibit discard of halibut if any halibut IFQ permit holder on board a CV holds unused halibut IFQ (§ 679.7(f)(11)), (3) sablefish IFQ fishermen typically hold halibut IFQ permits and are therefore required to retain the halibut they catch while fishing sablefish IFQ, and (4) NMFS estimates negligible halibut mortality for the jig gear fisheries. NMFS estimates halibut mortality is negligible in the jig gear fisheries given the small amount of groundfish harvested by jig gear (averaging 293 mt annually from 2001 through 2010), the selective nature of jig gear, and the high survival rates of halibut caught and released with jig gear.

Section 679.21(d)(5) authorizes NMFS to seasonally apportion the halibut PSC limits after consultation with the Council. The FMP and regulations require that the Council and NMFS consider the following information in seasonally apportioning halibut PSC limits: (1) Seasonal distribution of halibut, (2) seasonal distribution of target groundfish species relative to halibut distribution, (3) expected halibut bycatch needs on a seasonal basis relative to changes in halibut biomass and expected catch of target groundfish species, (4) expected bycatch rates on a seasonal basis, (5) expected changes in directed groundfish fishing seasons, (6) expected actual start of fishing effort, and (7) economic effects of establishing seasonal halibut allocations on segments of the target groundfish industry.

The final 2011 and 2012 harvest specifications (76 FR 11111, March 1, 2011) summarized the Council's and NMFS' findings with respect to halibut PSC for each of these FMP considerations. The Council's and NMFS' findings for 2012 and 2013 are unchanged from 2011. Table 9 lists the proposed 2012 and 2013 Pacific halibut PSC limits, allowances, and apportionments. Section 679.21(d)(5)(iii) and (iv) specify that any underages or overages of a seasonal apportionment of a PSC limit will be deducted from or added to the next respective seasonal apportionment within the fishing year.

TABLE 9—PROPOSED 2012 AND 2013 PACIFIC HALIBUT PSC LIMITS, ALLOWANCES, AND APPORTIONMENTS

[Values are in metric tons]

Trawl gear			Hook-and-line gear [1]				
			Other than DSR			DSR	
Season	Percent	Amount	Season	Percent	Amount	Season	Amount
January 20–April 1	27.5	550	January 1–June 10	86	250	January 1–December 31.	10
April 1–July 1	20	400	June 10–September 1	2	5		
July 1–September 1	30	600	September 1–December 31.	12	35		
September 1–October 1.	7.5	150					
October 1–December 31.	15	300					
Total		2,000			290		10

[1] The Pacific halibut PSC limit for hook-and-line gear is allocated to the demersal shelf rockfish (DSR) fishery and fisheries other than DSR. The hook-and-line IFQ sablefish fishery is exempt from halibut PSC limits, as are pot and jig gear for all groundfish fisheries.

Section 679.21(d)(3)(ii) authorizes further apportionment of the trawl halibut PSC limit to trawl fishery categories. The annual apportionments are based on each category's proportional share of the anticipated halibut bycatch mortality during a fishing year and optimization of the total amount of groundfish harvest under the halibut PSC limit. The fishery categories for the trawl halibut PSC limits are (1) a deep-water species category, composed of sablefish, rockfish, deep-water flatfish, rex sole, and arrowtooth flounder; and (2) a shallow-water species category, composed of pollock, Pacific cod, shallow-water flatfish, flathead sole, Atka mackerel, skates, sharks, squids, sculpins, and octopuses (§ 679.21(d)(3)(iii)). Table 10 lists the proposed 2012 and 2013 seasonal apportionments of Pacific halibut PSC trawl limits between the deep-water and the shallow-water species categories. Based on public comment and information presented in the final 2011 SAFE report, the Council may recommend or NMFS may make changes to the seasonal, gear-type, or fishery category apportionments of halibut PSC limits for the final 2012 and 2013 harvest specifications.

TABLE 10—PROPOSED 2012 AND 2013 SEASONAL APPORTIONMENTS OF THE PACIFIC HALIBUT PSC LIMIT APPORTIONED BETWEEN THE TRAWL GEAR SHALLOW-WATER SPECIES AND DEEP-WATER SPECIES CATEGORIES

([Values are in metric tons]

Season	Shallow-water	Deep-water [1]	Total
January 20–April 1	450	100	550
April 1–July 1	100	300	400
July 1–September 1	200	400	600
September 1—October 1	150	Any remainder	150
Subtotal, January 20–October 1	900	800	1,700

TABLE 10—PROPOSED 2012 AND 2013 SEASONAL APPORTIONMENTS OF THE PACIFIC HALIBUT PSC LIMIT APPORTIONED BETWEEN THE TRAWL GEAR SHALLOW-WATER SPECIES AND DEEP-WATER SPECIES CATEGORIES—Continued

([Values are in metric tons]

Season	Shallow-water	Deep-water [1]	Total
October 1–December 31 [2]			300
Total			2,000

[1] Vessels participating in cooperatives in the Central Gulf of Alaska Rockfish Program will receive a portion of the third season (July 1 through September 1) deep-water category halibut PSC apportionment. This amount is not currently known but will be posted on the Alaska Region Web site at *http://alaskafisheries.noaa.gov* when it becomes available.

[2] There is no apportionment between shallow-water and deep-water trawl fishery categories during the fifth season (October 1 through December 31).

According to the provisions of Amendment 83 to the FMP, the pending action that establishes Pacific cod sector splits, the ''other than DSR'' halibut PSC apportionment to vessels using hook-and-line gear must be apportioned between CVs and C/Ps. To calculate the halibut PSC apportionments to the hook-and-line CV and C/P sectors annually, NMFS must first scale the total hook-and-line CV and C/P percentage sector allocations in proportion to the relative size of the Pacific cod TAC area apportionments on an annual basis. This is because the Pacific cod TAC allocations to each regulatory area may change depending on the stock status in each area, as determined by the biennial surveys. NMFS proposes to apportion the GOA hook-and-line halibut PSC limit for the ''other than DSR'' category to the hook-and-line CV and C/P sectors in proportion to the scaled hook-and-line sector allocations. These sum to 10.4 percent to the hook-and-line C/P sector and 14.1 percent to the hook-and-line CV sector in the Western and Central Regulatory Areas in the GOA, as explained in the final rule associated with Amendment 83 (76 FR 74760, December 1, 2011).

Ten mt of the overall 300 mt hook-and-line PSC limit is allocated to the DSR fishery, leaving 290 mt to be allocated between the hook-and-line CVs and C/Ps. To calculate the annual hook-and-line allocations of the PSC limit, NMFS would multiply the scaled annual allocations of TAC by the 290 mt ''non-demersal shelf rockfish'' hook-and-line PSC limit. For 2012 and 2013 NMFS proposes that hook-and-line CV and hook-and-line C/P sectors receive annual halibut PSC limits of 167 mt and 123 mt, respectively. In addition, these annual limits are divided between three seasonal apportionments, using seasonal percentages of 86 percent, 2 percent, and 12 percent. These annual limits and seasonal apportionments are shown in Table 11.

No later than November 1 of each year, NMFS would calculate the projected unused amount of halibut PSC limit by either of the hook-and-line sectors for the remainder of the year. The projected unused amount of halibut PSC limit would be made available to the other hook-and-line sector for the remainder of that fishing year.

TABLE 11—PROPOSED 2012 AND 2013 HOOK-AND-LINE (HAL) HALIBUT PROHIBITED SPECIES CATCH (PSC) LIMITS AND SEASONAL APPORTIONMENTS BY SECTORS FOR THE GULF OF ALASKA GROUNDFISH FISHERIES

[Values are rounded to the nearest metric ton and percentages are rounded to the nearest 0.1 percent]

Operational type	Sum of percent	Relative percent between C/P and CV	Annual PSC limit	1st Season PSC limit	2nd Season PSC limit	3rd Season PSC limit
HAL C/P	10.4	42.4	123	106	2	15
HAL CV	14.1	57.6	167	144	3	20

The Rockfish Program, if approved, would require NMFS to allocate a fixed amount of the halibut PSC third seasonal apportionment to the deep-water species category to participants in the Rockfish Program. This amount is based on 87.5 percent of the 2000 through 2006 average halibut mortality usage of 218.8 mt. Of this amount, 134.1 mt of the halibut PSC is proposed to be allocated to the CV sector and 84.7 mt is proposed to be allocated to the C/P sector. Additionally, 27.4 mt (16.8 mt from the CV sector and 10.6 mt from the C/P sector) would be permanently removed from the annual apportionment for fisheries using trawl gear in the GOA. This would result in 117.3 mt of halibut PSC limit being available for use in the Rockfish Program by the CV sector and 74.1 mt available for use by the C/P sector.

NMFS anticipates that additional halibut PSC limits for the Rockfish Program will be implemented by Amendment 88. The proposed regulations associated with the reauthorized Rockfish Program (76 FR 52148, August 19, 2011) would limit the amount of the halibut PSC limit allocated to Rockfish Program participants that could be re-apportioned to the general GOA trawl fisheries. This would restrict halibut PSC limit reallocation to the non-Rockfish Program trawl fisheries from the Rockfish Program to no more than 55 percent of the unused annual halibut PSC apportioned to Rockfish Program participants. The remainder of the unused Rockfish Program halibut PSC limit would be unavailable for use by vessels directed fishing with trawl gear for the remainder of the fishing year. The pending final rule associated with the implementation of Amendment 88 does not change the halibut PSC limits described in the proposed rule for Amendment 88.

Estimated Halibut Bycatch in Prior Years

The best available information on estimated halibut bycatch is data collected by observers during 2011. The calculated halibut bycatch mortality by trawl, hook-and-line, and pot gears through October 1, 2011, is 1,319 mt, 185 mt, and 50 mt, respectively, for a

total halibut mortality of 1,554 mt. This halibut mortality was calculated using groundfish and halibut catch data from the NMFS Alaska Region's catch accounting system. This system contains historical and recent catch information compiled from each Alaska groundfish fishery.

Halibut bycatch restrictions seasonally constrained trawl gear fisheries during the 2011 fishing year. Table 12 displays the closure dates for fisheries that resulted from the attainment of seasonal or annual halibut PSC limits. NMFS does not know the amount of groundfish that trawl gear might have harvested if halibut PSC limits had not restricted some 2011 GOA groundfish fisheries.

TABLE 12—2011 FISHERY CLOSURES DUE TO ATTAINMENT OF PACIFIC HALIBUT PSC LIMITS

Fishery category	Opening date	Closure date	**Federal Register** Citation
Trawl Deep-water, season 2	January 20, 2011	April 22, 2011	76 FR 23511, April 27, 2011.
Trawl Shallow-water,[1] season 4	September 1, 2011	September 3, 2011	76 FR 55276, September 7, 2011.
Trawl Shallow-water,[1] season 4	September 14, 2011	September 16, 2011	76 FR 57679, September 16, 2011.
Trawl Shallow-water,[1] season 4	September 20, 2011	Remained open through end of season 4, October 1, 2011.	
Hook-and-line gear, all targets.[2]	January 1, 2011	Remains open.	

[1] With the exception of vessels participating in the Central GOA Rockfish Program and vessels fishing for pollock using pelagic trawl gear.
[2] With the exception of the IFQ sablefish fishery, which is open March 12, 2011, through November 18, 2011.

Current Estimates of Halibut Biomass and Stock Condition

The most recent halibut stock assessment was developed by the International Pacific Halibut Commission (IPHC) staff in December 2010 for the 2011 commercial fishery; this assessment was considered by the IPHC at its annual meeting in January 2011. Since 2006, the IPHC stock assessment has been fitted to a coastwide data set (including the United States and Canada) to estimate total biomass. Coastwide total halibut biomass at the beginning of 2011 was estimated to be 317 million pounds (143,790 mt), down from 334 million pounds (151,500 mt) in 2010. The coastwide total halibut biomass was apportioned among regulatory areas in accordance with survey estimates of relative abundance and other considerations.

The halibut resource is fully utilized. Recent catches in the commercial halibut fisheries in Alaska over the last 17 years (1994–2010) have averaged 32,336 mt round weight per year. In January 2011, the IPHC recommended Alaska commercial catch limits totaling 19,662 mt for 2011, a 25 percent decrease from 24,372 mt in 2010. Through December 31, 2010, commercial hook-and-line harvests of halibut off Alaska totaled 24,118 mt round weight.

The IPHC and its staff have expressed concerns that the IPHC's Slow Up-Fast Down (SUFD) harvest policy adjustments, which applied a policy of a 33 percent increase from the previous year's catch limit and a 50 percent decrease in recommended catch, have not achieved target harvest rate goals due to continued stock declines, decreases in halibut growth rate, and a recent history of high exploitation rates in some areas. The IPHC adopted the staff's recommendation that the SUFD policy be modified to a ''Slow Up-Full Down (SUFullD)'' policy to achieve the necessary reductions in harvest rate and promote increases in total halibut biomass. The SUFullD policy incorporates the existing policy of a 33 percent increase from the previous year's catch limits when stock yields are expected to increase but uses a 100 percent decrease in recommended catch when stock yields are projected to decrease.

The largest decreases in the 2011 catch limit recommendations in Alaska are for Area 2C, down from 2,661 mt round weight in 2010 to 1,409 mt round weight in 2011 (the decline is primarily the result of the application of the SUFullD harvest policy adjustment), and, for Areas 3A and 3B combined, down from 18,077 mt round weight in 2010 to 13,233 mt round weight in 2011 (the decline is primarily due to a decline in estimated total halibut biomass).

Additional information on the Pacific halibut stock assessment may be found in the IPHC's 2010 Pacific halibut stock assessment (December 2010), available on the IPHC Web site at *http://www.iphc.washington.edu.* The IPHC will consider the 2011 Pacific halibut assessment at its January 2012 annual meeting when it will set the 2012 commercial halibut fishery catch limits.

Other Considerations Associated With Halibut PSC

The IPHC will adjust the allowable commercial catch of halibut to account for the overall halibut PSC limit established for groundfish fisheries. The 2012 and 2013 groundfish fisheries are expected to use the entire proposed annual halibut PSC limit, whether that amount is 2,300 mt as proposed under the status quo, or some lesser amount that may be selected and implemented under the Council's pending halibut PSC action. The allowable directed commercial catch is determined by first accounting for recreational and subsistence catch, waste, and bycatch mortality, and then provides the remainder to the directed fishery. Groundfish fishing is not expected to affect adversely the halibut stocks. Methods available for reducing halibut bycatch include (1) consistent monitoring through publication of vessel specific bycatch rates on the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov,* (2) modifications to gear, (3) changes in groundfish fishing seasons, (4) individual transferable quota programs, and (5) time/area closures.

With respect to fishing gear modifications, various regulations have been implemented to address halibut bycatch concerns that are associated with different gear types. The definitions of the various gear types defined at § 679.2 under ''Authorized fishing gear'' delineate a variety of different requirements and restrictions by gear type. Many of these requirements are intended to decrease or minimize halibut bycatch by pot, trawl, and hook-and-line gear.

For example, groundfish pots must be constructed with biodegradable panels and tunnel openings to reduce halibut bycatch, thereby reducing halibut mortality in the groundfish pot fisheries. Further, the definition of ''pelagic trawl gear'' includes specific construction parameters and performance characteristics that distinguish it from nonpelagic trawl gear, which is designed for use in proximity to the

seafloor. Because halibut bycatch by pelagic trawl gear is minimal, directed fishing for pollock with pelagic trawl gear may continue even when the halibut PSC limit for the shallow-water species fishery is reached (see § 679.21(d)(7)(i)). Finally, all hook-and-line vessel operators are required to employ careful release measures when handling halibut bycatch (§ 679.7(a)(13)). These measures are intended to reduce handling mortality, thereby lowering overall halibut bycatch mortality in the groundfish fisheries, and to increase the amount of groundfish harvested under the available halibut mortality bycatch limits.

The FMP requires that the Council review recent halibut bycatch data and recommend proposed halibut PSC limits in conjunction with developing proposed groundfish harvest levels. NMFS and the Council will review the methods available for reducing halibut bycatch listed here to determine their effectiveness and will initiate changes, as necessary, in response to this review or to public testimony and comment.

Halibut Discard Mortality Rates

To monitor halibut bycatch mortality allowances and apportionments, the Regional Administrator uses observed halibut bycatch rates, discard mortality rates (DMRs), and estimates of groundfish catch to project when a fishery's halibut bycatch mortality allowance or seasonal apportionment is reached. The DMRs are based on the best information available, including information contained in the annual SAFE report.

NMFS proposes the Council's recommendation that the halibut DMRs developed and recommended by the IPHC for the 2011 GOA groundfish fisheries be used for monitoring the proposed 2012 and 2013 halibut bycatch mortality allowances (see Tables 9–11). The IPHC developed the DMRs for the 2011 GOA groundfish fisheries using the 10-year mean DMRs for those fisheries. Long-term average DMRs were not available for some fisheries, so rates from the most recent years were used. For the squid, shark, sculpin, octopus, and skate fisheries, where insufficient mortality data are available, the mortality rate of halibut caught in the Pacific cod fishery for that gear type was recommended as a default rate. The IPHC will analyze observer data annually and recommend changes to the DMRs when a fishery DMR shows large variation from the mean. A discussion of the DMRs and their justification is presented in Appendix 2 to the 2010 SAFE report (see **ADDRESSES**). Table 13 lists the proposed 2012 and 2013 DMRs.

TABLE 13—PROPOSED 2012 AND 2013 HALIBUT DISCARD MORTALITY RATES FOR VESSELS FISHING IN THE GULF OF ALASKA

[Values are percent of halibut assumed to be dead]

Gear	Target fishery	Mortality rate (%)
Hook-and-line	Other fisheries [1]	12
	Skates	12
	Pacific cod	12
	Rockfish	9
Trawl	Arrowtooth flounder	72
	Deep-water flatfish	48
	Flathead sole	65
	Non-pelagic pollock	59
	Other fisheries	62
	Pacific cod	62
	Pelagic pollock	76
	Rex sole	64
	Rockfish	67
	Sablefish	65
	Shallow-water flatfish	71
Pot	Other fisheries	17
	Pacific cod	17

[1] Other fisheries includes all gear types for Atka mackerel, sculpins, sharks, skates, squids, octopuses, and hook-and-line sablefish.

American Fisheries Act (AFA) Catcher/Processor and Catcher Vessel Groundfish Sideboard Limits

Section 679.64 establishes groundfish harvesting and processing sideboard limits on AFA C/Ps and CVs in the GOA. These sideboard limits are necessary to protect the interests of fishermen and processors who do not directly benefit from the AFA from those fishermen and processors who receive exclusive harvesting and processing privileges under the AFA. Section 679.7(k)(1)(ii) prohibits listed AFA C/Ps from harvesting any species

of fish in the GOA. Additionally, § 679.7(k)(1)(iv) prohibits listed AFA C/Ps from processing any pollock harvested in a directed pollock fishery in the GOA and any groundfish harvested in Statistical Area 630 of the GOA.

AFA CVs that are less than 125 ft (38.1 meters) length overall, have annual landings of pollock in the Bering Sea and Aleutian Islands of less than 5,100 mt, and have made at least 40 landings of GOA groundfish from 1995 through 1997 are exempt from GOA sideboard limits under § 679.64(b)(2)(ii). Sideboard limits for non-exempt AFA CVs operating in the GOA are based on their traditional harvest levels of TAC in groundfish fisheries covered by the FMP. Section 679.64(b)(3)(iii) establishes the groundfish sideboard limitations in the GOA based on the retained catch of non-exempt AFA CVs of each sideboard species from 1995 through 1997 divided by the TAC for that species over the same period.

As provided by Amendment 83 to the FMP (76 FR 44700, July 26, 2011), NMFS proposes to recalculate and establish sideboards limitations for Pacific cod for the non-exempt AFA CVs in the Western and Central GOA that would supersede the inshore offshore and offshore processing sideboards established under the AFA. The sideboard limits for other species would continue to be calculated as they have in the past, including the Eastern GOA sideboard limit. Table 14 lists the proposed 2012 and 2013 groundfish sideboard limits for non-exempt AFA CVs. NMFS will deduct all targeted or incidental catch of sideboard species made by non-exempt AFA CVs from the sideboard limits listed in Table 14. Absent implementation of Amendment 83, these sideboards would calculated and managed per the status quo, i.e., with specific inshore and offshore sideboards, including those established for 2012 by the final GOA 2011 and 2012 harvest specifications (76 FR 11111, March 1, 2011).

TABLE 14—PROPOSED 2012 AND 2013 GOA NON-EXEMPT AMERICAN FISHERIES ACT CATCHER VESSEL (CV) GROUNDFISH HARVEST SIDEBOARD LIMITS

[Values are rounded to the nearest metric ton]

Species	Apportionments by season/gear	Area/component	Ratio of 1995–1997 non-exempt AFA CV catch to 1995–1997 TAC	Proposed 2012 and 2013 TACs	Proposed 2012 and 2013 non-exempt AFA CV sideboard limit
Pollock	A Season—January 20–March 10.	Shumagin (610)	0.6047	6,186	3,741
		Chirikof (620)	0.1167	15,374	1,794
		Kodiak (630)	0.2028	5,783	1,173
	B Season—March 10–May 31.	Shumagin (610)	0.6047	6,185	3,740
		Chirikof (620)	0.1167	18,392	2,147
		Kodiak (630)	0.2028	2,765	561
	C Season—August 25–October 1.	Shumagin (610)	0.6047	11,280	6,821
		Chirikof (620)	0.1167	7,262	847
		Kodiak (630)	0.2028	8,803	1,785
	D Season—October 1–November 1.	Shumagin (610)	0.6047	11,280	6,821
		Chirikof (620)	0.1167	7,262	847
		Kodiak (630)	0.2028	8,803	1,785
	Annual	WYK (640)	0.3495	3,024	1,057
		SEO (650)	0.3495	9,245	3,231
Pacific cod	A Season [1]—January 1–June 10.	W	0.1331	12,317	1,639
		C	0.0692	21,818	1,510
	B Season [2]—September 1–December 31.	W	0.1331	8,211	1,093
		C	0.0692	14,545	1,007
	Annual	E inshore	0.0079	1,583	13
		E offshore	0.0078	176	1

TABLE 14—PROPOSED 2012 AND 2013 GOA NON-EXEMPT AMERICAN FISHERIES ACT CATCHER VESSEL (CV) GROUNDFISH HARVEST SIDEBOARD LIMITS—Continued

[Values are rounded to the nearest metric ton]

Species	Apportionments by season/gear	Area/component	Ratio of 1995–1997 non-exempt AFA CV catch to 1995–1997 TAC	Proposed 2012 and 2013 TACs	Proposed 2012 and 2013 non-exempt AFA CV sideboard limit
Sablefish	Annual, trawl gear	W	0.0000	297	0
		C	0.0642	869	56
		E	0.0433	226	10
Flatfish, Shallow-water	Annual	W	0.0156	23,681	369
		C	0.0587	29,999	1,761
		E	0.0126	2,562	32
Flatfish, deep-water	Annual	W	0.0000	541	0
		C	0.0647	3,004	194
		E	0.0128	2,941	38
Rex sole	Annual	W	0.0007	1,490	1
		C	0.0384	6,184	237
		E	0.0029	1,722	5
Arrowtooth flounder	Annual	W	0.0021	33,975	71
		C	0.0280	143,119	4,007
		E	0.0002	33,933	7
Flathead sole	Annual	W	0.0036	17,968	65
		C	0.0213	28,938	616
		E	0.0009	3,693	3
Pacific Ocean perch	Annual	W	0.0023	2,665	6
		C	0.0748	9,884	739
		E	0.0466	3,638	170
Northern rockfish	Annual	W	0.0003	2,446	1
		C	0.0277	2,168	60
Shortraker rockfish	Annual	W	0.0000	134	0
		C	0.0218	325	7
		E	0.0110	455	5
Other rockfish	Annual	W	0.0034	224	0
		C	0.1699	566	96
		E	0.0000	3,052	0
Pelagic shelf rockfish	Annual	W	0.0001	558	0
		C	0.0000	2,791	0
		E	0.0067	998	7
Rougheye rockfish	Annual	W	0.0000	81	0
		C	0.0237	868	21

TABLE 14—PROPOSED 2012 AND 2013 GOA NON-EXEMPT AMERICAN FISHERIES ACT CATCHER VESSEL (CV) GROUNDFISH HARVEST SIDEBOARD LIMITS—Continued

[Values are rounded to the nearest metric ton]

Species	Apportionments by season/gear	Area/component	Ratio of 1995–1997 non-exempt AFA CV catch to 1995–1997 TAC	Proposed 2012 and 2013 TACs	Proposed 2012 and 2013 non-exempt AFA CV sideboard limit
		E	0.0124	363	5
Demersal shelf rockfish	Annual	SEO	0.0020	300	1
Thornyhead rockfish	Annual	W	0.0280	425	12
		C	0.0280	637	18
		E	0.0280	708	20
Atka mackerel	Annual	Gulfwide	0.0309	4,700	145
Big skates	Annual	W	0.0063	598	4
		C	0.0063	2,049	13
		E	0.0063	681	4
Longnose skates	Annual	W	0.0063	81	0
		C	0.0063	2,009	13
		E	0.0063	762	5
Other skates	Annual	Gulfwide	0.0063	2,093	13
Squids	Annual	Gulfwide	0.0063	1,148	7
Sharks	Annual	Gulfwide	0.0063	6,197	39
Octopuses	Annual	Gulfwide	0.0063	954	6
Sculpins	Annual	Gulfwide	0.0063	5,496	35

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.

Non-Exempt AFA Catcher Vessel Halibut PSC Limits

The halibut PSC sideboard limits for non-exempt AFA CVs in the GOA are based on the aggregate retained groundfish catch by non-exempt AFA CVs in each PSC target category from 1995 through 1997 divided by the retained catch of all vessels in that fishery from 1995 through 1997 (§ 679.64(b)(4)). Table 15 lists the proposed 2012 and 2013 non-exempt AFA CV halibut PSC limits for vessels using trawl gear in the GOA.

TABLE 15—PROPOSED 2012 AND 2013 NON-EXEMPT AMERICAN FISHERIES ACT CATCHER VESSEL HALIBUT PROHIBITED SPECIES CATCH (PSC) LIMITS FOR VESSELS USING TRAWL GEAR IN THE GOA

[PSC limits are rounded to the nearest whole metric ton]

Season	Season dates	Target fishery	Ratio of 1995–1997 non-exempt AFA CV retained catch to total retained catch	Proposed 2012 and 2013 PSC limit	Proposed 2012 and 2013 non-exempt AFA CV PSC limit
1	January 20–April 1	shallow-water	0.340	450	153
		deep-water	0.070	100	7
2	April 1–July 1	shallow-water	0.340	100	34
		deep-water	0.070	300	21
3	July 1–September 1	shallow-water	0.340	200	68
		deep-water	0.070	400	28

TABLE 15—PROPOSED 2012 AND 2013 NON-EXEMPT AMERICAN FISHERIES ACT CATCHER VESSEL HALIBUT PROHIBITED SPECIES CATCH (PSC) LIMITS FOR VESSELS USING TRAWL GEAR IN THE GOA—Continued

[PSC limits are rounded to the nearest whole metric ton]

Season	Season dates	Target fishery	Ratio of 1995–1997 non-exempt AFA CV retained catch to total retained catch	Proposed 2012 and 2013 PSC limit	Proposed 2012 and 2013 non-exempt AFA CV PSC limit
4	September 1–October 1	shallow-water	0.340	150	51
		deep-water	0.070	0	0
5	October 1–December 31	all targets	0.205	300	62

Non-AFA Crab Vessel Groundfish Sideboard Limits

Section 680.22 establishes groundfish catch limits for vessels with a history of participation in the Bering Sea snow crab fishery to prevent these vessels from using the increased flexibility provided by the Crab Rationalization Program to expand their level of participation in the GOA groundfish fisheries. Sideboard limits restrict these vessels' catch to their collective historical landings in all GOA groundfish fisheries (except the fixed-gear sablefish fishery). Sideboard limits also apply to landings made using an LLP license derived from the history of a restricted vessel, even if that license is used on another vessel.

Vessels exempt from Pacific cod sideboards are those that landed less than 45,359 kilograms of Bering Sea snow crab and more than 500 mt of groundfish (in round weight equivalents) from the GOA between January 1, 1996, and December 31, 2000, and any vessel named on an LLP license that was based in whole or in part on the fishing history of a vessel meeting the criteria in § 680.22(a)(3).

Sideboard limits for non-AFA crab vessels operating in the GOA are based on their traditional harvest levels of TAC in groundfish fisheries covered by the FMP. Section 680.22(d) and (e) base the groundfish sideboard limits in the GOA on the retained catch by non-AFA crab vessels of each sideboard species from 1996 through 2000 divided by the total retained harvest of that species over the same period.

NMFS issued a final rule on June 20, 2011 (76 FR 35772), to implement Amendment 34 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs. Amendment 34 amended the Bering Sea and Aleutian Islands Crab Rationalization Program to exempt additional recipients of crab quota share from GOA pollock and Pacific cod sideboards. Such sideboards apply to some vessels and LLP licenses that are used to participate in these two fisheries. The sideboard ratios for pollock are unchanged. The sideboard ratios for Pacific cod in the Western GOA were changed under Amendment 34. However, those changes have been superseded by the Pacific cod sector splits implemented by the pending final rule for Amendment 83, which includes dividing the Pacific cod sideboards among applicable industry sectors.

Under the pending final rule for Amendment 83, the non-AFA crab vessel sideboards for the inshore and offshore components in the Western and Central GOA were combined. These combined sideboards must then be allocated per the sector allocations established under Amendment 83. Thus, NMFS proposes to specify sideboards limitations in the Pacific cod fisheries for the non-AFA crab vessels in the Western and Central GOA that supersede the original inshore offshore and offshore processing sideboards established under the Crab Rationalization Program. Table 16 lists these proposed 2012 and 2013 groundfish sideboard limitations for non-AFA crab vessels. All targeted or incidental catch of sideboard species made by non-AFA crab vessels or associated LLP licenses will be deducted from these sideboard limits. Absent implementation of Amendment 83, these sideboards would be calculated and managed per the status quo, i.e., with the specific inshore and offshore sideboards established for 2012 by the final GOA 2011 and 2012 harvest specifications (76 FR 11111, March 1, 2011), rather than sector-specific sideboards.

TABLE 16—PROPOSED 2012 AND 2013 GOA NON-AMERICAN FISHERIES ACT CRAB VESSEL GROUNDFISH HARVEST SIDEBOARD LIMITS

[Values are rounded to the nearest metric ton]

Species	Season/gear	Area/component/gear	Ratio of 1996–2000 non-AFA crab vessel catch to 1996–2000 total harvest	Proposed 2012 and 2013 TACs	Proposed 2012 and 2013 non-AFA crab vessel sideboard limit
Pollock	A Season	Shumagin (610)	0.0098	6,186	61
	January 20–March 10	Chirikof (620)	0.0031	15,374	48
		Kodiak (630)	0.0002	5,783	1
	B Season	Shumagin (610)	0.0098	6,185	61
	March 10–May 31	Chirikof (620)	0.0031	18,393	57

TABLE 16—PROPOSED 2012 AND 2013 GOA NON-AMERICAN FISHERIES ACT CRAB VESSEL GROUNDFISH HARVEST SIDEBOARD LIMITS—Continued

[Values are rounded to the nearest metric ton]

Species	Season/gear	Area/component/gear	Ratio of 1996–2000 non-AFA crab vessel catch to 1996–2000 total harvest	Proposed 2012 and 2013 TACs	Proposed 2012 and 2013 non-AFA crab vessel sideboard limit
		Kodiak (630)	0.0002	2,765	1
	C Season	Shumagin (610)	0.0098	11,280	111
	August 25–October 1	Chirikof (620)	0.0031	7,262	23
		Kodiak (630)	0.0002	8,803	2
	D Season	Shumagin (610)	0.0098	11,280	111
	October 1–November 1	Chirikof (620)	0.0031	7,262	23
		Kodiak (630)	0.0002	8,803	2
	Annual	WYK (640)	0.0000	3,024	0
		SEO (650)	0.0000	9,245	0
Pacific cod	A Season[1]	W Jig CV	0.0000	12,317	0
		W Hook-and-line CV	0.0003	12,317	4
	January 1–June 10	W Hook-and-line C/P	0.0015	12,317	18
		W Pot CV	0.0816	12,317	1,005
		W Pot C/P	0.0064	12,317	79
		W Trawl CV	0.0060	12,317	74
		C Jig CV	0.0000	21,818	0
		C Hook-and-line CV	0.0001	21,818	2
		C Hook-and-line C/P	0.0000	21,818	0
		C Pot CV	0.0354	21,818	772
		C Pot C/P	0.0092	21,818	201
		C Trawl CV	0.0010	21,818	22
	B Season[2]	W Jig CV	0.0000	8,211	0
		W Hook-and-line CV	0.0003	8,211	2
		W Hook-and-line C/P	0.0015	8,211	12
	September 1–December 31	W Pot CV	0.0816	8,211	670
		W Pot C/P	0.0064	8,211	53
		W Trawl CV	0.0060	8,211	49
		C Jig CV	0.0000	14,546	0
		C Hook-and-line CV	0.0001	14,546	1
		C Hook-and-line C/P	0.0000	14,546	0
		C Pot CV	0.0354	14,546	515
		C Pot C/P	0.0092	14,546	134
		C Trawl CV	0.0010	14,546	15

TABLE 16—PROPOSED 2012 AND 2013 GOA NON-AMERICAN FISHERIES ACT CRAB VESSEL GROUNDFISH HARVEST SIDEBOARD LIMITS—Continued

[Values are rounded to the nearest metric ton]

Species	Season/gear	Area/component/gear	Ratio of 1996–2000 non-AFA crab vessel catch to 1996–2000 total harvest	Proposed 2012 and 2013 TACs	Proposed 2012 and 2013 non-AFA crab vessel sideboard limit
	Annual	E inshore	0.0110	1,584	17
		E offshore	0.0000	176	0
Sablefish	Annual, trawl gear	W	0.0000	297	0
		C	0.0000	869	0
		E	0.0000	226	0
Flatfish, shallow-water	Annual	W	0.0059	23,681	140
		C	0.0001	29,999	3
		E	0.0000	2,562	0
Flatfish, deep-water	Annual	W	0.0035	541	2
		C	0.0000	3,004	0
		E	0.0000	2,941	0
Rex sole	Annual	W	0.0000	1,490	0
		C	0.0000	6,184	0
		E	0.0000	1,722	0
Arrowtooth flounder	Annual	W	0.0004	33,975	14
		C	0.0001	143,119	14
		E	0.0000	33,933	0
Flathead sole	Annual	W	0.0002	17,960	4
		C	0.0004	28,938	12
		E	0.0000	3,693	0
Pacific ocean perch	Annual	W	0.0000	2,665	0
		C	0.0000	9,884	0
		E	0.0000	3,638	0
Northern rockfish	Annual	W	0.0005	2,446	1
		C	0.0000	2,168	0
Shortraker rockfish	Annual	W	0.0013	134	0
		C	0.0012	325	0
		E	0.0009	455	0
Other Rockfish	Annual	W	0.0035	224	1
		C	0.0033	566	2
		E	0.0000	3,052	0
Pelagic shelf rockfish	Annual	W	0.0017	558	1
		C	0.0000	2,791	0

TABLE 16—PROPOSED 2012 AND 2013 GOA NON-AMERICAN FISHERIES ACT CRAB VESSEL GROUNDFISH HARVEST SIDEBOARD LIMITS—Continued

[Values are rounded to the nearest metric ton]

Species	Season/gear	Area/component/gear	Ratio of 1996–2000 non-AFA crab vessel catch to 1996–2000 total harvest	Proposed 2012 and 2013 TACs	Proposed 2012 and 2013 non-AFA crab vessel sideboard limit
		E	0.0000	998	0
Rougheye	Annual	W	0.0067	81	1
		C	0.0047	868	4
		E	0.0008	363	0
Demersal shelf rockfish	Annual	SEO	0.0000	300	0
Thornyhead Rockfish	Annual	W	0.0047	425	2
		C	0.0066	637	4
		E	0.0045	708	3
Atka mackerel	Annual	Gulfwide	0.0000	4,700	0
Big skate	Annual	W	0.0392	598	23
		C	0.0159	2,049	33
		E	0.0000	681	0
Longnose skate	Annual	W	0.0392	81	3
		C	0.0159	2,009	32
		E	0.0000	762	0
Other skates	Annual	Gulfwide	0.0176	2,093	37
Sharks	Annual	Gulfwide	0.0176	6,197	109
Squids	Annual	Gulfwide	0.0176	1,148	20
Octopuses	Annual	Gulfwide	0.0176	954	17
Sculpins	Annual	Gulfwide	0.0176	5,496	97

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.

Rockfish Program Groundfish Sideboard and Halibut PSC Limitations

Amendment 88 to the FMP would reauthorize the Rockfish Program, as previously described in the preamble. If approved, this amendment would establish three classes of sideboard provisions: CV groundfish sideboard restrictions, C/P rockfish sideboard restrictions, and C/P opt-out vessel sideboard restrictions. These sideboards are intended to limit the ability of rockfish harvesters to expand into other fisheries. A full description of the Rockfish Program sideboard provisions is contained in the proposed rule to implement Amendment 88 (76 FR 52148, August 19, 2011), including the proposed regulations that would establish the following limitations. Absent implementation of Amendment 88, these sideboards would not need to be calculated, as there would not be an applicable Rockfish Program fisheries or participants to which sideboards would apply. As described earlier in the preamble, the Central GOA rockfish fisheries would revert to being managed under the general limitations proscribed for the GOA groundfish fisheries, rather than with fisheries cooperatives and specific allocations.

CVs participating in the Rockfish Program may not participate in directed fishing for northern rockfish, Pacific ocean perch, and pelagic shelf rockfish in the Western GOA and West Yakutat Districts from July 1 through July 31. Furthermore, CVs may not participate in directed fishing for arrowtooth flounder, deep-water flatfish, and rex sole in the GOA from July 1 through July 31.

Amendment 88 also establishes rockfish and halibut PSC sideboard limitations for C/Ps participating in Rockfish Program cooperatives. These C/Ps are prohibited from directed fishing for northern rockfish, Pacific ocean perch, and pelagic shelf rockfish in the Western GOA and West Yakutat District. The sideboard limits are in effect only during the month of July, and are designed to restrict eligible C/Ps to historic catch levels of these three species. Holders of C/P-designated LLP licenses that opt-out of participating in a rockfish cooperative will receive the portion of each sideboard limit that is not assigned to rockfish cooperatives.

Table 17 lists the proposed 2012 and 2013 Rockfish Program C/P sideboard limits in the West Yakutat District and the Western GOA. Due to confidentiality requirements associated with fisheries data, the sideboard limits for the West Yakutat District are not displayed.

TABLE 17—PROPOSED 2012 AND 2013 ROCKFISH PROGRAM HARVEST LIMITS FOR THE WEST YAKUTAT DISTRICT AND WESTERN GOA BY FISHERY AND CATCHER/PROCESSOR SECTOR

[Values are rounded to the nearest metric ton]

Area	Fishery	C/P sector (% of TAC)	Proposed 2012 and 2013 TACs	Proposed 2012 and 2013 C/P limit
West Yakutat District	Pelagic shelf rockfish	Confid.[1]	372	N/A
	Pacific ocean perch	Confid.[1]	1,845	N/A
Western GOA	Pelagic shelf rockfish	72.3	558	403
	Pacific ocean perch	50.6	2,665	1,348
	Northern rockfish	74.3	2,446	1,817

[1] Not released due to confidentiality requirements associated with fish ticket data established by NMFS and the State of Alaska.

The C/P sector is subject to halibut PSC sideboard limits for the trawl deep-water and shallow-water species fisheries during July 1 through July 31. No halibut PSC sideboard limits apply to the CV sector. C/Ps that opt-out of the Rockfish Program would receive the portion of the deep-water and shallow-water halibut PSC sideboard limit not assigned to C/P rockfish cooperatives. Table 18 lists the Rockfish Program halibut PSC limits proposed for the C/P sector in 2012 and 2013.

TABLE 18—PROPOSED 2012 AND 2013 ROCKFISH PROGRAM HALIBUT MORTALITY LIMITS FOR THE CATCHER/PROCESSOR SECTOR

[Values are rounded to the nearest metric ton]

Sector	Shallow-water complex halibut PSC sideboard ratio (percent)	Deep-water complex halibut PSC sideboard ratio (percent)	Annual halibut mortality limit (mt)	Annual shallow-water complex halibut PSC sideboard limit (mt)	Annual deep-water complex halibut PSC sideboard limit (mt)
Catcher/processor	0.10	2.50	2,000	2	50

The sideboard provisions for C/Ps that elect to opt-out of participating in a rockfish cooperative are described in the proposed rule to implement Amendment 88 (76 FR 52148, August 19, 2011). These ratios and amounts are not known at this time because vessels applications for C/Ps electing to opt-out are due to NMFS on March 1 of each calendar year, thereby preventing NMFS from calculating proposed 2012 and 2013 allocations. NMFS will post these allocations on the Alaska Region Web site at *http://alaskafisheries.noaa.gov/sustainablefisheries/goarat/default.htm* when they become available.

Amendment 80 Vessel Program Groundfish Sideboard and PSC Limits

Amendment 80 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (Amendment 80 Program) established a limited access privilege program for the non-AFA trawl C/P sector. To limit the ability of participants eligible for the Amendment 80 program to expand their harvest efforts in the GOA, the Amendment 80 Program established groundfish and halibut PSC limits for Amendment 80 Program participants.

Section 679.92 establishes groundfish harvesting sideboard limits on all Amendment 80 Program vessels, other than the F/V GOLDEN FLEECE, to amounts no greater than the limits shown in Table 37 to part 679. Under regulations at § 679.92(d), the F/V GOLDEN FLEECE is prohibited from directed fishing for pollock, Pacific cod, Pacific ocean perch, pelagic shelf rockfish, and northern rockfish in the GOA.

Groundfish sideboard limits for Amendment 80 Program vessels operating in the GOA are based on their average aggregate harvests from 1998 to 2004. Table 19 lists the proposed 2012 and 2013 sideboard limits for Amendment 80 Program vessels. All targeted or incidental catch of sideboard species made by Amendment 80 Program vessels will be deducted from the sideboard limits in Table 19.

TABLE 19—PROPOSED 2012 AND 2013 GOA GROUNDFISH SIDEBOARD LIMITS FOR AMENDMENT 80 PROGRAM VESSELS

[Values are rounded to the nearest metric ton]

Species	Season	Area	Ratio of Amendment 80 sector vessels 1998–2004 catch to TAC	Proposed 2012 and 2013 TAC (mt)	Proposed 2012 and 2013 Amendment 80 vessel sideboards (mt)
Pollock	A Season— January 20–February 25	Shumagin (610)	0.003	6,186	19
		Chirikof (620)	0.002	15,374	31
		Kodiak (630)	0.002	5,783	12
	B Season— March 10–May 31	Shumagin (610)	0.003	6,185	19
		Chirikof (620)	0.002	18,394	37
		Kodiak (630)	0.002	2,765	6
	C Season— August 25–September 15	Shumagin (610)	0.003	11,280	34
		Chirikof (620)	0.002	7,262	15
		Kodiak (630)	0.002	8,803	18
	D Season— October 1–November 1	Shumagin (610)	0.003	11,280	34
		Chirikof (620)	0.002	7,262	15
		Kodiak (630)	0.002	8,803	18
	Annual	WYK (640)	0.002	3,024	6
Pacific cod	A Season [1]— January 1–June 10	W	0.020	12,317	246
		C	0.044	21,818	960
	B Season [2]— September 1–December 31	W	0.020	8,211	164
		C	0.044	14,545	640
	Annual	WYK	0.034	1,760	60
Pacific ocean perch	Annual	W	0.994	2,665	2,649
		WYK	0.961	1,845	1,773
Northern rockfish	Annual	W	1.000	2,446	2,446
Pelagic shelf rockfish	Annual	W	0.764	558	426
		WYK	0.896	372	333

[1] The Pacific cod A season for trawl gear does not open until January 20.
[2] The Pacific cod B season for trawl gear closes November 1.

The PSC sideboard limits for Amendment 80 Program vessels in the GOA are based on the historic use of halibut PSC by Amendment 80 Program vessels in each PSC target category from 1998 through 2004. These values are slightly lower than the average historic use to accommodate two factors: Allocation of halibut PSC cooperative quota under the Central GOA Rockfish Program and the exemption of the F/V GOLDEN FLEECE from this restriction. Table 20 lists the proposed 2012 and 2013 halibut PSC limits for Amendment 80 Program vessels, as proscribed at Table 38 to 50 CFR part 679.

TABLE 20—PROPOSED 2012 AND 2013 HALIBUT PSC SIDEBOARD LIMITS FOR AMENDMENT 80 PROGRAM VESSELS IN THE GOA

[Values are rounded to nearest metric ton]

Season	Season dates	Fishery category	Historic Amendment 80 use of the annual halibut PSC limit (ratio)	Proposed 2012 and 2013 annual PSC limit (mt)	Proposed 2012 and 2013 Amendment 80 vessel PSC sideboard limit (mt)
1	January 20–April 1	shallow-water	0.0048	2,000	10
		deep-water	0.0115	2,000	23
2	April 1–July 1	shallow-water	0.0189	2,000	38
		deep-water	0.1072	2,000	214
3	July 1–September 1	shallow-water	0.0146	2,000	29
		deep-water	0.0521	2,000	104
4	September 1–October 1	shallow-water	0.0074	2,000	15
		deep-water	0.0014	2,000	3
5	October 1–December 31	shallow-water	0.0227	2,000	45
		deep-water	0.0371	2,000	74

Classification

NMFS has determined that the proposed harvest specifications are consistent with the FMP and preliminarily determined that the proposed harvest specifications are consistent with the Magnuson-Stevens Act and other applicable laws.

This action is authorized under 50 CFR 679.20 and is exempt from review under Executive Order 12866.

NMFS prepared an EIS for this action (see **ADDRESSES**) and made it available to the public on January 12, 2007 (72 FR 1512). On February 13, 2007, NMFS issued the Record of Decision (ROD) for the EIS. Copies of the EIS and ROD for this action are available from NMFS. The EIS analyzes the environmental consequences of the proposed groundfish harvest specifications and its alternatives on resources in the action area. The EIS found no significant environmental consequences from the proposed action or its alternatives.

NMFS prepared an Initial Regulatory Flexibility Analysis (IRFA) as required by section 603 of the Regulatory Flexibility Act, analyzing the methodology for establishing the relevant TACs. The IRFA evaluated the impacts on small entities of alternative harvest strategies for the groundfish fisheries in the EEZ off Alaska. As set forth in the methodology, TACs are set to a level that fall within the range of ABCs recommended by the SSC; the sum of the TACs must achieve the OY specified in the FMP. While the specific numbers that the methodology may produce vary from year to year, the methodology itself remains constant.

A description of the proposed action, why it is being considered, and the legal basis for this proposed action are contained in the preamble above. A copy of the analysis is available from NMFS (see **ADDRESSES**). A summary of the IRFA follows.

The action under consideration is a harvest strategy to govern the catch of groundfish in the GOA. The preferred alternative is the existing harvest strategy in which TACs fall within the range of ABCs recommended by the SSC. This action is taken in accordance with the FMP prepared by the Council pursuant to the Magnuson-Stevens Act.

The directly regulated small entities include approximately 627 CVs and approximately 10 C/Ps in the GOA. The entities directly regulated by this action are those that harvest groundfish in the EEZ of the GOA, and in parallel fisheries within State of Alaska waters. These include entities operating CVs and C/Ps within the action area, and entities receiving direct allocations of groundfish. Catcher vessels and C/Ps are considered to be small entities if they have annual gross receipts of $4 million per year or less from all economic activities, including the revenue of their affiliated operations (see Table 37 to the Economic Status of the Groundfish off Alaska, 2010, in the 2010 SAFE report, dated November 2010, available from the Council (see **ADDRESSES**)). Because the 627 CVs and 10 C/Ps meet this size standard, they are considered to be small entities for the purposes of this analysis.

The preferred alternative (Alternative 2) was compared to four other alternatives. Alternative 1 would have set TACs to generate fishing rates equal to the maximum permissible ABC (if the full TAC were harvested), unless the sum of TACs exceeded the GOA OY, in which case harvests would be limited to the OY. Alternative 3 would have set TACs to produce fishing rates equal to the most recent five-year average fishing rate. Alternative 4 would have set TACs to equal the lower limit of the GOA OY range. Alternative 5, the ''no action alternative,'' would have set TACs equal to zero.

The TACs associated with the preferred harvest strategy are those adopted by the Council in October 2011, as per Alternative 2. OFLs and ABCs for the species were based on recommendations prepared by the Council's GOA Plan Team in August and September 2011, and reviewed and modified by the Council's SSC in October 2011. The Council based its TAC recommendations on those of its AP, which were consistent with the SSC's OFL and ABC recommendations.

Alternative 1 selects harvest rates that would allow fishermen to harvest stocks

at the level of ABCs, unless total harvests were constrained by the upper bound of the GOA OY of 800,000 mt. As shown in Table 1 of the preamble, the sum of ABCs in 2012 and 2013 would be about 603,990 mt, which falls below the upper bound of the OY range. The sum of TACs is equal to the sum of ABCs. In this instance, Alternative 1 is consistent with the preferred alternative (Alternative 2), meets the objectives of that action, and has small entity impacts that are equivalent to the preferred alternative. In some instances, the selection of Alternative 1 would not reflect the practical implications that increased TACs (where the sum of TACs equals the sum of ABCs) for some species probably would not be fully harvested. This could be due to a lack of commercial or market interest in such species. Additionally, an underharvest of some TACs could result due to constraints such as the fixed, and therefore constraining, prohibited species catch limits associated with the harvest of the GOA groundfish species.

Alternative 3 selects harvest rates based on the most recent five years of harvest rates (for species in Tiers 1 through 3) or for the most recent five years of harvests (for species in Tiers 4 through 6). This alternative is inconsistent with the objectives of this action, the Council's preferred harvest strategy, because it does not take account of the most recent biological information for this fishery. Harvest rates are listed for each species category for each year in the SAFE report (see **ADDRESSES**).

Alternative 4 would lead to significantly lower harvests of all species. It would reduce TACs from the upper end of the OY range in the GOA, to its lower end of 116,000 mt. Overall, this would reduce 2012 TACs by about 81 percent. This would lead to significant reductions in harvests of species harvested by small entities. While reductions of this size would be associated with offsetting price increases, the size of these increases is very uncertain. There are close substitutes for GOA groundfish species available in significant quantities from the Bering Sea and Aleutian Islands management area. While production declines in the GOA would undoubtedly be associated with significant price increases in the GOA, these increases would still be constrained by production of substitutes, and are very unlikely to offset revenue declines from smaller production. Thus, this alternative would have a detrimental impact on small entities.

Alternative 5, which sets all harvests equal to zero, may also address conservation issues, but would have a significant adverse economic impact on small entities. Tables 2 and 3 of the IRFA (see **ADDRESSES**) provide information on numbers of individual vessels with gross revenues less than $4 million, and with the average gross revenues for these vessels. These tables indicate that median annual aggregate revenues for these vessels in the years from 2005 to 2009 were $386 million; annual aggregate revenues for this group of vessels ranged from $308 to $451 million. These estimates do not take account of affiliations among vessels, and thus overstate the revenues flowing to small entities

The proposed harvest specifications extend the current 2012 OFLs, ABCs, and most TACs, to 2012 and 2013. As noted in the IRFA, the Council may modify these OFLs, ABCs, and TACs in December 2011, when it reviews the November meeting reports from its groundfish plan teams, and the December Council meeting reports of its SSC and AP. Because most TACs in the proposed 2012 and 2013 harvest specifications are unchanged from the 2011 TACs, NMFS does not expect adverse impacts on small entities. Also, NMFS does not expect any changes made by the Council in December to have significant adverse impacts on small entities.

This action does not modify recordkeeping or reporting requirements, or duplicate, overlap, or conflict with any Federal rules.

Adverse impacts on marine mammals or endangered species resulting from fishing activities conducted under this rule are discussed in the EIS and its accompanying annual SIRs (see **ADDRESSES**).

Authority: 16 U.S.C. 773 *et seq.;* 1801 *et seq.;* 3631 *et seq.;* Public Law 108–447.

Dated: December 16, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2011–32848 Filed 12–21–11; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 76, No. 246

Thursday, December 22, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

January 21, 2010.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Fruits, Nut, and Specialty Crops.

OMB Control Number: 0535–0039.

Summary of Collection: The primary function of the National Agricultural Statistics Service (NASS) is to prepare and issue current official state and national estimates of crop and livestock production. Estimates of fruit, tree nuts, and specialty crops are an integral part of this program. These estimates support the NASS strategic plan to cover all agricultural cash receipts. The authority to collect these data activities is granted under U.S. Code title 7, Section 2204. Information is collected on a voluntary basis from growers, processors, and handlers through surveys.

Need and Use of the Information: Data reported on fruit, nut, specialty crops and Hawaii tropical crops are used by NASS to estimate acreage, yield, production, utilization, and crop value in States with significant commercial production. These estimates are essential to farmers, processors, and handlers in making production and marketing decisions. Estimates from these inquiries are used by market order administrators in their determination of expected supplies of crop under federal and state market orders as well as competitive fruits and nuts.

Description of Respondents: Farms; Business or other for-profit.

Number of Respondents: 63,305.

Frequency of Responses: Reporting: On occasion; Annually; Quarterly; Semi-annually; Monthly.

Total Burden Hours: 16,489.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–32731 Filed 12–21–11; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Food And Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comments Request—Nutrition Assistance in Farmers' Markets: Understanding the Shopping Patterns of SNAP Participants

AGENCY: Food and Nutrition Service (FNS), United States Department of Agriculture (USDA).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the public and other public agencies to comment on this proposed information collection. This is a revision to a previous data collection regarding Farmers' Market Operations. The purpose of this collection is for the Food and Nutrition Service to examine the reasons behind the shopping decision at farmers' markets among recipients of Supplemental Nutrition Assistance Program (SNAP) benefits.

DATES: Written comments must be received on or before February 21, 2012.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden on the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Steven Carlson, Office of Research and Analysis, Food and Nutrition Service/USDA, 3101 Park Center Drive, Room 1014, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Steven Carlson at (703) 305–2017 or via email to *Steve.Carlson@fns.usda.gov*. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov* and follow

the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the Office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m. Monday through Friday) at 3101 Park Center Drive, Room 1014, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collected should be directed to Steven Carlson at (703) 305–2017.

SUPPLEMENTARY INFORMATION:

Title: Nutrition Assistance in Farmers' Markets: Understanding the Shopping Patterns of SNAP Participants.

OMB Number: 0564–Revision.

Expiration Date of Approval: 11/30/2014.

Abstract: The USDA, Food and Nutrition Service (FNS), is pursuing initiatives to improve access to healthy foods among nutrition assistance program clients. Among these are steps to support access to fresh fruits and vegetables through farmers' markets. The overall objective of this collection is to promote opportunities for nutrition assistance program clients to take advantage of farmers' markets. In order to meet this objective, FNS needs to examine the reasons behind the shopping decision at farmers' markets among recipients of Supplemental Nutrition Assistance Program (SNAP) benefits. To this end, FNS is conducting a survey with SNAP participants who purchase food in a catchment area around a nationally representative sample of farmers' markets that redeemed at least $1,000 in SNAP benefits from July 2010 through June 2011. This survey will be implemented with a sample of SNAP participants from two groups that are of particular interest to FNS:

1. SNAP participants who used their EBT card at a farmers' market in the past year; and

2. SNAP participants who have not used their EBT card at a farmers' market in the past year.

The data collection activities to be undertaken subject to this notice include:

- The questionnaire will be administered to SNAP participants represented in the two categories of participants above. First, a hard-copy survey will be mailed to SNAP participants, and they will be asked to return it in a postage-paid envelope. Those with bad addresses and those who do not respond to the mailing will be contacted by telephone and will be given an option to complete a telephone interview.
- To supplement the survey data, twelve focus groups will be conducted with SNAP participants. Three groups will be held with English-language users of EBT cards at farmers' markets, three groups will be held with Spanish-language users of EBT cards at farmers' markets, three groups will be held with English-language non-users of their EBT card at a farmers' market, and three groups will be held with Spanish-language non-users of their EBT card at a farmers' market.

Affected Public: Respondent groups identified include: Individuals/Households (SNAP clients).

Estimated Number of Respondents: The total number of respondents is 4,806. This includes 3,750 SNAP participants (80% who will complete interviews) and 1,056 SNAP participants (96 will participate in the focus group discussions).

Estimated Number of Responses per Respondent: SNAP participants will complete the survey one time. SNAP participants will attend the focus group once.

Estimated time per Response: SNAP participants who have used their EBT card at a farmers' market in the past year will take approximately 20 minutes (.3333 hours) to complete the survey. SNAP participants who have not used their EBT card at a farmers' market in the past year will take approximately 25 minutes (.4166 hours) to complete the survey. Each SNAP participant will participate in the focus group discussion for approximately 1.5 hours.

Estimated Total Annual Burden on Respondents: 1,374 hours. See the table below for estimated total annual burden for each type of respondent.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondent	Number of respondents	Number of responses per respondent	Estimated total annual responses	Average burden per response (in hours)	Total burden (in hours)
SNAP Client Survey					
SNAP clients who used EBT card at farmers' market:					
Completed	1,000	1	1,000	.3333	333.30
Attempted	250	1	250	.0333	8.33
SNAP clients who did not use EBT card at farmers' market:					
Completed	2,000	1	2,000	.4166	833.20
Attempted	500	1	500	.0333	16.65
Survey Total	3,750		3,750		1,191.48
Focus Group with SNAP Clients					
Recruitment Screener:					
Completed	120	1	120	.0835	10.02
Attempted	840	1	840	.0334	28.06
Focus Group Discussion:					
Completed	96	1	96	1.50	144.00
Attempted	0	1	0		
Focus Group Total	1,056		1,056		182.08

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Respondent	Number of respondents	Number of responses per respondent	Estimated total annual responses	Average burden per response (in hours)	Total burden (in hours)
Total	4,806		4,806		1,373.56

Dated: December 15, 2011.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2011–32798 Filed 12–21–11; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Understanding the Rates, Causes, and Costs of Churning in the Supplemental Nutrition Assistance Program (SNAP)

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This collection is a new collection for research on the rates, causes, and costs of churning in SNAP.

DATES: Written comments must be received on or before February 21, 2012.

ADDRESSES: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Steven Carlson, Office of Research and Analysis, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 1014, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Steven Carlson at (703) 305–2576 or via email to *Steve.Carlson@fns.usda.gov*. Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov*, and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m. Monday through Friday) at 3101 Park Center Drive, Room 1014, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Steven Carlson at (703) 305–2017. Information requests submitted through email should refer to the title of this proposed collection and/or the OMB approval number in the subject line.

SUPPLEMENTARY INFORMATION:

Title: Understanding the Rates, Causes, and Costs of Churning in SNAP.

Form Number: [If applicable, insert number].

OMB Number: 0584–NEW.

Expiration Date: [Insert date or Not Yet Determined].

Type of Request: New collection.

Abstract: The Supplemental Nutrition Assistance Program (SNAP, formerly known as the Food Stamp Program) is the U.S. Department of Agriculture's (USDA's) largest nutrition program, enabling millions of low-income Americans to purchase groceries. It served an average of 40.3 million people per month in Fiscal Year 2010, growing from 17.1 million in Fiscal Year 2000.

The program is designed to respond to broad economic and individual circumstances as they change over time. For this reason, households move on and off the program as they become benefit-eligible and then lose eligibility because of changing income and household circumstances. A new job, a reduction in work hours, the addition of a household member, someone moving out, or other changes in household income or composition can affect eligibility and lead naturally to program entry and exit.

There are also times, however, when households leave the program despite remaining eligible. Eligible households not receiving SNAP benefits are of concern to the program because of their reduced access to nutritious foods.

The Office of Research and Analysis (ORA) in USDA's Food and Nutrition Service (FNS) has undertaken a study on the causes and costs of churning in SNAP. Churning occurs when a SNAP participant leaves the program and returns within a short period of time, defined here as four months or less. Churning is a policy concern because of its presumed adverse effects on participants and on the administering agencies. When churn occurs, agency staff must re-collect paperwork and re-complete the application process for households whose eligibility may not have changed since they left the program and who thus may have incurred a loss of benefits. The study seeks to better understand (1) the rates and patterns of churning; (2) why participants churn; (3) what happens administratively when a participant returns to SNAP after a brief spell of non-receipt, and (4) the costs of churn to both programs and participants.

The study includes a quantitative research component involving the use of administrative data in six states and a qualitative research component involving on-site staff interviews and participant focus groups in six study sites. At each of the six sites, hour-long semi-structured interviews will be conducted with state and local SNAP administrators, SNAP caseworkers, and directors of community-based organizations involved with SNAP outreach. Also at each site, two focus groups will be conducted with SNAP participants who have experienced churn. Each group will consist of five individuals and will last one hour. Recruitment for each focus group will require three-minute telephone calls to ten individuals.

Affected Public: (State, Local, Tribal Government, Business (Not-for-Profit), Individual/Households).

Respondent groups identified include: (1) SNAP administrators; (2) SNAP caseworkers; (3) directors of

community-based organizations; (4) SNAP participants—attempted focus groups; and (5) SNAP participants—completed focus groups.

Estimated Number of Respondents: The total estimated number of respondents is 234. This includes: (1) 12 SNAP administrators; (2) 30 SNAP caseworkers; (3) 12 directors of community-based organizations; (4) 180 SNAP participants recruited (120 SNAP participants—attempted focus groups; and (5) 60 SNAP participants—completed focus groups.)

Estimated Number of Responses per Respondent: Each respondent will be asked to participate in one interview, telephone call, or focus group.

Estimated Total Annual Responses: 234.

Estimated Time per Response: 38.5 minutes (0.64 hours). The estimated time of response varies from 3 minutes to 60 minutes depending on the respondent group, as shown in the table below.

Estimated Total Annual Burden on Respondents: 7,380 minutes (123 hours). See the table below for estimated total annual burden for each type of respondent.

REPORTING BURDEN

(a) Affected public	Respondent type	(b) Survey instruments	(c) Number respondents	(d) Frequency of response	(e) Est. total annual responses per respondent (c × d)	(f) Hours per response	(g) Total burden hours (e × f)
State, Local and Tribal Agencies.	SNAP Administrators	interview	12.00	1.00	12.00	1.00	12.00
	SNAP Caseworkers	interview	30.00	1.00	30.00	1.00	30.00
Subtotal			42.00	1.00	42		42.00
Individuals & Households.	SNAP Participants	Recruited—Declined	120.00	1.00	120.00	0.05	6.00
		Recruited—Accepted	60	1.00	60	0.05	3.00
		Focus Group	60.00	1.00	60.00	1	60
Subtotal			180.00	1.00	180.00	—	69.00
Business (not-for-profit).	Directors of community-based organizations.	interview	12.00	1.00	12.00	1.00	12.00
Grand Total			234.00		234.00		123.00

December 15, 2011.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2011–32799 Filed 12–21–11; 8:45 am]

BILLING CODE 3410–30–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Arizona Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that two meetings of the Arizona Advisory Committee (Committee) to the Commission will be held on Wednesday, January 4, 2012, at the Harmon Library, 1325 S. 5th Avenue, Phoenix, AZ 85003. The first meeting is administrative in purpose and will convene at 1 p.m. and adjourn at approximately 2 p.m.; the purpose of the administrative meeting is for members of the newly chartered Committee to receive orientation and ethics training. The second meeting is planning in purpose and will convene at 2 p.m. and adjourn at approximately 3:30 p.m.; the purpose of the planning meeting is for the Committee to plan future Committee activity.

Members of the public are entitled to submit written comments. The comments must be received in the Western Regional Office by February 5, 2012. The mailing address is Western Regional Office, U.S. Commission on Civil Rights, 300 N. Los Angeles St., Suite 2010, Los Angeles, CA 90012. Persons wishing to email their comments may do so to *atrevino@usccr.gov.* Persons that desire additional information should contact Angelica Trevino, Administrative Assistant, Western Regional Office, at (213) 894–3437.

Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

Records generated from this meeting may be inspected and reproduced at the Western Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *www.usccr.gov*, or to contact the Western Regional Office at the above email or street address.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, December 19, 2011.

Peter Minarik,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2011–32797 Filed 12–21–11; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Louisiana Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the

Louisiana Advisory Committee (Committee) to the Commission will convene in Baton Rouge at Louisiana State University, Student Union Room 303, Raphael Semmes Road (corner of Raphael Semmes Road and Highland) at 2 p.m. and adjourn at approximately 5 p.m. on Thursday, January 26, 2012. The purpose of this meeting is to continue planning the Committee's civil rights project. The Committee has invited Mr. Carle Jackson of the Louisiana Commission on Law Enforcement to provide preliminary information concerning potential racial disparities in the high incarceration of African-Americans in state operated prisons.

This meeting is available to the public through the following call-in number: (225) 578–4958, conference call access code number. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1-(800) 977–8339 and providing the Service with the conference call number and contact name Farella E. Robinson.

To ensure that the Commission secures an appropriate number of lines for the public, persons are asked to register by contacting Corrine Sanders of the Central Regional Office and TTY/TDD telephone number, by 4 p.m. on January 19, 2012.

Members of the public are entitled to submit written comments. The comments must be received in the regional office by February 7, 2012. The address is U.S. Commission on Civil Rights, 400 State Avenue, Suite 908, Kansas City, Kansas 66101. Comments may be emailed to *frobinson@usccr.gov*. Records generated by this meeting may be inspected and reproduced at the Central Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *www.usccr.gov,* or to contact the Central Regional Office at the above email or street address.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, December 19, 2011.

Peter Minarik,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2011–32800 Filed 12–21–11; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; Survey of Income and Program Participation (SIPP) Wave 13 of the 2008 Panel

AGENCY: U.S. Census Bureau.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before February 21, 2012.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *DHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Patrick J. Benton, Census Bureau, Room HQ–6H045, Washington, DC 20233–8400, (301) 763–4618.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau conducts the SIPP, which is a household-based survey designed as a continuous series of national panels. New panels are introduced every few years with each panel having durations of one to six years. Respondents are interviewed at 4-month intervals or ''waves'' over the life of the panel. The survey is molded around a central ''core'' of labor force and income questions that remain fixed throughout the life of the panel. The core is supplemented with questions designed to address specific needs, such as obtaining information on household members' participation in government programs as well as prior labor force patterns of household members. These supplemental questions are included with the core and are referred to as ''topical modules.''

The SIPP represents a source of information for a wide variety of topics and allows information for separate topics to be integrated to form a single, unified database so that the interaction between tax, transfer, and other government and private policies can be examined. Government domestic-policy formulators depend heavily upon the SIPP information concerning the distribution of income received directly as money or indirectly as in-kind benefits and the effect of tax and transfer programs on this distribution. They also need improved and expanded data on the income and general economic and financial situation of the U.S. population, which the SIPP has provided on a continuing basis since 1983. The SIPP has measured levels of economic well-being and permitted changes in these levels to be measured over time.

The 2008 panel is currently scheduled for approximately 6 years and will include 16 waves of interviewing beginning in September 2008. Approximately 65,300 households were selected for the 2008 panel, of which 45,000 households were interviewed. We estimate that each household contains 2.1 people, age 15 years or older, yielding approximately 94,500 person-level interviews in Wave 1 and subsequent waves. Interviews take 30 minutes on average. Three waves will occur in the 2008 SIPP Panel during FY 2012. The total annual burden for 2008 Panel SIPP interviews would be 141,750 hours in FY 2012.

The topical module for the 2008 Panel Wave 13 collects information about Educational Certificates and Industry Recognized Certifications. Wave 13 interviews will be conducted from September 1, 2012 through December 31, 2012.

A 10-minute re-interview of 3,100 people is conducted at each wave to ensure the accuracy of responses. Reinterviews require an additional 1,553 burden hours in FY 2012.

II. Method of Collection

The SIPP is designed as a continuing series of national panels of interviewed households that are introduced every few years with each panel having durations of one to six years. All household members 15 years old or over are interviewed using regular proxy-respondent rules. During the 2008 panel, respondents are interviewed a total of 16 times or 16 waves at 4-month

intervals making the SIPP a longitudinal survey. Sample people (all household members present at the time of the first interview) who move within the country and reasonably close to a SIPP primary sampling unit will be followed and interviewed at their new address. Individuals 15 years old or over who enter the household after Wave 1 will be interviewed; however, if these individuals move, they are not followed unless they happen to move along with a Wave 1 sample individual.

III. Data

OMB Control Number: 0607–0944.

Form Number: SIPP/CAPI Automated Instrument.

Type of Review: Regular submission.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 94,500 people per wave.

Estimated Time per Response: 30 minutes per person on average.

Estimated Total Annual Burden Hours: 143,303.[1]

Estimated Total Annual Cost: The only cost to respondents is their time.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 182.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) methods to enhance the quality, utility, and clarity of the information to be collected; and (d) methods to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 19, 2011.

Lenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–32796 Filed 12–21–11; 8:45 am]

BILLING CODE 3510–07–P

[1] (94,500 × .5 hr × 3 waves + (3,100 × .167 hr × 3 waves))

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–828]

Stainless Steel Butt-Weld Pipe Fittings From Italy: Preliminary Results of Antidumping Duty Administrative Review and Preliminary No Shipment Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests for an administrative review, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on stainless steel butt-weld pipe fittings (SSBW pipe fittings) from Italy. The review involves the imports of subject merchandise of two respondent companies and covers the period February 1, 2010, through January 31, 2011. For these preliminary results, we found that one respondent made sales of subject merchandise at or above normal value while the other respondent had no shipments of subject merchandise during the period of review.

DATES: *Effective Date:* December 22, 2011.

FOR FURTHER INFORMATION CONTACT: Edythe Artman or Angelica Mendoza, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3931 or (202) 482–3019, respectively.

SUPPLEMENTARY INFORMATION:

Period of Review

The period of review is February 1, 2010, through January 31, 2011.

Background

On February 1, 2011, the Department published a notice of opportunity to request an administrative review of the order on SSBW pipe fittings from Italy. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 76 FR 5559 (February 1, 2011). In response, the Department received requests from two companies—Tectubi Raccordi S.p.A. (Tectubi) and Filmag Italia SRL (Filmag)—on February 28, 2011. In each request, the companies requested a review of their own sales. We initiated the review of both companies on March 31, 2011. *See Initiation of Antidumping Duty Administrative Reviews, Requests for Revocation in Part, and Deferral of Administrative Review,* 76 FR 17825 (March 31, 2011).

On October 31, 2011, we extended the time limit for completion of the preliminary results of the review to no later than December 15, 2011. *See Stainless Steel Butt-Weld Pipe Fittings From Italy; Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review,* 76 FR 67146 (October 31, 2011).

Both Tectubi and Filmag submitted responses to the Department's antidumping questionnaire and responses to subsequent requests for clarifications or additional information. The petitioner did not file any comments on these submissions.

Preliminary Determination of No Shipments

In its response to the Department's antidumping questionnaire, Filmag stated that it had no sales of subject merchandise during the period of review. We later confirmed with U.S. Customs and Border Protection (CBP) that this company had no entries of SSBW pipe fittings from Italy during the period of review. *See* ''Memorandum to the File'' regarding No Shipments Inquiries for Filmag Italia SRL, dated November 28, 2011. Because the evidence on the record indicates that Filmag did not export subject merchandise to the United States during the period of review, we preliminarily determine that it had no reviewable transactions during this period.

Our past practice concerning no-shipment respondents was to rescind the administrative review if the respondent certified that it had no shipments and we confirmed the certified statement through an examination of CBP data. We would then instruct CBP to liquidate any entries of merchandise produced by the respondent at the deposit rate in effect on the date of entry. However, in our May 6, 2003, ''automatic assessment'' clarification, we explained that, where respondents in an administrative review demonstrated that they had no knowledge of sales through resellers to the United States, we would instruct CBP to liquidate such entries at the all-others rate applicable to the proceeding. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003) (Assessment Policy Notice). Thus, our practice of rescinding no-shipment reviews did not comport with the clarification, since it was our intent to no longer liquidate the entries of resellers, of which a respondent company had no knowledge, at an ''as entered'' rate.

Therefore, instead of rescinding the review with respect to Filmag, we find it appropriate to complete the review and issue liquidation instructions to CBP concerning entries for this company following the final results of the review. If we continue to find that Filmag had no reviewable transactions of subject merchandise in the final results, we will instruct CBP to liquidate any existing entries of merchandise produced by Filmag but exported by other parties at the all-others rate. *See, e.g., Magnesium Metal From the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 26922 (May 13, 2010), unchanged in *Magnesium Metal From the Russian Federation: Final Results of Antidumping Duty Administrative Review,* 75 FR 56989 (September 17, 2010).

Collapsing of Affiliated Companies

In its original and supplemental questionnaire responses, Tectubi reported all home-market and U.S. sales of SSBW pipe fittings from Italy that involved itself and two affiliates, Raccordi Forgiati S.r.l. (Raccordi) and Allied International S.r.l. (Allied). Tectubi explained that, although it had made the only sales of subject merchandise during the period of review, it concluded that the questionnaire instructions required a response on behalf of all three companies based on their close affiliation with one another and Raccordi and Allied's involvement in the production and sale of SSBW pipe fittings.

When considering whether to collapse affiliates and treat them as a single entity for purposes of an administrative review, we first consider their affiliation to one another. Because Tectubi and Raccordi are wholly-owned subsidiaries of Allied, we found that the three companies were affiliated under section 771(33)(E) and (F) of the Tariff Act of 1930, as amended (the Act).

We next found that, as both Tectubi and Raccordi produced the merchandise under review during the period of review, they had production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure their manufacturing priorities, as required under 19 CFR 351.401(f)(1). We also found that there was a significant potential for the manipulation of price or production between the two companies, based on their common ownership, their shared president and chief executive officer (CEO), and their intertwined production operations. We found that, in the case of Tectubi's sales of Raccordi's product, they also shared sales information. Accordingly, because both collapsing criteria were met under 19 CFR 351.401(f)(1), we concluded that Tectubi and Raccordi should be treated as a single entity for purposes of this review.

In keeping with the Department's practice to consider the collapsing of affiliated processors and exporters, our consideration of collapsing extended to Allied as well. *See Certain Frozen and Canned Warmwater Shrimp from Brazil: Final Determination of Sales at Less Than Fair Value,* 69 FR 76910 (December 23, 2004) (*Shrimp from Brazil*), and accompanying Issues and Decision Memorandum at Comment 5. As in *Shrimp from Brazil,* we found in the current review that the ownership, management and operations of a producer and an affiliated exporter were so intertwined that management could switch the role of producer and seller between the two companies without substantial retooling of either company. Specifically, we found that Raccordi and Allied shared the same president and CEO, as well as two managers and the staff of two company units, including that of the commercial unit. In terms of operations, we found that Allied acted as the primary sales arm for Raccordi for sales made to affiliated and unaffiliated parties in Italy and all export markets.

As for the second criteria of 19 CFR 351.401(f)(1), we found a significant potential for the manipulation of price or production between Allied and the two producing companies. Apart from sharing ownership and management, the three companies: (1) Shared sales information, as Raccordi was dependent on the other two companies for sales promotion and processing; (2) coordinated their production and pricing decisions; (3) shared employees in the case of Raccordi and Allied; and (4) had significant transactions between them, due to Raccordi's reliance on Tectubi and Allied to market its products.

Therefore, we concluded that Tectubi, Raccordi and Allied should be treated as a single entity for purposes of calculating a dumping margin pursuant to the provisions of 19 CFR 351.401(f). Consequently, we calculated a dumping margin based on the sales information reported by Tectubi for all three companies for these preliminary results.

For a more detailed discussion of our collapsing decision, see the ''Memorandum to the File'' regarding Tectubi Raccordi S.p.A.—Analysis Memorandum for the Preliminary Results of the 2010/2011 Administrative Review of Stainless Steel Butt-Weld Pipe Fittings from Italy, dated December 15, 2011 (Tectubi Analysis Memorandum), at 2–5.

Scope of the Order

For purposes of the order, the product covered is certain stainless steel butt-weld pipe fittings. SSBW pipe fittings are under 14 inches in outside diameter (based on nominal pipe size), whether finished or unfinished. The product encompasses all grades of stainless steel and ''commodity'' and ''specialty'' fittings. Specifically excluded from the definition are threaded, grooved, and bolted fittings, and fittings made from any material other than stainless steel.

The butt-weld fittings subject to the order are generally designated under specification ASTM A403/A403M, the standard specification for Wrought Austenitic Stainless Steel Piping Fittings, or its foreign equivalents (*e.g.,* DIN or JIS specifications). This specification covers two general classes of fittings, WP and CR, of wrought austenitic stainless steel fittings of seamless and welded construction covered by the latest revision of ANSI B16.9, ANSI B16.11, and ANSI B16.28. Butt-weld fittings manufactured to specification ASTM A774, or its foreign equivalents, are also covered by the order.

The order does not apply to cast fittings. Cast austenitic stainless steel pipe fittings are covered by specifications A351/A351M, A743/743M, and A744/A744M.

The butt-weld fittings subject to the order is currently classifiable under subheading 7307.23.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Fair Value Comparisons

To determine if sales of subject merchandise were made in the United States at less than fair value, we compared the export price of U.S. sales to normal value, as described in the ''Export Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(2) of the Act, we compared the export price of U.S. sales within the period of review to the monthly, weighted-average normal value of foreign like product where there were sales made in the ordinary course of trade, as discussed in the ''Price-to-Price Comparisons'' section below.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all SSBW pipe fittings produced by the collapsed entity (hereinafter referred to as Tectubi), covered by the description in the ''Scope of the Order'' section above, and sold in the home market during the period of review, to be foreign like product for purposes of determining appropriate product comparisons to subject merchandise sold in the United States. We relied on the following product characteristics to identify identical or similar subject merchandise and foreign like product: (1) The type of fitting; (2) the grade of steel; (3) the type of feedstock used in the production of the fitting; (4) the nominal pipe sizes of the larger and, if applicable, smaller openings; and, (5) the wall thickness of the pipe. We found that Tectubi had reported a contemporaneous sale of identical foreign like product for each sale of subject merchandise it made to the United States during the period of review.

Level of Trade

In accordance with section 773(a)(1)(B) of the Act and to the extent practicable, we determine normal value based on sales made in the home market at the same level of trade as export price or the constructed export price. The normal-value level of trade is based on the starting prices of sales in the home market or, when normal value is based on constructed value, those of the sales from which we derived selling, general, and administrative expenses and profit. *See* 19 CFR 351.412(c)(1)(iii). For export price, the level of trade is based on the starting price, which is usually the price from the exporter to the importer. *See* 19 CFR 351.412(c)(1)(i). In this review, Tectubi reported only export-price sales to the United States.

To determine if the home-market sales are made at a different level of trade than export sales, we examined stages in the marketing process and the selling functions performed along the chain of distribution between the producer and the unaffiliated customer. *See* 19 CFR 351.412(c)(2). If home-market sales are at a different level of trade, as manifested in a pattern of consistent price differences between the sales on which normal value is based and home-market sales made at the level of trade of the export transaction, and the difference affects price comparability, then we make a level-of-trade adjustment to normal value under section 773(a)(7)(A) of the Act and 19 CFR 351.412. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa,* 62 FR 61731 (November 19, 1997).

In the home market, Tectubi identified the following two channels of distribution through which it had made sales during the period of review: (1) Direct sales made by Tectubi and, (2) indirect sales made through Allied to the first unaffiliated customer. Tectubi reported that all of the sales had been made at a single level of trade. Based on our analysis of Tectubi's selling functions, we found that the sales made in both channels of distribution were made at one level of trade. With respect to the U.S. market, Tectubi reported that its export-price sales were made through one channel of distribution—direct sales made by Tectubi to the U.S. unaffiliated customer—and that they had been made at one level of trade. Based on our analysis of the selling functions performed by Tectubi on these sales, we found them to be made at one export-price level of trade.

We then compared the selling functions performed for the sales at the normal-value level of trade to those performed for the export-price level of trade and found that Tectubi performed a greater range of selling functions for the home-market sales than for the U.S. sales. But, because there was only one level of trade in the home market and no data were available to determine the existence of a pattern of price differences within that market and because we do not have any other information that provides an appropriate basis for determining a level-of-trade adjustment, we were unable to calculate a level-of-trade adjustment. Therefore, for these preliminary results, we matched the export-price sales to home-market sales without making a level-of-trade adjustment to normal value. *See* section 773(a)(7)(A) of the Act.

For a more detailed discussion of our analysis, see the ''Level of Trade'' section in the Tectubi Analysis Memorandum at 5 and 6.

Date of Sale

The regulation at 19 CFR 351.401(i) states that the Department normally will use the date of invoice, as recorded in the producer's or exporter's records kept in the ordinary course of business, as the date of sale. The regulation provides further that the Department may use a date other than the date of the invoice if the Secretary is satisfied that a different date better reflects the date on which the material terms of sale are established. The Department has a long-standing practice of finding that, where shipment date precedes invoice date, shipment date better reflects the date on which the material terms of sale are established. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand,* 69 FR 76918 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 10; *see also Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From Germany,* 67 FR 35497 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 2.

Tectubi reported that, in the home market, it generally ships the merchandise to the customer and issues the invoice near the end of the month of shipment. For this reason, it reported the date of shipment as the date of sale for all home-market sales. It reported invoice date as the date of sale for its U.S. sales, since Tectubi issues the invoice when the merchandise leaves the factory for all export sales.

Based on this information and our practice, we found that date of shipment best reflected the date on which material terms of sales were established in the home market. We found that the invoice date best reflected this date in the U.S. market. Accordingly, we found these dates—the shipment date in the home market and the invoice date in the U.S. market—to be the most appropriate dates of sale for these preliminary results. For a more detailed discussion of this topic, see the ''Date of Sale'' section of the Tectubi Analysis Memorandum at 6 and 7.

Export Price

Section 772(a) of the Act defines export price as ''the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c).''

For purposes of these preliminary results, we calculated export price for sales by Tectubi in accordance with section 772(a) of the Act because the merchandise was sold, prior to importation by the producer, outside of the United States to the first unaffiliated purchaser in the United States. We calculated export price based on the packed price that was charged to the first unaffiliated U.S. customer. We made deductions for movement expenses, where appropriate, in

accordance with section 772(c)(2)(A) of the Act, including deductions for foreign inland freight (plant/warehouse to the port of exit), international freight, U.S. inland freight (port of entry to the unaffiliated customer), marine insurance, brokerage and handling and U.S. customs duties. We also made adjustments, where appropriate, for imputed credit and certain direct selling expenses, such as U.S. sales commissions and bank charges.

Normal Value

A. Selection of Home Market

To determine if there was a sufficient volume of sales of SSBW pipe fittings in the home market during the period of review to serve as a viable basis for calculating normal value, we compared Tectubi's volume of home-market sales of the foreign like product to the volume of its U.S. sales of the subject merchandise, in accordance with section 773(a) of the Act. Because the aggregate volume of the home-market sales of the foreign like product was greater than five percent of the aggregate volume of U.S. sales for subject merchandise, we determined that the home market was viable for comparison purposes, pursuant to section 773(a)(1)(B) of the Act.

B. Price-to-Price Comparisons

We calculated normal value based on prices to the first, unaffiliated customers. In our calculation of normal value, we accounted for certain sales discounts. We did not make deductions for movement or warehousing expenses, pursuant to section 773(a)(6)(B) of the Act, as all sales were *ex works.* We made adjustments for differences in circumstances of sale (COS), in accordance with section 773(a)(6)(C)(iii) of the Act. Specifically, we made a COS adjustment for imputed credit expenses. Although there were commissions incurred on the U.S. sales but not on home-market sales, we made no commission offset to normal value as Tectubi opted not to report its home-market indirect selling expenses. Finally, we deducted home-market packing costs to normal value and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

Preliminary Results of Review

As a result of our review, we preliminarily determine that the following weighted-average dumping margin exists for the period February 1, 2010, through January 31, 2011:

Manufacturer/exporter	Weighted-average margin (percent)
Tectubi Raccordi S.p.A./ Raccordi Forgiati S.r.l./Allied International S.r.l.	0.00

Disclosure and Public Comments

The Department will disclose the calculations used in our analysis to parties to this review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). An interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). Any hearing, if requested, will be held 37 days after the date of publication, or the first business day thereafter, unless the Department alters the date pursuant to 19 CFR 351.310(d). Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(c). Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than five days after the time limit for submitting the case briefs. *See* 19 CFR 351.309(d). Parties who submit argument in these proceedings are requested to submit with the argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Parties are reminded that any case or rebuttal briefs must be filed electronically using Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System, in compliance with the procedures set forth in *Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

The Department intends to issue the final results of this administrative review, including the results of our analysis of the issues in any such argument or at a hearing, within 120 days of the date of publication of this notice.

Duty Assessment

Upon completion of this administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we will calculate importer- or customer-specific *ad valorem* assessment rates for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the period of review to the total customs value of the sales used to calculate those duties. Where the duty assessment rates are above *de minimis,* we will instruct CBP to assess duties on all entries of subject merchandise by that importer in accordance with the requirements set forth in 19 CFR 351.106(c)(2).

As noted above, the Department clarified its ''automatic assessment'' regulation on May 6, 2003. This clarification will apply to entries of subject merchandise during the period of review that were produced by Tectubi and for which it did not know that the merchandise was destined for the United States. Likewise, if we make a final determination of no shipments for Filmag, which certified that it made no review-period shipments of subject merchandise for which it had knowledge of U.S. destination, the clarification will apply to any entries of subject merchandise during the period of review produced by that company. In such instances, we will instruct CBP to liquidate un-reviewed entries at the all-others rate of 26.59 percent, established in the less-than-fair-value (LTFV) investigation of the order, if there is no rate for the intermediate company(ies) involved in the transaction. *See Antidumping Duty Orders: Stainless Steel Butt-Weld Pipe Fittings From Italy, Malaysia, and the Philippines,* 66 FR 11257, 11258 (Feb., 23, 2001). For a full discussion of this matter, *see Assessment Policy Notice.*

We intend to issue assessment instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash-deposit requirements will be effective, upon completion of the final results of this administrative review, for all shipments of SSBW pipe fittings from Italy entered or withdrawn from warehouse for consumption on or after the date of publication of the final results of review, as provided by section 751(a)(1) of the Act: (1) The cash-deposit rate for Tectubi will be the rate established in the final results of this review, except if the rate is less than 0.50 percent (*de minimis* within the meaning of 19 CFR 351.106(c)(1)), in which case the cash deposit will be zero; (2) for previously reviewed or investigated companies not listed above, the cash-deposit rate will continue to be the company-specific rate published for the most-recent period; (3) if the exporter is not a firm covered in this review, the prior review, or the LTFV investigation but the manufacturer is, the cash-deposit rate will be the rate established for the most

recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash-deposit rate will be the all-others rate of 26.59 percent. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

These preliminary results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 15, 2011.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2011–32839 Filed 12–21–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–357–812]

Honey From Argentina: Notice of Extension of Time Limit for Preliminary Results

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is extending the preliminary results of this administrative review to no later than January 3, 2012.

DATES: *Effective Date:* December 22, 2011.

FOR FURTHER INFORMATION CONTACT: John Drury or Angelica Mendoza, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Room 7850, Washington, DC 20230; telephone: (202) 482–0195 or (202) 482–3019, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 28, 2011, the Department initiated a review of the 21 [1] companies for which an administrative review was requested. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 76 FR 5137 (January 28, 2011) (*Initiation Notice*).[2]

On September 7, 2011, the Department extended the time limit for the preliminary results until December 1, 2011, and rescinded the administrative review with respect to ten companies: (1) Alimentos Naturales-Natural Foods Lavalle, (2) Alma Pura, (3) Apidouro Comercial Exportadora E Importadora Ltda., (4) Bomare S.A., (5) HoneyMax, (6) Interrupcion S.A., (7) Miel Ceta SRL, (8) Nexco, (9) Productos Afer S.A., and (10) Seabird Argentina S.A. *See Notice of Extension of Time Limit for Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review,* 76 FR 55349 (September 7, 2011). On December 7, 2011, the Department extended the time limit for the preliminary results until December 15, 2011. *See Honey From Argentina: Notice of Extension of Time Limit for Preliminary Results,* 76 FR 76374 (December 7, 2011). This review covers the following companies: TransHoney S.A. (TransHoney), Compañía Inversora Platense S.A. (CIPSA), AGLH S.A., Algodonera Avellaneda S.A., Compania Apicola Argentina S.A., El Mana S.A., Industrial Haedo S.A., Mielar S.A., Patagonik S.A., and Villamora S.A. We selected TransHoney and CIPSA for individual examination. *See* Memorandum to Richard O. Weible, ''Administrative Review of the Antidumping Duty Order on Honey from Argentina: Respondent Selection Memorandum,'' dated May 9, 2011.

[1] On January 13, 2011, petitioners withdrew their request for an antidumping duty administrative review of honey from Argentina for the period of review with respect to Asociacion de Cooperativas Argentinas (ACA). Petitioners noted that ACA is no longer subject to the antidumping duty order on honey from Argentina.

[2] On February 24, 2011, the Department published a subsequent initiation notice which included corrections to the *Initiation Notice* with respect to honey from Argentina. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 76 FR 10329 (February 24, 2011) (*Second Initiation Notice*). In the review request for Nexco S.A. (Nexco), it also requested revocation from the antidumping duty order on honey from Argentina (in part). However, Nexco's request for revocation in part from the order was inadvertently omitted from the *Initiation Notice.* Furthermore, certain company names were misspelled in the same *Initiation Notice.* All errors were corrected in the *Second Initiation Notice.*

Extension of Time Limit for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to complete the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an order for which a review is requested. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the preliminary results to a maximum of 365 days after the last day of the anniversary month of an order for which a review is requested.

The Department has determined it is not practicable to complete this review within the statutory time limit due to the selection of two new mandatory respondents for this review after the requests for review for the original respondents were withdrawn. The Department requires additional time to analyze sufficiently information submitted by the current respondents in this administrative review. Accordingly, the Department is further extending the time limit for completion of the preliminary results of this administrative review by 16 days (*i.e.,* to December 31, 2011).[3]

This notice is issued and published in accordance with section 351.213(d)(4) of the Department's regulations and sections 751(a)(3)(A) and 777(i)(1) of the Act.

Dated: December 15, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–32836 Filed 12–21–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Manufacturing Council Meeting

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The Manufacturing Council will hold a meeting to hear updates from the Department of Commerce in

[3] Because December 31, 2011, falls on a Saturday, the Department will toll the date of the preliminary results to the first business day after December 31, 2011. Therefore, the deadline for the preliminary results will be the following business day, Tuesday, January 3, 2012. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, as Amended,* 70 FR 24533 (May 10, 2005).

addition to the Council's ex-officio members, the Secretaries of Energy, Labor, and the Treasury (or their designees) on the Government response to past Council recommendations regarding competitiveness, workforce development issues, energy policy, trade agreements and other issues affecting the U.S. manufacturing sector and to determine the Council's work plan for 2012.

DATES: January 20, 2012.

TIME: 9:30 a.m.–11:30 a.m. EST.

ADDRESSES: The U.S. Department of Commerce, 1401 Constitution Avenue NW., Room 4830, Washington DC 20230. All guests are requested to register in advance. This meeting will be physically accessible to people with disabilities. Seating is limited and will be on a first come, first served basis. Requests for sign language interpretation, other auxiliary aids, or pre-registration, should be submitted no later than January 13, 2012 to Jennifer Pilat, the Manufacturing Council, Room 4043, 1401 Constitution Avenue NW., Washington, DC, 20230, telephone (202) 482–4501, *OACIE@trade.gov.* Last minute requests will be accepted, but may be impossible to fill.

FOR FURTHER INFORMATION CONTACT: Jennifer Pilat, the Manufacturing Council, Room 4043, 1401 Constitution Avenue NW., Washington, DC, 20230, telephone: (202) 482–4501, email: *OACIE@trade.gov*

SUPPLEMENTARY INFORMATION: The Council was re-chartered on April 8, 2010, to advise the Secretary of Commerce on matters relating to the U.S. manufacturing industry. No time will be available for oral comments from members of the public attending the meeting. Any member of the public may submit pertinent written comments concerning the Council's affairs at any time before or after the meeting. Comments may be submitted to Jennifer Pilat at the contact information indicated above. To be considered during the meeting, comments must be received no later than 5 p.m. Eastern Time on January 13, 2012, to ensure transmission to the Council prior to the meeting. Comments received after that date will be distributed to the members but may not be considered at the meeting.

Copies of Council meeting minutes will be available within 90 days of the meeting.

Dated: December 19, 2011.

Jennifer Pilat,

Executive Secretary, The Manufacturing Council.

[FR Doc. 2011–32826 Filed 12–21–11; 8:45 am]

BILLING CODE 3510–DR–P

COMMISSION OF FINE ARTS

Notice of Meeting

The next meeting of the U.S. Commission of Fine Arts is scheduled for 19 January 2012, at 9 a.m. in the Commission offices at the National Building Museum, Suite 312, Judiciary Square, 401 F Street NW., Washington DC, 20001–2728. Items of discussion may include buildings, parks and memorials.

Draft agendas and additional information regarding the Commission are available on our Web site: www.cfa.gov. Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address; by emailing *staff@cfa.gov;* or by calling (202) 504–2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated December 15, 2011 in Washington, DC.

Thomas Luebke,

AIA Secretary.

[FR Doc. 2011–32707 Filed 12–21–11; 8:45 am]

BILLING CODE 6330–01–M

COMMODITY FUTURES TRADING COMMISSION

Submission for OMB Review; Comment Request; Correction

In notice document 2011–31650 appearing on page 76953 in the issue of December 9, 2011, make the following correction:

On page 76953, in the second column, in the **SUPPLEMENTARY INFORMATION** section, the last sentence before *Burden,* should read ''The **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published on'', should read ''September 30, 2011 (76 FR 60810)''.

On page 76953, in the second column, ''*Burden statement''* should read, ''*Burden statement:* The respondent burden for this collection is estimated to average 2.5 hours per response.

Respondents/Affected Entities: 15.

Estimated number of responses: 15.

Estimated total annual burden on respondents: 0.17 hours.

Frequency of collection: On occasion.

Issued in Washington, DC, on December 16, 2011, by the Commission.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2011–32724 Filed 12–21–11; 8:45 am]

BILLING CODE P

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 12–C0005]

E & B Giftware LLC, Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of 16 CFR 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with E & B Giftware LLC, containing a civil penalty of $550,000.00, of which $50,000 shall be suspended, within twenty (20) days of service of the Commission's final Order accepting the Settlement Agreement.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by January 6, 2012.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 12–C0005, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Room 820, Bethesda, Maryland 20814–4408.

FOR FURTHER INFORMATION CONTACT: Regan A. Sweeney, Trial Attorney, Division of Compliance, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814–4408; telephone (301) 504–7831.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: December 19, 2011.

Todd A. Stevenson,

Secretary.

United States of America Consumer Product Safety Commission

In the matter of:
E & B Giftware LLC.
CPSC Docket No.: *12–C0005.*

Settlement Agreement

1. In accordance with 16 CFR 1118.20, E&B Giftware LLC (''E&B'') and staff (''Staff'') of the U.S. Consumer Product Safety Commission (''Commission'' or ''CPSC'') hereby enter into this Settlement Agreement (''Agreement'') under the Consumer Product Safety Act (''CPSA''). The Agreement and the incorporated attached Order resolve Staff's allegations set forth below.

The Parties

2. Staff is the staff of the CPSC, an independent federal regulatory agency established pursuant to, and responsible for the enforcement of, the CPSA, 15 U.S.C. 2051–2089.

3. E&B Giftware LLC is a limited liability corporation, organized and existing under the laws of the State of Delaware, with its principal corporate office located in Yonkers, New York. E&B Giftware LLC is a parent to many other companies, including but not limited to, EB Brands, Inc. (hereinafter, ''EB'').

Staff Allegations

4. Between January 2000 and October 2008, EB imported and distributed approximately 3 million (3,000,000) of the subject exercise balls under the following brand names: Bally Total Fitness, Everlast, Valeo, and Body Fit Fitness Balls (collectively referred to as ''exercise balls''), which were sold at department stores and fitness retailers nationwide from May 2000 to February 2009, for between $15.00 and $30.00. The exercise balls remain on the market.

5. The exercise balls are ''consumer products'' and, at all relevant times, EB imported and distributed the exercise balls. Therefore, EB was a ''manufacturer'' of these consumer products, which were ''distributed in commerce,'' as those terms are defined or used in sections 3(a)(5), (8), and (11) of the CPSA, 15 U.S.C. 2052(a)(5), (8), and (11).

6. The exercise balls are defective because they can rupture and/or explode when overinflated by consumers, thereby posing a falling hazard to consumers.

7. EB received its first report of an incident involving a burst exercise ball in January 2004.

8. By 2007, EB knew of approximately 25 reports of incidents involving bursting exercise balls. In 20 of those incidents, the bursting exercise balls were alleged to have caused various injuries, most of them minor.

9. Despite being aware of the information set forth in paragraphs 6 through 8, EB did not report to the Commission until October of 2008. By that time, EB was aware of at least 44 reports of incidents involving bursting exercise balls, which were alleged to have caused physical injuries, most of them minor, to 29 consumers. In April 2009, Commission staff and EB agreed that EB would revise its existing warning labels to consumers advising against overinflating the exercise balls. No other changes to the label, warnings, or instructions, or to the specifications, composition, or manufacturing process were recommended.

10. Although EB had obtained sufficient information to reasonably support the conclusion that the exercise balls either contained a defect which could create a substantial product hazard, or created an unreasonable risk of serious injury or death, EB failed to immediately inform the Commission of such defect or risk, as required by sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. 2064(b)(3) and (4). In failing to report immediately to the Commission, EB knowingly violated section 19(a)(4) of the CPSA, 15 U.S.C. 2068(a)(4) as the term ''knowingly'' is defined in section 20(d) of the CPSA, 15 U.S.C. 2069(d).

11. Pursuant to section 20 of the CPSA, 15 U.S.C. 2069, EB is subject to civil penalties for its failure to immediately report to the Commission, as required under section 15(b) of the CPSA, 15 U.S.C. 2064(b).

Response of E&B Giftware, LLC (on behalf of EB)

12. EB denies the allegations of Staff that the exercise balls contain a defect which could create a substantial product hazard or create an unreasonable risk of serious injury or death. Furthermore, it denies that it violated the reporting requirements of Section 15(b) of the CPSA, 15 U.S.C. 2064(b).

13. Exercise balls are manufactured from plastic material that is inflated. All exercise balls can be damaged and/or burst when they are subject to abuse or misuse. The mere fact that an exercise ball is reported to burst does not indicate that the exercise ball is defective. The number of complaints of burst exercise balls received by EB was very small, constituting only approximately .0015 percent of all exercise balls sold by EB. The injuries reported were minor, and the injuries were consistent with those expected when people fall off of exercise equipment.

14. EB investigated the complaints and reports received about bursting balls, and it conducted tests of the exercise balls. The exercise balls passed all of the tests to which they were subjected; no manufacturing flaws could be identified; and there was no indication that the balls were defective. The investigations did not reveal that the exercise balls contained a defect.

15. EB did not knowingly fail to report to the Commission. To the contrary, EB voluntarily filed a report with the Commission even though the testing concluded that the exercise balls did not burst when used as directed by the instructions.

Agreement of the Parties

16. Under the CPSA, the Commission has jurisdiction over this matter and over E&B Giftware LLC and EB.

17. In settlement of Staff's allegations, E&B or an affiliate shall pay a civil penalty in the amount of five hundred and fifty thousand dollars ($550,000.00), with $50,000.00 of that sum suspended. The civil penalty is payable within twenty (20) calendar days of E&B or an affiliate receiving service of the Commission's final Order accepting the Agreement. The payment shall be made by electronic payment via *www.pay.gov*.

18. The parties agree that in consideration of this suspension of the above-referenced portion of the penalty amount, E&B will provide the CPSC with evidence of its program to comply with the reporting requirements of section 15(b) of the Consumer Product Safety Act, 15 U.S.C. 2064(b), including Standard Operating Procedures and training materials in the possession of, or created by, E&B.

19. The parties agree that if E&B fails to provide evidence of a compliance program within 20 days after the date this agreement becomes final, fails to pay the $500,000 civil penalty by the date designated, or commits a violation of 15 U.S.C. 2051, *et seq.,* within two years of the date this agreement becomes final, such conduct will be considered a violation of this Agreement and Order, and the $50,000 suspended portion of the civil penalty will be immediately due and payable, along with interest accrued at the rate specified in accordance with the Order in this case.

20. The parties enter into this Agreement for settlement purposes only. The Agreement does not constitute an admission by either EB or E&B, or a determination by the Commission that

EB or E&B violated the CPSA's reporting requirements. Upon issuance of, and E&B's compliance with, the final Order, the Commission regards this matter as resolved and agrees not to bring a civil penalty action, or other enforcement action against EB, E&B, or any of their directors, officers, agents, employees, representatives, successors, assigns, or any person in active concert and participation with any of them, based on Staff's allegations, set forth above, regarding the exercise balls.

21. Upon provisional acceptance of the Agreement by the Commission, the Agreement shall be placed on the public record and published in the **Federal Register**, in accordance with the procedures set forth in 16 CFR 1118.20(e). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the Agreement shall be deemed finally accepted on the 16th calendar day after the date it is published in the **Federal Register**, in accordance with 16 CFR 1118.20(f).

22. Upon the Commission's final acceptance of the Agreement and issuance of the final Order, EB, E&B and any affiliate knowingly, voluntarily, and completely waives any rights it may have in this matter to the following: (i) An administrative or judicial hearing; (ii) judicial review or other challenge or contest of the Commission's actions; (iii) a determination by the Commission as to whether EB, E&B or any affiliate failed to comply with the CPSA and the underlying regulations; (iv) a statement of findings of fact and conclusions of law; and (v) any claims under the Equal Access to Justice Act.

23. The Agreement and the Order shall apply to, and be binding upon, EB, E&B Giftware LLC, and each of its successors and/or assigns.

24. The Commission issues the Order under the provisions of the CPSA, and a violation of the Order may subject EB, E&B and each of its successors and assigns to appropriate legal action.

25. The Agreement may be used in interpreting the Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict their terms. The Agreement shall not be waived, amended, modified, or otherwise altered without written agreement thereto, executed by the party against whom such waiver, amendment, modification, or alteration is sought to be enforced.

26. If any provision of the Agreement and the Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and the Order, such provision shall be fully severable. The balance of the Agreement and the Order shall remain in full force and effect, unless the Commission, EB and E&B agree that severing the provision materially affects the purpose of the Agreement and Order.

E & B GIFTWARE LLC
Dated: *December 1, 2011*
By:

_____
David Mauer,
Chief Executive Officer
E & B GIFTWARE LLC,
4 Executive Plaza,
Yonkers, NY 10701.
Dated: *December 1, 2011*
By:

_____
Kate Beardsley,
Esq.,
Zuckerman Spaeder LLP,
1800 M Street, NW.,
Suite 1000,
Washington, DC 20036–5807.
U.S. CONSUMER PRODUCT SAFETY COMMISSION STAFF
Cheryl A. Falvey,
General Counsel.
Mary B. Murphy,
Assistant General Counsel,
Office of the General Counsel.
Dated: *December 1, 2011*
By:

_____
Regan A. Sweeney,
Trial Attorney,
Division of Compliance,
Office of the General Counsel.

UNITED STATES OF AMERICA CONSUMER PRODUCT SAFETY COMMISSION

In the matter of:
E & B GIFTWARE LLC
CPSC Docket No.: *12–C0005*

Order

Upon consideration of the Settlement Agreement entered into between E&B Giftware LLC (''E&B'') and U.S. Consumer Product Safety Commission (''Commission'') staff, and the Commission having jurisdiction over the subject matter and over E&B, and it appearing that the Settlement Agreement and the Order are in the public interest, it is

Ordered that the Settlement Agreement be, and hereby is, accepted; and it is

Further ordered that E&B shall pay a civil penalty in the amount of five hundred fifty thousand dollars ($550,000.00), of which $50,000 shall be suspended, within twenty (20) days of service of the Commission's final Order accepting the Settlement Agreement. The payment shall be made via www.pay.gov. Upon the failure of E&B to make the foregoing payment of $500,000 when due, interest on the unpaid amount shall accrue and be paid by E&B at the federal legal rate of interest set forth at 28 U.S.C. 1961(a) and (b). In the event that E&B fails to make such payment, fails to provide evidence of their compliance program, as specified in the agreement, or commits another violation of 15 U.S.C. 2051, *et seq.,* within two years of the date this agreement becomes final, the suspended portion of the civil penalty will be due and payable immediately, along with interest on the unpaid amount and will accrue and be paid by E&B at the federal legal rate of interest set forth at 28 U.S.C. 1961(a) and (b).

Provisionally accepted and provisional Order issued on the *19th* day of *December,* 2011.

BY ORDER OF THE COMMISSION:

_____
Todd A. Stevenson,
Secretary,
U.S. Consumer Product Safety Commission.

[FR Doc. 2011–32861 Filed 12–21–11; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 11–45]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 11–45 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: December 19, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

DEC 14 2011

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 11-45, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to the United Arab Emirates for defense articles and services estimated to cost $60 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Richard A. Genaille, Jr.
Deputy Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified Document Provided Under Separate Cover)

BILLING CODE 5001–06–C

Transmittal No. 11–45

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act (U)

(i) *Prospective Purchaser:* United Arab Emirates

(ii) *Total Estimated Value:*

Major Defense Equipment*	$50 million
Other	10 million
TOTAL	60 million

* as defined in Section 47(6) of the Arms Export Control Act.

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* 260 JAVELIN Anti-Tank Guided Missiles, tripods, JAVELIN Weapon Effects Simulators, enhanced basic skills trainers, containers, rechargeable and non-rechargeable batteries, battery chargers and dischargers, battery coolant units, support equipment, spare and repair parts, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support.

(iv) *Military Department:* Army (ZAO)

(v) *Prior Related Cases, if any:* FMS case ZUB–$117M–21Jun10

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Annex attached

(viii) *Date Report Delivered to Congress:* 14 December 2011

POLICY JUSTIFICATION

United Arab Emirates—JAVELIN Anti-Tank Missiles

The Government of the United Arab Emirates (UAE) has requested a possible sale of 260 JAVELIN Anti-Tank Guided Missiles, tripods, JAVELIN Weapon Effects Simulators, enhanced basic skills trainers, containers, rechargeable and non-rechargeable batteries, battery chargers and dischargers, battery coolant units, support equipment, spare and repair parts, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering and logistics support services, and other related elements of logistics support. The estimated cost is $60 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country that has been and continues to be an important force for political stability and economic progress in the Middle East.

The proposed sale of these missiles will provide the United Arab Emirates with a medium-range, man-portable, shoulder-launched, fire and forget anti-armor weapon system. The proposed sale will enhance UAE's existing anti-tank capability to meet current and future threats. UAE, which already has JAVELIN Anti-Tank missiles in its inventory, will have no difficulty absorbing these additional missiles into its armed forces.

The proposed sale of this weapon system will not alter the basic military balance in the region.

The prime contractor is a JAVELIN joint venture of Lockheed-Martin in Orlando, Florida, and Raytheon in Tucson, Arizona. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to UAE.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 11–45

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item No. vii

(vii) Sensitivity of Technology:

1. The JAVELIN Weapon System hardware and the documentation provided with the sale are Unclassified. However, sensitive technology is contained within the system itself. This sensitivity is primarily in the software programs that instruct the system on how to operate in the presence of countermeasures.

2. The JAVELIN Anti-Tank Missile system provides a man-portable, medium anti-tank capability to infantry, scouts, and combat engineers. JAVELIN is comprised of two major tactical components: a reusable Command Launch Unit (CLU) and a missile sealed in a disposable launch tube assembly. The CLU provides the interface between the operator and the missile. The CLU incorporates an integrated day/night sight and provides target engagement capability in adverse weather and countermeasure environments. The CLU's thermal sight is a second-generation Forward Looking Infrared (FLIR) sensor, operating in the 8 to 10 microns wavelength, and is a 240x2 scanning array integral with a Dewar/Cooler unit. To facilitate initial loading and subsequent updating of software, all on-broad missile software is uploaded via the CLU after mating and prior to launch. JAVELIN is Unclassified; however, information associated with the system is classified up to Secret.

3. The software programs contained in the JAVELIN Weapon System are in the form of microprocessors equipped with available Read Out Memory maps. However, the system does not allow access to the actual software program. The overall hardware is considered sensitive in that the modulation frequency and infrared wavelengths could be useful in attempted countermeasure developments.

4. If a technologically advanced adversary were to obtain knowledge of the specific hardware in the proposed sale, the information could be used to develop countermeasures which might reduce weapons system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 2011–32795 Filed 12–21–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2011–OS–0145]

Privacy Act of 1974; System of Records

AGENCY: Defense Information Systems Agency, DoD.

ACTION: Notice to delete a system of records.

SUMMARY: The Defense Information Systems Agency is deleting one system of records notices in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on January 23, 2012 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Jeanette M. Weathers-Jenkins, Defense Information Systems Agency, 6916 Cooper Avenue, Fort Meade, MD 20755–7901, or by phone at (301) 225–8158.

SUPPLEMENTARY INFORMATION: The Defense Information Systems Agency systems of records notice subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The Defense Information Systems Agency proposes to delete a system of records notice from its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed deletion is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended,

which requires the submission of a new or altered system report.

Dated: December 19, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

Deletion:

KPAC.03

SYSTEM NAME:

420–20 Permanent Change of Station and Temporary Travel Order File (February 22, 1993, 58 FR 10562).

REASON:

DISA Pacific no longer maintains records on Permanent Change of Station orders. Records are maintained by the Services or the Defense Finance and Accounting Service (DFAS). Temporary Duty travel records are now covered by DHRA 08 DoD, Defense Travel System (March 24, 2010, 75 FR 14142). DISA Pacific does not maintain any records for these systems requiring a SORN. Records in this system will not be destroyed until the National Archives and Records Administration (NARA) retention has been fulfilled.

[FR Doc. 2011–32771 Filed 12–21–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2011–OS–0146]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to Amend a System of Records.

SUMMARY: The Office of the Secretary of Defense is proposing to amend a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on January 23, 2012 unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* Federal Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Allard, Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155, or by phone at (571) 372–0461.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The specific changes to the records systems being amended are set forth below followed by the notices, as amended, published in their entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: December 19, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DHRA 05

SYSTEM NAME:

Joint Advertising, Market Research & Studies (JAMRS) Survey Database (July 23, 2008, 73 FR 42786).

CHANGES:

* * * * *

SYSTEM LOCATION:

Epsilon Marketing Technology, Inc., 601 Edgewater Drive, Wakefield, MA 01880–6235.

* * * * *

AFTER CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM INSERT THE FOLLOWING:

OPT-OUT INFORMATION:

Individuals, who are 15½ years old or older, or parents or legal guardians acting on behalf of individuals who are between the ages of 15½ and 18 years old, seeking to have their name or the name of their child or ward, as well as other identifying data, removed from this system of records (or removed in the future when such information is obtained), should address written Opt-Out requests to Joint Advertising, Marketing Research & Studies (JAMRS), Attn: Survey Project Officer, Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000. Such requests must contain the full name, date of birth, and current address of the individual.

Opt-Out requests will be honored until the individual is no longer eligible for recruitment. However, because opt-out screening is based, in part, on the current address of the individual, any change in address will require the submission of a new opt-out request with the new address.

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Program Manager, Joint Advertising, Market Research & Studies (JAMRS), Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000.''

* * * * *

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Joint Advertising, Market Research & Studies (JAMRS), Direct Marketing Program Officer, Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000.

Requests must include the name and number of this system of records notice as well as the requester's name and current address and be signed.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to records about themselves contained in this system of records should address written requests to the OSD FOIA Requester Service Center, 1155 Defense Pentagon, Washington DC 20301–1155.

Requests must include the name and number of this system of records notice as well as the requester's name and current address and be signed.''

* * * * *

DHRA 05

SYSTEM NAME:

Joint Advertising, Market Research & Studies (JAMRS) Survey Database.

SYSTEM LOCATION:

Epsilon Marketing Technology, Inc., 601 Edgewater Drive, Wakefield, MA 01880–6235.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals aged 16 through maximum recruiting age; Selective

Service System registrants; individuals who have taken the Armed Services Vocational Aptitude Battery (ASVAB) test; current military personnel who are on Active Duty or in the Reserves; prior service individuals who still have remaining Military Service Obligation (commonly known as the Individual Ready Reserve or IRR); individuals who are in the process of enlisting or enrolled in ROTC (commonly known as the Military Entrance Program Command (MEPCOM) applicant file); and individuals who have asked to be removed from consideration as a participant in any future JAMRS survey.

OPT-OUT INFORMATION:

Individuals, who are 15½ years old or older, or parents or legal guardians acting on behalf of individuals who are between the ages of 15½ and 18 years old, seeking to have their name or the name of their child or ward, as well as other identifying data, removed from this system of records (or removed in the future when such information is obtained), should address written Opt-Out requests to Joint Advertising, Marketing Research & Studies (JAMRS), Attn: Survey Project Officer, Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000. Such requests must contain the full name, date of birth, and current address of the individual.

Opt-Out requests will be honored until the individual is no longer eligible for recruitment. However, because opt-out screening is based, in part, on the current address of the individual, any change in address will require the submission of a new opt-out request with the new address.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's name, gender, mailing address, date of birth, information source code.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 503(a), Enlistments: Recruiting campaigns; 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 3013, Secretary of the Army; 10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 8013, Secretary of the Air Force; and 10 U.S.C. 2358, Research and development projects.

PURPOSE(S):

To compile names of individuals aged 16 through maximum recruiting age to create a mailing frame from which to conduct surveys. These surveys will be conducted multiple times per year and each survey will be designed so that appropriate levels of precision can be achieved for inferences to be made at various geographic levels. The system also provides JAMRS with the ability to remove the names of individuals who are current/former members of, or are enlisting in, the Armed Forces, and individuals who have asked to be removed from consideration as a participant in any future JAMRS survey.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

THE DOD "BLANKET ROUTINE USES" SET FORTH AT THE BEGINNING OF OSD'S COMPILATION OF SYSTEMS OF RECORDS NOTICES DO NOT APPLY TO THIS SYSTEM EXCEPT:

To any component of the Department of Justice for the purpose of representing the Department of Defense, or any officer, employee or member of the Department, in pending or potential litigation to which the record is pertinent.

To the General Services Administration and the National Archives and Records Administration for the purpose of records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media.

RETRIEVABILITY:

Individual's full name, address, and date of birth.

SAFEGUARDS:

Access to information in the database is highly restricted and limited to those that require the records in the performance of their official duties. The database utilizes a layered approach of overlapping controls, monitoring and authentication to ensure overall security of the data, network and system resources. Sophisticated physical security, perimeter security (firewall, intrusion prevention), access control, authentication, encryption, data transfer, and monitoring solutions prevent unauthorized access from internal and external sources.

RETENTION AND DISPOSAL:

If selected for a survey: Records will be retained for one year after the completion of the survey. If not selected for a survey, the record will be deleted after other records have been selected. Opt-outs will be deleted when the individual is no longer eligible for recruiting.

SYSTEM MANAGER(S) AND ADDRESS:

Program Manager, Joint Advertising, Market Research & Studies (JAMRS), Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Joint Advertising, Market Research & Studies (JAMRS), Direct Marketing Program Officer, Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000.

Requests must include the name and number of this system of records notice as well as the requester's name and current address and be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written requests to the OSD FOIA Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301–1155.

Requests must include the name and number of this system of records notice as well as the requester's name and current address and be signed.

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are contained in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

State Department of Motor Vehicle offices; commercial information brokers/vendors; the Selective Service System; the Defense Manpower Data Center (DMDC); the United States Military Entrance Processing Command for individuals who have taken the ASVAB test; and individuals who have submitted written "opt-out" requests.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–32779 Filed 12–21–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2011–OS–0147]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to Amend a System of Records.

SUMMARY: The Office of the Secretary of Defense is proposing to amend a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on January 23, 2012 unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Allard, Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155, or by phone at (571) 372–0461.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The specific changes to the records systems being amended are set forth below followed by the notices, as amended, published in their entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: December 19, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DHRA 04

SYSTEM NAME:

Joint Advertising, Market Research & Studies Recruiting Database (January 9, 2007, 72 FR 952).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with ''Epsilon Marketing Technology, Inc., 601 Edgewater Drive, Wakefield, MA 01880–6235.''

* * * * *

AFTER CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM INSERT THE FOLLOWING:

Opt-Out information: Individuals, who are 15½ years old or older, or parents or legal guardians acting on behalf of individuals who are between the ages of 15½ and 18 years old, seeking to have their name or the name of their child or ward, as well as other identifying data, removed from this system of records (or removed in the future when such information is obtained), should address written Opt-Out requests to Joint Advertising, Marketing Research & Studies (JAMRS), ATTN: Opt-Out, Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000. Such requests must contain the full name, date of birth, and current address of the individual.

Opt-Out requests will be honored for ten years. However, because opt-out screening is based, in part, on the current address of the individual, any change in address will require the submission of a new opt-out request with the new address.

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Program Manager, Joint Advertising, Market Research & Studies (JAMRS), Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Joint Advertising, Market Research & Studies (JAMRS), Direct Marketing Program Officer, Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000.

Requests should contain the full name, date of birth, and current address of the individual.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301–1155.

Requests should contain the full name, date of birth, and current address of the individual as well as the name and number of this system of records notice and be signed.''

* * * * *

DHRA 04

SYSTEM NAME:

Joint Advertising, Market Research & Studies Recruiting Database.

SYSTEM LOCATION:

Epsilon Marketing Technology, Inc., 601 Edgewater Drive, Wakefield, MA 01880–6235.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Young adults aged 16 to 18; college students; Selective Service System registrants; individuals who have taken the Armed Services Vocational Aptitude Battery (ASVAB) test; individuals who have responded to various paid/non-paid advertising campaigns seeking enlistment information; current military personnel who are on Active Duty or in the Reserves and prior service individuals who still have remaining Military Service Obligation; individuals who are in the process of enlisting; and individuals who have asked to be removed from any future recruitment lists.

OPT-OUT INFORMATION:

Individuals, who are 15½ years old or older, or parents or legal guardians acting on behalf of individuals who are between the ages of 15½ and 18 years old, seeking to have their name or the name of their child or ward, as well as other identifying data, removed from this system of records (or removed in the future when such information is obtained), should address written Opt-Out requests to the Joint Advertising, Marketing Research & Studies (JAMRS), Attn: Opt-Out, Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000. Such requests must contain the full name, date of birth, and current address of the individual.

Opt-Out requests will be honored for ten years. However, because opt-out

screening is based, in part, on the current address of the individual, any change in address will require the submission of a new opt-out request with the new address.

CATEGORIES OF RECORDS IN THE SYSTEM:

All Records: full name, gender, address, city, state, zip code, source code. For young adults aged 16 to 18: Date of birth, telephone number, high school name, graduation date, grade point average, education level, military interest, college intent, ethnicity, ASVAB test date, ASVAB Armed Forces Qualifying Test Category Score. For college students: Telephone number, college name, college location, college type, college competitive ranking, class year, ethnicity, field of study. For Selective Service System: Date of birth, scrambled Social Security Number, Selective Service registration method. Individuals who have responded to various paid/non-paid advertising campaigns seeking enlistment information: Date of birth, telephone number, Service Code, last grade completed, email address, contact immediately flag. For military personnel: Date of birth, scrambled Social Security Number, ethnicity, education level, application date, military service and occupation information. For individuals who have asked to be removed from future recruitment list: Date of birth, reason code.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 503(a), Enlistments: Recruiting campaigns; 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 3013 (Secretary of the Army); 10 U.S.C. 5013 (Secretary of the Navy); 10 U.S.C. 8013 (Secretary of the Air Force); and E.O.9397 (SSN), as amended.

PURPOSE(S):

The purpose of the system of records maintained by the Joint Advertising, Market Research and Studies (JAMRS) is to compile, process and distribute files of individuals to the Services to assist them in their direct marketing recruiting efforts. The system also provides JAMRS with the ability to measure effectiveness of list purchases through ongoing analysis and to remove the names of individuals who are currently members of, or are enlisting in, the Armed Forces or who have asked that their names be removed from future recruitment lists.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

THE 'DOD BLANKET ROUTINE USES' SET FORTH AT THE BEGINNING OF OFFICE OF THE SECRETARY OF DEFENSE (OSD) COMPILATION OF SYSTEMS OF RECORDS NOTICES DO NOT APPLY TO THIS SYSTEM EXCEPT:

To any component of the Department of Justice for the purpose of representing the Department of Defense, or any officer, employee or member of the Department, in pending or potential litigation to which the record is pertinent.

To the General Services Administration and the National Archives and Records Administration for the purpose of records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained on electronic storage media.

RETRIEVABILITY: RECORDS MAY BE RETRIEVED BY AN INDIVIDUAL'S FULL NAME, ADDRESS, AND DATE OF BIRTH.

SAFEGUARDS:

Access to information in the database is highly restricted and limited to those that require the records in the performance of their official duties. The database utilizes a layered approach of overlapping controls, monitoring and authentication to ensure overall security of the data, network and system resources. Sophisticated physical security, perimeter security (firewall, intrusion prevention), access control, authentication, encryption, data transfer, and monitoring solutions prevent unauthorized access from internal and external sources.

RETENTION AND DISPOSAL:

Destroy three years from the date the information pertaining to the individual is first distributed to the Services or, where data are subsequently collected from a different data source, from the date that subsequent data are subsequently distributed to the Services. Records for individuals who have responded to various paid/nonpaid advertising campaigns seeking enlistment are kept, for analytical purposes, until they are no longer needed. Records for individuals who wish to be removed from future recruitment lists (opted-out) are retained for ten years.

SYSTEM MANAGER(S) AND ADDRESS:

Program Manager, Joint Advertising, Market Research & Studies (JAMRS), Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Joint Advertising, Market Research & Studies (JAMRS), Direct Marketing Program Officer, Suite 06J25, 4800 Mark Center Drive, Alexandria, VA 22350–4000.

Requests should contain the full name, date of birth, and current address of the individual.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301–1155.

Requests should contain the full name, date of birth, and current address of the individual as well as the name and number of this system of records notice and be signed.

CONTESTING RECORD PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are contained in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individuals; state Department of Motor Vehicle offices; commercial information brokers/vendors; Selective Service System; Defense Manpower Data Center (DMDC); United States Military Entrance Processing Command for individuals who have taken the ASVAB test; and the Military services and Congressional offices for individuals who have asked to be removed from any future recruitment lists.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2011–32783 Filed 12–21–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 21, 2012.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: December 19, 2011.

Darrin King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.

Title of Collection: Guaranty Agency Financial Report.

OMB Control Number: 1845–0026.

Agency Form Number(s): Form 2000.

Frequency of Responses: Monthly.

Affected Public: Business or other for-profit; State, Local, or Tribal Government.

Total Estimated Number of Annual Responses: 792.

Total Estimated Annual Burden Hours: 43,560.

Abstract: The Guaranty Agency Financial Report (GAFR), ED Form 2000, is used by the thirty-three (33) guaranty agencies under the Federal Family Education Loan program, authorized by Title IV, Part B of the Higher Education Act of 1965, as amended. Guaranty agencies use the GAFR to: (1) Request reinsurance from the U.S. Department of Education (ED); (2) request payment on death, disability, closed school, and false certification claim payments to lenders; (3) remit to ED refunds on rehabilitated loans and consolidation loans; (4) remit to ED default and wage garnishment collections. ED also uses report data to monitor the guaranty agency's financial activities (agency federal fund and agency operating fund) and each agency's federal receivable balance.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 4771. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to (202) 401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1 (800) 877–8339.

[FR Doc. 2011–32820 Filed 12–21–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Department of Energy (DOE) has submitted an information collection request to the OMB for extension under the provisions of the Paperwork Reduction Act of 1995. The information collection package requests a three-year extension of ''Industrial Relations,'' OMB Control Number 1910–0600. This proposed collection covers major Department contractor Human Resource information necessary for contract management, administration, and cost control.

DATES: Comments regarding this collection must be received on or before January 23, 2012. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at (202) 395–4650.

ADDRESSES: Written comments should be sent to the

DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street, NW., Washington, DC 20503; and to

Robert M. Myers, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–1615, 202–287–1584, or by fax at (202) 287–1349, or by email at *robert.myers@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Robert Myers at the address listed above.

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) OMB No. 1910–0600;

(2) *Information Collection Request Title:* Industrial Relations;

(3) *Type of Request:* Renewal;

(4) *Purpose:* This information is required for management oversight of the Department of Energy's Facilities Management Contractors and to ensure that the programmatic and administrative management requirements of the contract are managed efficiently and effectively;

(5) *Annual Estimated Number of Respondents:* 303;

(6) *Annual Estimated Number of Total Responses:* 303;

(7) *Annual Estimated Number of Burden Hours:* 6,437;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $0.

Authority: 42 U.S.C. 7256; 48 CFR 970.0370–1.

Issued in Washington, DC, on December 16, 2011.

Patrick M. Ferraro,

Acting Director, Office of Procurement and Assistance Management (OPAM).

[FR Doc. 2011–32806 Filed 12–21–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CW–021]

Decision and Order Granting a Waiver to LG from the Department of Energy Residential Clothes Washer Test Procedure

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

ACTION: Decision and Order.

SUMMARY: The U.S. Department of Energy (DOE) gives notice of the decision and order (Case No. CW–021) that grants to LG Electronics U.S.A., Inc. (LG) a waiver from the DOE clothes washer test procedure for determining the energy consumption of clothes washers for the basic models set forth in its petition for waiver. Under today's decision and order, LG shall be required to test and rate these clothes washers using an alternate test procedure that takes their large capacities into account when measuring energy consumption.

DATES: This Decision and Order is effective December 22, 2011.

FOR FURTHER INFORMATION CONTACT: Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–9611, Email: *mail to: Michael.Raymond@ee.doe.gov*.

Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 586–7796, Email: *mail to: Elizabeth.Kohl@hq.doe.gov*.

SUPPLEMENTARY INFORMATION: In accordance with Title 10 of the Code of Federal Regulations (10 CFR 430.27(l)), DOE gives notice of the issuance of its decision and order as set forth below. The decision and order grants LG a waiver from the applicable clothes washer test procedure in 10 CFR part 430, subpart B, appendix J1 for certain basic models of clothes washers with capacities greater than 3.8 cubic feet, provided that LG tests and rates such products using the alternate test procedure described in this notice. Today's decision prohibits LG from making representations concerning the energy efficiency of these products unless the product has been tested consistent with the provisions and restrictions in the alternate test procedure set forth in the decision and order below, and the representations fairly disclose the test results.

Distributors, retailers, and private labelers are held to the same standard when making representations regarding the energy efficiency of these products. 42 U.S.C. 6293(c).

Issued in Washington, DC, on December 16, 2011.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

Decision and Order

In the Matter of: LG Electronics U.S.A., Inc. (Case No. CW–021).

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the residential clothes washers that are the focus of this notice.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)). The test procedure for automatic and semi-automatic clothes washers is set forth in 10 CFR part 430, subpart B, appendix J1.

DOE's regulations for covered products contain provisions allowing a person to seek a waiver from the test procedure requirements for a particular basic model for covered consumer products when (1) the petitioner's basic model for which the petition for waiver was submitted contains one or more design characteristics that prevent testing according to the prescribed test procedure, or (2) when prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption characteristics. 10 CFR 430.27(b)(1)(iii).

The Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

Any interested person who has submitted a petition for waiver may also file an application for interim waiver of the applicable test procedure requirements. 10 CFR 430.27(a)(2). The Assistant Secretary will grant an interim waiver request if it is determined that the applicant will experience economic hardship if the interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(g).

On December 23, 2010, DOE issued enforcement guidance for large-capacity clothes washers. This guidance can be found on DOE's Web site at *http://energy.gov/sites/prod/files/gcprod/documents/LargeCapacityRCW_guidance_122210.pdf*.

II. LG's Petition for Waiver: Assertions and Determinations

On October 3, 2011, LG submitted the instant petition for waiver and application for interim waiver (petition) from the test procedure applicable to automatic and semi-automatic clothes washers set forth in 10 CFR part 430, subpart B, appendix J1. LG requested a waiver to test specified basic models of its residential clothes washers with basket volumes greater than 3.8 cubic feet on the basis of the test procedures contained in 10 CFR part 430, Subpart B, Appendix J1, with a revised Table 5.1 which extends the range of container volumes beyond 3.8 cubic feet. LG's instant petition and DOE's grant of interim waiver were published in the

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

Federal Register on October 18, 2011. 76 FR 64330. DOE received no comments on the LG petition.

LG's petition seeks a waiver from the DOE test procedure because the mass of the test load used in the procedure, which is based on the basket volume of the test unit, is currently not defined for basket sizes greater than 3.8 cubic feet. The basic models specified in LG's February 2011 petition have capacities larger than 3.8 cubic feet. In addition, if the current maximum test load mass is used to test these products, the tested energy use would be less than the actual energy usage and could evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data.

Table 5.1 of Appendix J1 defines the test load sizes used in the test procedure as linear functions of the basket volume. LG requests that DOE grant a waiver for testing and rating based on a revised Table 5.1, the same table as set forth in the waiver granted to LG on April 19, 2011 (76 FR 21879). The table is identical to the Table 5.1 found in DOE's clothes washer test procedure Notice of Proposed Rulemaking (NOPR). 75 FR 57556 (Sept. 21, 2010).

DOE has determined that it is in the public interest to have similar products tested and rated for energy consumption on a comparable basis. Previously, DOE granted a test procedure waiver to Whirlpool for specified Whirlpool's clothes washer models with container capacities greater than 3.8 cubic feet. 75 FR 69653 (Nov. 15, 2010). This notice contained an alternate test procedure, which extended the linear relationship between maximum test load size and clothes washer container volume in Table 5.1 to include a maximum test load size of 15.4 pounds (lbs) for clothes washer container volumes of 3.8 to 3.9 cubic feet. This extended Table 5.1 was set forth in DOE's September 2010 NOPR. On December 10, 2010, DOE granted a similar waiver to General Electric Company (GE), which used the same alternate test procedure. 75 FR 76968. DOE has also granted waivers to Electrolux (76 FR 11440 (Mar. 2, 2011)), LG (76 FR 11233 (Mar. 1, 2011)); (76 FR 21879 (Apr. 19, 2011)) and Samsung (76 FR 13169 (Mar. 10, 2011); 76 FR 50207 (Aug. 12, 2011)).

DOE notes that its supplemental proposed rule (*http://www.eere.energy.gov/buildings/appliancestandards/residential/pdfs/rcw_tp_snopr.pdf*) to amend the test procedures for clothes washers makes slight adjustments to Table 5.1 to correct for rounding errors. (76 FR 49238, Aug. 9, 2011). The alternate test procedure set forth in this decision and order adopts this updated table.

III. Consultations with Other Agencies

DOE consulted with the Federal Trade Commission (FTC) staff concerning the LG petition for waiver. The FTC staff did not have any objections to granting a waiver to LG.

IV. Conclusion

After careful consideration of all the material that was submitted by LG, the waivers granted to Whirlpool, GE, Samsung and Electrolux, as well as previously to LG, the clothes washer test procedure rulemaking, and consultation with the FTC staff, it is ordered that:

(1) The petition for waiver submitted by the LG Electronics America, Inc. (Case No. CW–021) is hereby granted as set forth in the paragraphs below.

(2) LG shall be required to test and rate the following LG models according to the alternate test procedure set forth in paragraph (3) below.

Model	Brand
WT6001H*	LG.
WT5170H*	LG.
WM3470H***	LG.
WM4070H***	LG.
4153#21#	Kenmore.
4154#21#	Kenmore.

(3) LG shall be required to test the products listed in paragraph (2) above according to the test procedures for clothes washers prescribed by DOE at 10 CFR part 430, appendix J1, except that the expanded Table 5.1 below shall be substituted for Table 5.1 of appendix J1.

TABLE 5.1—TEST LOAD SIZES

Container volume			Minimum load		Maximum load		Average load
cu. ft.	Liter		lb	kg	lb	kg	lb
	≥ <	≥ <					
0–0.8	0–22.7	3.00	1.36	3.00	1.36	3.00	1.36
0.80–0.90	22.7–25.5	3.00	1.36	3.50	1.59	3.25	1.47
0.90–1.00	25.5–28.3	3.00	1.36	3.90	1.77	3.45	1.56
1.00–1.10	28.3–31.1	3.00	1.36	4.30	1.95	3.65	1.66
1.10–1.20	31.1–34.0	3.00	1.36	4.70	2.13	3.85	1.75
1.20–1.30	34.0–36.8	3.00	1.36	5.10	2.31	4.05	1.84
1.30–1.40	36.8–39.6	3.00	1.36	5.50	2.49	4.25	1.93
1.40–1.50	39.6–42.5	3.00	1.36	5.90	2.68	4.45	2.02
1.50–1.60	42.5–45.3	3.00	1.36	6.40	2.90	4.70	2.13
1.60–1.70	45.3–48.1	3.00	1.36	6.80	3.08	4.90	2.22
1.70–1.80	48.1–51.0	3.00	1.36	7.20	3.27	5.10	2.31
1.80–1.90	51.0–53.8	3.00	1.36	7.60	3.45	5.30	2.40
1.90–2.00	53.8–56.6	3.00	1.36	8.00	3.63	5.50	2.49

TABLE 5.1—TEST LOAD SIZES—Continued

Container volume			Minimum load		Maximum load		Average load
cu. ft.	Liter		lb	kg	lb	kg	lb
	≥ <	≥ <					
2.00–2.10	56.6–59.5	3.00	1.36	8.40	3.81	5.70	2.59
2.10–2.20	59.5–62.3	3.00	1.36	8.80	3.99	5.90	2.68
2.20–2.30	62.3–65.1	3.00	1.36	9.20	4.17	6.10	2.77
2.30–2.40	65.1–68.0	3.00	1.36	9.60	4.35	6.30	2.86
2.40–2.50	68.0–70.8	3.00	1.36	10.00	4.54	6.50	2.95
2.50–2.60	70.8–73.6	3.00	1.36	10.50	4.76	6.75	3.06
2.60–2.70	73.6–76.5	3.00	1.36	10.90	4.94	6.95	3.15
2.70–2.80	76.5–79.3	3.00	1.36	11.30	5.13	7.15	3.24
2.80–2.90	79.3–82.1	3.00	1.36	11.70	5.31	7.35	3.33
2.90–3.00	82.1–85.0	3.00	1.36	12.10	5.49	7.55	3.42
3.00–3.10	85.0–87.8	3.00	1.36	12.50	5.67	7.75	3.52
3.10–3.20	87.8–90.6	3.00	1.36	12.90	5.85	7.95	3.61
3.20–3.30	90.6–93.4	3.00	1.36	13.30	6.03	8.15	3.70
3.30–3.40	93.4–96.3	3.00	1.36	13.70	6.21	8.35	3.79
3.40–3.50	96.3–99.1	3.00	1.36	14.10	6.40	8.55	3.88
3.50–3.60	99.1–101.9	3.00	1.36	14.60	6.62	8.80	3.99
3.60–3.70	101.9–104.8	3.00	1.36	15.00	6.80	9.00	4.08
3.70–3.80	104.8–107.6	3.00	1.36	15.40	6.99	9.20	4.17
3.80–3.90	107.6–110.4	3.00	1.36	15.80	7.16	9.40	4.26
3.90–4.00	110.4–113.3	3.00	1.36	16.20	7.34	9.60	4.35
4.00–4.10	113.3–116.1	3.00	1.36	16.60	7.53	9.80	4.45
4.10–4.20	116.1–118.9	3.00	1.36	17.00	7.72	10.00	4.54
4.20–4.30	118.9–121.8	3.00	1.36	17.40	7.90	10.20	4.63
4.30–4.40	121.8–124.6	3.00	1.36	17.80	8.09	10.40	4.72
4.40–4.50	124.6–127.4	3.00	1.36	18.20	8.27	10.60	4.82
4.50–4.60	127.4–130.3	3.00	1.36	18.70	8.46	10.85	4.91
4.60–4.70	130.3–133.1	3.00	1.36	19.10	8.65	11.05	5.00
4.70–4.80	133.1–135.9	3.00	1.36	19.50	8.83	11.25	5.10
4.80–4.90	135.9–138.8	3.00	1.36	19.90	9.02	11.45	5.19
4.90–5.00	138.8–141.6	3.00	1.36	20.30	9.20	11.65	5.28
5.00–5.10	141.6–144.4	3.00	1.36	20.70	9.39	11.85	5.38
5.10–5.20	144.4–147.2	3.00	1.36	21.10	9.58	12.05	5.47
5.20–5.30	147.2–150.1	3.00	1.36	21.50	9.76	12.25	5.56
5.30–5.40	150.1–152.9	3.00	1.36	21.90	9.95	12.45	5.65

TABLE 5.1—TEST LOAD SIZES—Continued

Container volume			Minimum load		Maximum load		Average load
cu. ft.	Liter		lb	kg	lb	kg	lb
	≥ <	≥ <					
5.40–5.50	152.9–155.7	3.00	1.36	22.30	10.13	12.65	5.75
5.50–5.60	155.7–158.6	3.00	1.36	22.80	10.32	12.90	5.84
5.60–5.70	158.6–161.4	3.00	1.36	23.20	10.51	13.10	5.93
5.70–5.80	161.4–164.2	3.00	1.36	23.60	10.69	13.30	6.03
5.80–5.90	164.2–167.1	3.00	1.36	24.00	10.88	13.50	6.12
5.90–6.00	167.1–169.9	3.00	1.36	24.40	11.06	13.70	6.21

NOTES: (1) All test load weights are bone dry weights.
(2) Allowable tolerance on the test load weights are ±0.10 lbs (0.05 kg).

(4) Representations. LG may make representations about the energy use of its clothes washer products for compliance, marketing, or other purposes only to the extent that such products have been tested in accordance with the provisions outlined above and such representations fairly disclose the results of such testing.

(5) This waiver shall remain in effect consistent with the provisions of 10 CFR 430.27(m).

(6) This waiver is issued on the condition that the statements, representations, and documentary materials provided by the petitioner are valid. DOE may revoke or modify this waiver at any time if it determines the factual basis underlying the petition for waiver is incorrect, or the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

(7) This waiver applies only to those basic models set out in LG's October 3, 2011 petition for waiver. Grant of this waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

Issued in Washington, DC, on December 16, 2011.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2011–32808 Filed 12–21–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–24–000]

ANR Pipeline Company; Notice of Application for Abandonment

Take notice that on December 5, 2011, ANR Pipeline Company (ANR), 717 Texas Street, Houston, Texas 77002–2761, filed with the Federal Energy Regulatory Commission an application under section 7(b) of the Natural Gas Act seeking authority to abandon its present and any future obligation to perform transportation service through approximately 8.5 miles of 20-inch pipeline extending from High Island Block A–531 to High Island Block A–555, located in federal waters, offshore Texas, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding the application should be directed to Rene Staeb, Manager, Project Determinations & Regulatory Administration, ANR Pipeline Company, 717 Texas Street, Houston, Texas 77002–2761, or telephone (832) 320–5215 or fax (832) 320–6215 or by email *Rene_Staeb@transcanada.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit seven copies of filings made in the

proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and seven copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: January 5, 2012.

Dated: December 15, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32742 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14332–000]

Historic Harrisville, Inc.; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Exemption From Licensing.

b. *Project No.:* 14332–000.

c. *Date filed:* December 5, 2011.

d. *Applicant:* Historic Harrisville, Inc.

e. *Name of Project:* Cheshire Mills Hydroelectric Project .

f. *Location:* On Nubanusit Brook, in the Town of Harrisville, Cheshire County, New Hampshire. The project would not occupy lands of the United States.

g. *Filed Pursuant to:* Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705, 2708.

h. *Applicant Contact:* Linda Willett, Historic Harrisville, Inc., P.O. Box 79, 69 Main Street, Harrisville, NH 03450, (603) 827–3722.

i. *FERC Contact:* Brandon Cherry, (202) 502–8328 or *brandon.cherry@ferc.gov.*

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* February 3, 2012.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/ferconline.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

m. The application is not ready for environmental analysis at this time.

n. *The Cheshire Mills Hydroelectric Project would consist of:* (1) The existing 94-foot-long, 29-foot-high quarried-stone Cheshire Mills Dam with a 38-foot-long, 27-foot-high spillway section; (2) an existing 0.2-acre impoundment with a normal maximum water surface elevation of 1,282.85 feet above mean sea level; (3) an existing intake structure with a 24-foot-high, 5-foot-wide trashrack that would be modified to have 1-inch clear bar spacing, and a 4-foot-high, 4-foot-wide sluice gate; (4) an existing 128-foot-long, 42-inch-diameter steel penstock; (5) an existing powerhouse containing a rebuilt turbine and a new generator with an installed capacity of 90 kilowatts; (6) an existing discharge portal in the bottom of the powerhouse; and (7) a new 75-foot-long, 208-volt transmission line located in the mill connecting the generator to an existing distribution system. The proposed project is estimated to generate an average of 213,000 kilowatt-hours annually.

o. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. With this notice, we are initiating consultation with the New Hampshire

Division of Historical Resources, as required by 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36, CFR, at 800.4.

q. *Procedural schedule:* The application will be processed according to the following preliminary Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate (*e.g.,* if scoping is waived, the schedule would be shortened).

Issue Deficiency Letter	February 2012.
Issue Notice of Acceptance	April 2012.
Issue Scoping Document	May 2012.
Issue Notice of ready for environmental analysis	July 2012.
Issue Notice of the availability of the EA	December 2012.

Dated: December 15, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32738 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13239–002]

Parker Knoll Hydro, LLC; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New license.

b. *Project No.:* 13239–002.

c. *Date filed:* November 30, 2011.

d. *Applicant:* Parker Knoll Hydro, LLC.

e. *Name of Project:* Parker Knoll Pumped Storage Hydroelectric Project.

f. *Location:* At Parker Mountain, near the Town of Richfield, Piute County, Utah. The project would occupy 458.7 acres of Federal land.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Parker Knoll Hydro, LLC., 975 South State Highway, Logan, UT 84321; (435) 752–2580.

i. *FERC Contact:* Matt Buhyoff; (202) 502–6824; *matt.buhyoff@ferc.gov.*

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).

k. Pursuant to Section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* Jan 30, 2012.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–(866) 208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

m. The application is not ready for environmental analysis at this time.

n. The proposed Parker Knoll Pumped Storage Project would be located at Parker Mountain, in Piute County, Utah. The proposed project would be a closed-loop pumped storage system, with an initial fill from the existing Otter Creek Reservoir. Parker Knoll would include the following new facilities: (1) An approximately 175-foot-high upper main dam with a crest length of approximately 1,650 feet and one saddle dam; (2) an upper reservoir with a storage capacity of approximately 6,780 acre-feet and a surface area of approximately 110 acres; (3) an approximately 100-foot-high lower dam with a crest length of approximately 1,750 feet and two saddle dams; (4) a lower reservoir with storage capacity of approximately 6,760 acre-feet and a surface area of approximately 130 acres; (5) a 2,390-feet-long and 27-foot-diameter headrace tunnel; (6) a 2,200-feet-long and 27-feet-diameter vertical shaft; (7) a 1,000-feet-long and 27-foot-diamter steel-lined penstock tunnel; (8) a 7,126-foot-long and 35-feet-diameter tailrace tunnel; (9) a powerhouse containing four variable speed, reversible pump-turbine units with a minimum rating of 250 MW; (10) an approximately 585-feet by 340-feet substation; (11) a 16-inch diameter and 68,000-feet-long fill pipeline and system; (12) approximately 1 mile of 345-kV transmission line; and (13) appurtenant facilities. The project would occupy 458.7 acres of Federal land and would have an estimated annual generation of 2,630 gigawatt hours.

o. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. *Procedural schedule and final amendments:* The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Issue Acceptance or Deficiency Letter	March 2012.
Request Additional Information	March 2012.
Issue Acceptance Letter	June 2012.
Issue Scoping Document 1 for comments	November 2012.
Request Additional Information (if necessary)	December 2012.
Issue Scoping Document 2	February 2013.
Notice that application is ready for environmental analysis	February 2013.
Notice of the availability of the draft EA or EIS	July 2013.
Notice of the availability of the final EA or final EIS	January 2014.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: December 16, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32763 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. DI12–1–000]

Chitina Electric Inc.; Notice of Declaration of Intention and Soliciting Comments, Protests, and/or Motions To Intervene

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Declaration of Intention.

b. *Docket No:* DI12–1–000.

c. *Date Filed:* November 22, 2011.

d. *Applicant:* Chitina Electric Inc.

e. *Name of Project:* Fivemile Creek Hydroelectric Project.

f. *Location:* The proposed Fivemile Creek Hydroelectric Project will be located on Fivemile Creek, near the town of Chitina, Alaska, at T. 3 S., R. 5 E., secs. 23, 24, 25, 26, 27, and 28, Copper River Meridian.

g. *Filed Pursuant to:* Section 23(b)(1) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant Contact:* Kurt Meehleis, CRW Engineering Group, LLC, 3940 Arctic Blvd., Anchorage, AK 99503; telephone: (907) 646–5621; fax: (907) 561–2273; email: *www.KHulse@CRWEng.com.*

i. *FERC Contact:* Any questions on this notice should be addressed to Henry Ecton, (202) 502–8768, or Email address: *henry.ecton@ferc.gov.*

j. *Deadline for filing comments, protests, and/or motions:* January 23, 2012.

All documents should be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* Please include the docket number (DI12–1–000) on any comments, protests, and/or motions filed.

k. Description of Project: The proposed run-of-river Fivemile Creek Hydroelectric Project will consist of: (1) An approximately 6-foot-high diversion structure on Fivemile Creek diverting water into a 10,000-foot-long, 12-inch-diameter steel penstock; (2) a proposed 20-foot wide, 40-foot-long powerhouse, containing a 300-kW pelton wheel turbine and electrical generating equipment; (3) a tailrace from the powerhouse to Fivemile Creek; and (4) appurtenant facilities. Hydroelectric power will be used to replace diesel generator power used in the town of Chitina.

When a Declaration of Intention is filed with the Federal Energy Regulatory Commission, the Federal Power Act requires the Commission to investigate and determine if the interests of interstate or foreign commerce would be affected by the proposed project. The Commission also determines whether or not the project: (1) Would be located on a navigable waterway; (2) would occupy or affect public lands or reservations of the United States; (3) would utilize surplus water or water power from a government dam; or (4) if applicable, has involved or would involve any construction subsequent to 1935 that may have increased or would increase the project's head or generating capacity, or have otherwise significantly modified the project's pre-1935 design or operation.

l. *Locations of the Application:* Copies of this filing are on file with the Commission and are available for public inspection. This filing may be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or TTY, contact (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTESTS'', AND/OR ''MOTIONS TO INTERVENE'', as applicable, and the Docket Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an

agency's comments must also be sent to the Applicant's representatives.

Dated: Issued December 16, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32768 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–28–000]

Tennessee Gas Pipeline Company, L.L.C.; Notice of Application

On December 9, 2011, Tennessee Gas Pipeline Company, L.L.C. (Tennessee), 1001 Louisiana Street, Houston, Texas 77002, filed with the Federal Energy Regulatory Commission (Commission) an application under section 7(c) of the Natural Gas Act (NGA), as amended, and part 157 of the Commission's regulations to construct, install, modify, operate, and maintain certain pipeline and compressor facilities to be located in Pennsylvania (the MMP Project). The MMP Project involves (1) installing approximately 7.9 miles of 30-inch diameter pipeline in Potter County, Pennsylvania, and (2) modifying facilities at four existing compressor stations, all located in northern Pennsylvania. These facilities will allow Tennessee to increase pipeline capacity to provide an additional 240 MMcf/d of firm natural gas transportation into northeast U.S. markets.

Questions regarding the application may be directed to Jacquelyne Rocan, Senior Counsel, Tennessee Gas Pipeline Company, L.L.C., 1001 Louisiana Street, Houston, Texas 77002, phone: (713) 420–4544, fax: (713) 420–1601, email: *jacquelyne.rocan@elpaso.com,* or Thomas Joyce, Manager, Rates and Regulatory Affairs, Tennessee Gas Pipeline Company, L.L.C., 1001 Louisiana Street, Houston, Texas 77002, phone: (713) 420–3299, fax: (713) 420–1605, email: *tom.joyce@elpaso.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit seven copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental cementers will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental cementers will not be required to serve copies of filed documents on all other parties. However, the nonparty commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to fileelectronically should submit an original and seven copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. This filing is accessible on-line at *http://www.ferc.gov* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free) or TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 3, 2012.

Dated: December 16, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32767 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1927–132]

PacifiCorp; Notice of Application Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Types of Application:* Amendment of License To Add Lands to the Project Boundary.

b. *Project No.:* 1927–132.

c. *Date Filed:* October 7, 2011, and supplemented November 28, 2011 and December 7, 2011.

d. *Applicant:* PacifiCorp.

e. *Name of Project:* North Umpqua Hydroelectric Project.

f. *Location:* North Umpqua River and two of its tributaries, the Clearwater River and Fish Creek, in Douglas County, Oregon.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Mike Ichisaka, PacifiCorp, 825 NE Multnomah, Suite 1500, Portland, Oregon 97232, (503) 813–6617.

i. *FERC Contact:* Mr. Jeremy Jessup, (202) 502–6779, *Jeremy.Jessup@ferc.gov.*

j. Deadline for filing comments, motions to intervene, and protests, is 30 days from the issuance date of this notice. All documents may be filed electronically via the Internet. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments.

Please include the project number (P–1927) on any comments, motions, or recommendations filed.

k. *Description of Request:* The applicant proposes to add approximately 2.25 acres of United Stated Department of Agriculture—Forest Service lands, with existing structures, to the project boundary. The land and facilities, formerly known as Toketee School, are located adjacent to Toketee Village in the Toketee Development of the project. The licensee states the additional space will be used to support project operations.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208- 3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* Any filing must (1) Bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the license surrender. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: December 16, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32766 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL12–16–000]

Benjamin Riggs v. Rhode Island Public Utility Commission; Notice of Complaint

Take notice that on December 15, 2011, pursuant to sections 206 of the Federal Power Act and Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), Benjamin Riggs (Complainant) filed a formal complaint against Rhode Island Public Utility Commission (Respondent) alleging that Respondent's November 30, 2011 approval of a 15-year Distributed Generation Standard Contract appears to constitute a violation of the Federal Power Act, 16 U.S.C. 2621 and 16 U.S.C. 824, and section 210(h)(2) of the Public Utility Regulatory Policies Act of 1978.

The Complainant certifies that copies of the complaint were served on the contacts for the Respondent as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC

Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 5, 2012.

Dated: December 16, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32764 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–2–002]

Pelico Pipeline, LLC; Notice of Extension of Time

On November 30, 2011, Pelico Pipeline, LLC (PELICO) filed a request to extend the date for filing its next rate case pursuant to sections 284.224 and 284.123 (2011) of the Commission's regulations.[1] In support of this request, PELICO states that in Order No. 735 the Commission modified its policy concerning periodic reviews of rates charges by section 311 and Hinshaw pipelines to extend the cycle for such reviews from three to five years.[2] Therefore, PELICO requests that the date for its next rate filing be extended to November 1, 2014, which is five years from the date of PELICO's most recent rate filing with this Commission.

Upon consideration, notice is hereby given that an extension of time for PELICO to file its section 284.123 rate petition is granted to and including November 1, 2014.

Dated: December 15, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32736 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR09–23–003]

Overland Trail Transmission, LLC; Notice of Extension of Time

On November 30, 2011, Overland Trail Transmission, LLC (OTTCO) filed a request to extend the date for filing its next rate case pursuant to sections 284.224 and 284.123 (2011) of the Commission's regulations.[1] In support of this request, OTTCO states that in Order No. 735 the Commission modified its policy concerning periodic reviews of rates charges by section 311 and Hinshaw pipelines to extend the cycle for such reviews from three to five years.[2] Therefore, OTTCO requests that the date for its next rate filing be extended to March 31, 2014, which is five years from the date of OTTCO's most recent rate filing with this Commission.

Upon consideration, notice is hereby given that an extension of time for OTTCO to file its section 284.123 rate petition is granted to and including March 31, 2014.

Dated: December 15, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32739 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR09–32–003]

DCP Raptor Pipeline, LLC; Notice of Extension of Time

On November 30, 2011, DCP Raptor Pipeline, LLC (Raptor) filed a request to extend the date for filing its next rate case pursuant to sections 284.224 and 284.123 (2011) of the Commission's regulations.[1] In support of this request, Raptor states that in Order No. 735 the Commission modified its policy concerning periodic reviews of rates charges by section 311 and Hinshaw pipelines to extend the cycle for such reviews from three to five years.[2] Therefore, Raptor requests that the date for its next rate filing be extended to September 1, 2014, which is five years from the date of Raptor's most recent rate filing with this Commission.

Upon consideration, notice is hereby given that an extension of time for Raptor to file its section 284.123 rate petition is granted to and including September 1, 2014.

Dated: December 15, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32740 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12790–001]

Pomperaug Hydro Project Andrew Peklo III; Notice of Site Visit and Technical Meeting

On January 18, 2012, Office of Energy Projects staff will hold a site visit and technical meeting for the proposed Pomperaug Hydro Project (FERC No. 12790–001). The purpose of the site visit is to view the proposed site and to describe the proposed project layout. The purpose of the technical meeting is to explain the exemption process and discuss and clarify issues and comments filed with the Commission in response to its November 3, 2011, notice of acceptance and ready for environmental analysis.

The site visit will begin at 1 p.m. EST. Attendees should park along Pomperaug Road in Woodbury, in the vicinity of the Pomperaug Dam, and meet by the doors under the sign at the mill. The technical meeting will begin at 6 p.m. EST and conclude no later than 9 p.m. The meeting will be held in the O and G Conference Room at the Woodbury Senior Center, 265 Main Street South, Woodbury, CT 06798. Attached is an agenda for the meeting. Anyone may attend either the site visit or the technical meeting. If you have questions about the site visit or meeting, please contact Steve Kartalia at (202) 502–6131, or via email at *stephen.kartalia@ferc.gov.*

Dated: December 15, 2011.

Kimberly D. Bose,

Secretary.

Technical Meeting Agenda

A. Introduction

1. Introduction of FERC staff
2. Meeting procedures and objectives
2. Description of the exemption process
3. Presentation of the proposed project

B. Discussion of Issues

C. Other Issues

D. Summary of Meeting

1. Issue Resolution
2. Follow-up Actions

[FR Doc. 2011–32737 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

[1] 18 CFR 284.123 and 284.224 (2011).

[2] *Contract Reporting Requirements of Intrastate Natural Gas Companies,* Order No. 735, 131 FERC ¶ 61,150 (May 20, 2010).

[1] 18 CFR 284.123 and 284.224 (2011).

[2] *Contract Reporting Requirements of Intrastate Natural Gas Companies,* Order No. 735, 131 FERC ¶ 61,150 (May 20, 2010).

[1] 18 CFR 284.123 and 284.224 (2011).

[2] *Contract Reporting Requirements of Intrastate Natural Gas Companies,* Order No. 735, 131 FERC ¶ 61,150 (May 20, 2010).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–4580–000]

California Independent System Operator Corporation; Supplemental Notice of Agenda and Discussion Topics for Staff Technical Conference

This notice establishes the agenda and topics for discussion at the technical conference to be held on February 2, 2012 to discuss issues related to the California Independent System Operator Corporation's (CAISO) proposal to eliminate convergence bidding at intertie scheduling points.[1] The technical conference will be held from 9 a.m. to 4:30 p.m. (Eastern Time) in Hearing Room 1 at the Commission's headquarters, 888 First Street NE., Washington, DC. The technical conference will be led by Commission staff.

The topics and related questions to be discussed during this conference are attached. The purpose of the technical conference is to provide Commission staff and interested parties an opportunity to discuss CAISO's proposal to eliminate convergence bidding at intertie scheduling points in detail. No formal presentations will be made other than an opening presentation by CAISO; however, parties will be encouraged to participate in the discussion along with Commission staff. All interested parties may file written comments following the technical conference.

The technical conference will be open for the public to attend, and advance registration is not required. The conference will be accessible via telephone on a listen-only basis. For information regarding telephone access to the conference and to specify whether you will be dialing into the conference, please email *colleen.farrell@ferc.gov* no later than 5 p.m. (Eastern Time) on Monday, January 30, 2012. You will then receive a confirmation email containing a dial-in number and a password. Staff requests that, to the extent possible, individuals calling from the same location share a single telephone line.

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an email to *accessibility@ferc.gov* or call toll free 1–(866) 208–3372 (voice) or (202) 208–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

For more information on this conference, please contact Moon Athwal at *moon.athwal@ferc.gov* or (202) 502–6272 or Colleen Farrell at *colleen.farrell@ferc.gov* or (202) 502–6751.

Dated: December 16, 2011.

Kimberly D. Bose,

Secretary.

Agenda for the Technical Conference Discussing CAISO's Proposal To Eliminate Convergence Bidding at Intertie Scheduling Points February 2, 2012

Opening Remarks

9 a.m.–9:15 a.m.—Greeting and Opening Remarks.

9:15 a.m.–10 a.m.—Opening Presentation by CAISO.

Discussion

Discussion on the following issues will be led by Commission staff, with questions on each topic to be raised by staff and interested parties in attendance. Commission staff and CAISO will be seated at tables located at the front of the hearing room. Staff does not anticipate any formal presentations during these discussions; however, parties should plan to participate in topics of specific interest to them. The objective of the technical conference is to obtain new information on and discuss these topics, including information on alternative proposals. Please note that although specified time periods have been allotted to discussion topics, we will continue to move forward to discussion topics as soon as discussion on the prior topic has concluded. There will be a lunch break.

Discussion of the Performance of Convergence Bidding at Intertie Scheduling Points and Internal Nodes

—What have the total aggregate monthly values of the real-time imbalance energy offset been since April 2009?

—CAISO claims that, out of approximately $102 million total real-time imbalance energy offset costs, the offsetting convergence supply bids at intertie scheduling points and convergence demand bids at the internal nodes have contributed a total of $53 million since February 2011.[2] Meanwhile, SESCO Enterprises LLC, West Oaks Energy, LLC, and XO Energy CAL, LP (collectively, Financial Marketers) argue that when the offsetting bids are removed convergence bidding contributes only $34.9 million of the $53 million to the total real-time imbalance energy offset, and they argue that this value is declining.[3] What has been the monthly contribution of convergence bidding at intertie scheduling points to the real-time imbalance energy offset since February 2011? What has been the monthly contribution to the total real-time imbalance energy offset of convergence bidding when offsetting bids submitted within the same scheduling coordinator are isolated since February 2011?

—What has been the impact of the elimination of convergence bidding at intertie scheduling points, pursuant to the November 25 Order, in terms of the real-time imbalance energy offset and convergence/divergence of prices?

—CAISO argues that convergence bidding at the interties has led to divergence between day-ahead and real-time prices.[4] Western Power Trading Forum (WPTF) argues that there has been convergence between day-ahead and real-time prices (hour ahead scheduling process prices and real-time dispatch prices).[5] Please explain in greater detail the effects of convergence bidding at the internal nodes and interties. For example, under the current market design:

- Has there been convergence or divergence of day-ahead and real-time prices on the internal nodes? Please explain whether there is convergence or divergence based on daily data, monthly data, or other. How do these metrics differ?
- Has there been convergence or divergence of day-ahead and hour-ahead scheduling process prices on the interties? Please explain whether there is convergence or divergence based on daily data, monthly data, or other. How do these metrics differ?

—What are the total aggregate monthly values representing the impact of the price inconsistencies that result from the dual intertie constraint?[6] What has the monthly trend been, and what is the driver of the trend?

—Does implicit convergence bidding cause problems (i.e., reliability concerns)? Has convergence bidding at intertie scheduling points aided in limiting or eliminating implicit convergence bidding (i.e., cancelling

[1] *Cal. Indep. Sys. Operator Corp.,* 137 FERC ¶ 61,157 (November 25, 2011 Order).

[2] CAISO Filing at 14.

[3] Financial Marketers Protest at 7.

[4] CAISO Filing at 3.

[5] WPTF at 14.

[6] The dual intertie constraint refers to the fact that, on the interties, CAISO only considers physical transactions when determining unit commitment, but considers both physical and virtual transactions to establish prices.

physical import or export schedules)? If so, how has the elimination of explicit convergence bidding at intertie locations impacted the occurrence of implicit convergence bidding?

—Have there been any reliability impacts, price spikes, or price divergence from eliminating explicit convergence bidding at intertie scheduling points?

—Have there been benefits observed from permitting convergence bidding at intertie scheduling points? What evidence has there been of the benefits?

—How has convergence bidding been used to hedge congestion on intertie scheduling points?

—How has convergence bidding been used to hedge delivery risk on intertie scheduling points? What are physical resources losing by not being able to hedge their physical positions using virtual bidding at intertie scheduling points? Please provide examples of any other practices that are impacted by not being able to submit convergence bids at intertie scheduling points.

—CAISO states that a rule prohibiting offsetting internal and external virtual bids would be ''easily undermined by collusive transactions.'' [7] In order to understand the motivation for ''collusive transactions,'' please provide aggregate values that represent the maximum actual monthly profit of a virtual bidder submitting offsetting virtual supply bids at the interties and virtual demand bids at the internal nodes.

Discussion of the Dual Real-Time Market Structure (Scheduling and Pricing Interties in the Hour-Ahead Scheduling Process, and Scheduling and Pricing Internal Nodes in Real-Time Dispatch)

—Has the hour-ahead scheduling process price been consistently below the day ahead price since April 2009? Has there been a predictable pattern of price difference in certain hours? How has that pattern been affected, if at all, since convergence bidding was allowed?

—What are the contributing factors to the real-time dispatch price being higher than hour-ahead scheduling process price (i.e., forecasting errors, operator biasing, ramping flexibility procurement, hourly interchange scheduling)? How do these factors impact the ability of convergence bidding to result in price convergence on internal nodes and intertie scheduling points?

—WPTF states that on July 6, 2011, the loss of an external resource contributed to an increased number of market participants declining hour-ahead scheduling process awarded schedules to import power. WPTF states that, instead of considering whether resources within CAISO could replace the lost energy at cost-effective prices, CAISO continued to dispatch increasing quantities of imports, inflating the hour-ahead scheduling process price.[8] Is this an accurate representation of the events on July 6, 2011? In general, what impact does the dual real-time market structure have on CAISO's operations and pricing trends? How does scheduling in the hour-ahead scheduling process based on forecasted conditions impact prices and scheduling at the internal nodes in real-time dispatch?

—What are the disadvantages and advantages of settling imports and exports at the real-time dispatch price?

Discussion of alternative proposals: Please evaluate the alternatives proposed by protestors and discussed by CAISO in its filing as described below, as well as any others, to eliminating convergence bidding indefinitely at intertie scheduling points. Please be prepared to discuss whether these alternatives could be implemented and how the alternatives will address the costs identified by CAISO that are attributed to convergence bidding at intertie scheduling points.

—Prohibit offsetting internal and external virtual bids.

—Implement a settlement rule that would neutralize the price arbitrage of the hour-ahead scheduling process and real-time dispatch.

—Modify the timing of convergence bidding liquidation and settlement. For instance, CAISO states that it considered keeping day-ahead awarded virtual supply and demand positions in the hour ahead scheduling process.

—Modify the existing allocation of the real-time imbalance energy offset to measured demand, to more accurately reflect cost causation.

—The approach utilized in the New York Independent System Operator to settle the interties.[9]

—Pay as bid or pay the greater of the bid or the real-time dispatch price.

4:15 p.m.–4:30 p.m.—Closing Remarks.

[FR Doc. 2011–32765 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

[7] CAISO Filing at 17.

[8] WPTF Protest at 18.

[9] NYISO is a net importer and schedules imports and exports in the hour-ahead process, similar to CAISO's hour-ahead scheduling process. Where there is no congestion on external interfaces, NYISO will settle imports and exports at the time-weighted average of the real-time price at the relevant proxy bus. Imports receive a bid production cost guarantee if the real-time price is lower than their offer price. CAISO Filing at 18.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–19–000; Docket No. CP12–20–000]

Dominion Transmission Inc.; Notice of Onsite Environmental Review

On December 28, 2011, the Federal Energy Regulatory Commission's (FERC or Commission) Office of Energy Projects staff will be in Tioga and Potter Counties, Pennsylvania and Steuben County, New York to gather data related to the environmental analysis of the Tioga Area Expansion and Sabinsville to Morrisville Projects proposed by Dominion Transmission Inc. (DTI) in the above-referenced dockets. Staff will examine the proposed TL–610 pipeline route and various above-ground facilities where modifications or additions are proposed. Viewing of this area is anticipated to be from public access points and DTI's existing right-of-way. The review is open to the public. All interested parties in attendance must provide their own transportation. Those attending should meet:

Wednesday, December 28, 2011, 9 a.m., at DTI's Sabinville Office—5094 Route 349, Westfield, PA 16950, Local DTI Contact—Debra Annibella—telephone (814) 628–6068.

The review will be cancelled if there is a significant weather event. In case of a snowfall that may result in cancellation, please check the event calendar posted on the Commission's Internet Web page. Information about this onsite environmental review will be posted on the Commission's calendar at: *http://www.ferc.gov/EventCalendar/EventsList.aspx?CalendarID=119&Date=12/1/2011&View=listview&DisplayString=Scoping+Meetings+%26+Environmental+Site+Reviews%20-%20December%202011&IsSearch=false.*

For additional information, contact the FERC's Office of External Affairs at (866) 208–FERC. Please use the FERC's free eSubscription service to keep track of all formal issuances and submittals in these dockets. This can reduce the

amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. To register for this service, go to *www.ferc.gov/esubscribenow.htm.*

Dated: December 15, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32741 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL12–14–000]

Trans-Allegheny Interstate Line Company; Notice of Petition For Declaratory Order

Take notice that on December 14, 2011, pursuant to Rule 207 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.207 (2011), Trans-Allegheny Interstate Line Company (TrAILCo) filed a Petition for Declaratory Order, requesting that the Commission find that the payment by TrAILCo of one or more dividends from paid-in capital, subject to proposed safeguards, will not violate section 305(a) of the Federal Power Act.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 23, 2011.

Dated: December 16, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32769 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ12–3–000]

City of Banning, CA; Notice of Petition for Declaratory Order

Take notice that on December 9, 2011, pursuant to Rules 205 and 207 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR 385.205, 385.207 (2011), and consistent with the provisions of the Transmission Owner (TO) Tariff of the City of Banning, California (Banning), Banning filed a Petition for Declaratory Order, seeking a declaratory order to (1) accept Banning's annual revisions to its Transmission Revenue Balancing Account Adjustment (TRBAA); (2) approve Banning's first annual update to the costs of its Existing Transmission Contracts (ETC) with Southern California Edison Company for purposes of recovery of such costs through the ETC Pass-through Clause contained in Banning's TO Tariff; (3) accept revisions to Appendix I to Banning's TO Tariff to reflect Banning's revised TRBAA, forcasted calendar year 2012 ETC costs, and updated Base, High, and Low Voltage Transmission Revenue Requirements (TRR); (4) waive the sixty-day notice requirement; (5) waive the filing fee and any other fees associated with the requested revisions; and (6) grant any other relief or waivers necessary or appropriate for approval of implementation of the revisions to Banning's Base TRR, TRBAA, High and Lower Voltage TRRs, and corresponding modifications to Appendix I of Banning's TO Tariff effective as of January 1, 2012.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 30, 2011.

Dated: December 15, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–32743 Filed 12–21–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9506–1]

Proposed CERCLA Administrative Cost Recovery Settlement; North Hollywood Operable Unit of the San Fernando Valley Area 1 Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (''CERCLA''), 42 U.S.C.

9622(i), notice is hereby given of a proposed administrative settlement for recovery of response costs concerning the North Hollywood Operable Unit of the San Fernando Valley Area 1 Superfund Site, located in the vicinity of Los Angeles, California, with the following settling parties: Pick-Your-Part Auto Wrecking; Hayward Associates, LLC; and PNM Properties, LLC. The settlement requires the settling parties to pay a total of $102,161 to the North Hollywood Operable Unit Special Account within the Hazardous Substance Superfund. The settlement also includes a covenant not to sue the settling parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a). For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at the City of Los Angeles Central Library, Science and Technology Department, 630 West 5th Street, Los Angeles, CA 90071 and at the EPA Region 9 Superfund Records Center, Mail Stop SFD–7C, 95 Hawthorne Street, Room 403, San Francisco, CA 94105.

DATES: Comments must be submitted on or before January 23, 2012.

ADDRESSES: The proposed settlement is available for public inspection at the EPA Region 9 Superfund Records Center, Mail Stop SFD–7C, 95 Hawthorne Street, Room 403, San Francisco, CA 94105. A copy of the proposed settlement may also be obtained from the EPA Region 9 Superfund Record Center, 95 Hawthorne Street, Mail Stop SFD–7C, Room 403, San Francisco, CA 94105, (415) 820–4700. Comments should reference the North Hollywood Operable Unit of the San Fernando Valley Area 1 Superfund Site, and EPA Docket No. 9–2011–0019 and should be addressed to Michael Massey, EPA Region 9, 75 Hawthorne Street, Mail Stop ORC–3, San Francisco, CA 94105.

FOR FURTHER INFORMATION CONTACT: Kelly Manheimer, EPA Region 9, 75 Hawthorne Street, Mail Stop SFD–7–1, San Francisco, CA 94105, (415) 972–3290.

Dated: December 7, 2011.

Jane Diamond,

Director, Superfund Division.

[FR Doc. 2011–32805 Filed 12–21–11; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Economic Impact Policy

This notice is to inform the public that the Export-Import Bank of the United States has received an application for a $74 million long-term guarantee to support the export of approximately $87 million worth of mining equipment, locomotives and railcars to Canada. The U.S. exports will enable the Canadian mining company to increase production by about 5 million metric tons of iron ore per year during the 8.5-year repayment term of the guarantee. Available information indicates that all of the additional Canadian iron ore production will be sold in China. Interested parties may submit comments on this transaction by email to *economic.impact@exim.gov* or by mail to 811 Vermont Avenue NW., Room 947, Washington, DC 20571, within 14 days of the date this notice appears in the **Federal Register**.

Angela Mariana Freyre,

Senior Vice President and General Counsel.

[FR Doc. 2011–32774 Filed 12–21–11; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before February 21, 2012. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at (202) 395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B.Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0986.

Title: Competitive Carrier Line Count Report and Self-Certification as a Rural Carrier, WC Docket Nos. 10–90 and 05–337, CC Docket No. 96–45 and GN Docket No. 09–51.

Form Number: FCC Form 525.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions and state, local or tribal government.

Number of Respondents: 3,016 respondents; 3,130 responses.

Estimated Time per Response: .5 hours–8 hours.

Frequency of Response: On occasion, quarterly and annual reporting requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 151–154, 201–206, 214, 218–220, 251, 252, 254, 256, 303(r), 403, 405 and 410 of the

Communications Act of 1934, as amended.

Total Annual Burden: 9,995 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting that respondents submit confidential information. However, respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: This collection is being submitted as a revision to a currently approved collection. In November 2011, the Commission adopted an order reforming its high-cost universal service support mechanisms. Connect America Fund; A National Broadband Plan for Our Future; Establish Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund, WC Docket Nos. 10–90, 07–135, 05–337, 03–109; GN Docket No. 09–51; CC Docket Nos. 01–92, 96–45; WT Docket No. 10–208, FCC 11–161. This revision addresses several reforms adopted in the order. The Commission plans to submit additional revisions to 3060–0986 for OMB review to address other substantial, non-emergency reforms adopted in the order at a later date.

The order provides that existing high-cost support for price cap incumbent local exchange carriers will be frozen at 2011 levels. In addition, the order provides for up to $300 million annually in incremental support to those carriers, to be allocated by the use of a cost equation. Carriers accepting such incremental funding will be required to meet defined broadband deployment obligations. Eligible carriers will be required to notify the Commission, the Universal Service Fund Administrative Company (the Universal Service Fund Administrator or USAC), as well as relevant state and Tribal authorities the amount, if any, of funds they accept. Carriers accepting funding will also be required to identify the areas to which they will deploy broadband to meet their deployment obligations. Specifically, carriers will be required to provide, in electronic form, the following data for each location to which they intend to deploy broadband in satisfaction of their obligation: latitude, longitude, census block, and wire center.

The order also adopts a rule to reduce, dollar-for-dollar, a carrier's high-cost loop support (for rate-of-return carriers) or Connect America Phase I support (for price cap carriers) to the extent that the carrier's local end user rate plus state regulated fees do not meet a specified urban rate floor. Accordingly, carriers will be required to report, on an annual basis, the local end user rates that fall below the specified urban rate floor, and the number of lines associated with each rate so that the universal service fund Administrator can calculate reductions in support.

The order also modifies section 54.307 (often called the ''identical support rule'') and related rules, which provide that competitive eligible telecommunications carriers receive the same per-line level of support as received by incumbent LECs serving the same areas. As a result, the Commission will be reducing the burdens associated with a number of collections in this control number, including line count filings for competitive ETCs and incumbent LECs serving competitive areas, disaggregation plans (which permit incumbent LECs to target support for the purpose of calculating per-line support amounts), and certifications for carriers serving Tribal lands and Alaska native regions. In addition, the Commission eliminates the ''own costs'' exception to the interim cap for competitive ETCs. The interim cap limited the total annual amount of high-cost support competitive ETCs in any state could receive to the amount competitive ETCs in that state received in March 2008 on an annualized basis. The ''own costs'' exception provided that competitive ETCs that showed that they met the support threshold in the same manner as the incumbent LEC would not be subject to the cap. Eliminating the ''own costs'' exception does not alter the content of this information collection; it does, however, address the terms of clearance in the May 2009 Notice of Office of Management and Budget Action.

The order also revises the certifications that state commissions (or ETCs that are not subject to state jurisdiction) are required to file annually with the Commission and the universal service fund Administrator to ensure that carriers use universal service support ''only for the provision, maintenance and upgrading of facilities and services for which the support is intended'' consistent with section 254(e) of the Act. The existing certifications are prospective only. Although the existing certifications are prospective only, the revised certification will ensure that carriers not only will use support in the next year for the intended purposes, but also have used support in the prior year for the intended purposes.

The order also eliminates eligibility for Safety Net Additive support for costs incurred after 2009. Accordingly, this collection is being revised to eliminate the requirement that carriers notify the Commission and USAC that they qualify for Safety Net Additive Support.

The order also eliminates the distinction between ''rural'' and ''non-rural'' carriers. Therefore, this collection is being revised to eliminate the reporting requirements for self-certification as a rural carrier.

The Order also moves the recordkeeping requirement from 47 CFR 54.202(e) to new 47 CFR 54.320. It also increases the required document retention period from five to ten years and makes clear that carriers are subject to random compliance audits and other investigations and must make all documents and records available to the Commission, any of its Bureaus or Offices, the universal service fund Administrator, and their respective auditors.

Finally, during the review process, the Commission determined that the reporting requirements of OMB Control Number 3060–0894 should be eliminated. The order eliminated the rate comparability review and certification as well as the certification letter accounting for receipt of federal support in OMB Control Number 3060–0894. These requirements are duplicative of the certification pursuant to section 254(e) of the Act, which is contained in the instant OMB Control Number. Upon OMB approval of this revision, the Commission will voluntarily discontinue OMB Control Number 3060–0894.

Federal Communications Commission.

Bulah P. Wheeler,

Deputy Manager, Office of the Secretary, Office of Managing Director.

[FR Doc. 2011–32786 Filed 12–21–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction

Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before February 21, 2012. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at (202) 395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0927.

Title: Auditor's Annual Independence and Objectivity Certification.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 4 respondents; 4 responses.

Estimated Time per Response: 5 hours.

Frequency of Response: Annual reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 201(b), 219(b) and 220 of the Communications Act of 1934, as amended.

Total Annual Burden: 20 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality. However, respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission is seeking an extension of this information collection in order to obtain the full three year approval from OMB. There is no change to the annual reporting requirement. There is no change to the Commission's previous burden estimates.

Section 64.904 requires certain local exchange carriers, in connection with their cost allocation manual filings and the accompanying financial reports the Commission prescribes under 47 U.S.C. 201(b), 219(b) and 220, to have an attest engagement performed by an independent auditor every two years, over the prior two year period. The attest engagement is to be performed in accordance with the attestation standards established by the American Institute of Certified Public Accountants (AICPA), except as otherwise directed by the Chief, Enforcement Bureau. The audit is to be conducted in compliance with generally accepted auditing standards (GAAS), except as otherwise directed by the Commission's Enforcement Bureau. The Responsible Accounting Office (RAO) letter requires that carriers' independent auditors:

(a) Disclose in writing all relationships between the auditor and its related entities and the carrier and its related entities that in the auditor's professional judgment may reasonably be thought to bear on independence;

(b) Confirm in writing that in its professional judgment it is independent of the carrier; and

(c) Discuss the auditor's independence.

The information is used by the Commission to determine whether the independent auditors are performing their audits independently and unbiased of the carrier they audit.

OMB Control Number: 3060–1124.

Title: Section 80.231, Technical Requirements for Class B Automatic Identification System (AIS) Equipment.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 20 respondents; 20 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 151–155 and 301–309 of the Communications Act of 1934, as amended.

Total Annual Burden: 20 hours.

Total Annual Cost: $28,000.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality. However, respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission is seeking an extension of this information collection in order to obtain the full three year approval from OMB. There is no change to the annual reporting requirement. There is no change to the Commission's previous burden estimates.

When the Commission adopted and released a Second Report and Order, FCC 08–208, it contained in Section 80.231, a requirement that manufacturers of Class B Automatic Identification System (AIS) transmitters for the Maritime Radio Service must include with each transmitting device a statement explaining how to enter static information accurately and to affix a warning that entering the vessel tracking and navigation information transmitted from Class B AIS device(s) are accurate and reliable thereby promoting marine safety. The rule also requires manufacturers to obtain a letter from the U.S. Coast Guard stating that the AIS device satisfies all of the requirements specified in IEC 62287–1, and to submit the letter to the Commission with its certification application for a Class B AIS device.

Additionally, prior to submitting a certification application (FCC Form 731, OMB Control Number 3060–0057) for a Class B AIS device, the following information must be submitted in duplicate to the Commandant (CG–521), U.S. Coast Guard, 2100 2nd Street SW., Washington, DC 20593–0001:

(1) The name of the manufacturer or grantee and the model number of the AIS device; and

(2) Copies of the test report and test data obtained from the test facility showing that the device complies with the environmental and operational requirements identified in IEC 62287–1.

After reviewing the information described in the certification application, the U.S. Coast Guard will issue a letter stating whether the AIS device satisfies all of the requirements specified in IEC–62287–1. A certification application for an AIS device submitted to the Commission must contain a copy of the U.S. Coast Guard letter stating that the device satisfies all of the requirements specified in IEC 62287–1, a copy of the technical test date and the instruction manual(s).

The information collection requires that manufacturers of AIS transmitters label each product and affix and label each transmitting device with a statement explaining how to enter static information and the following statement:

"WARNING: It is a violation of the rules of the Federal Communications Commission to input a MMSI that has not been properly assigned to the end user, or to otherwise input any inaccurate data in this device."

The information collection also requires manufacturers to assure the device meets standards set forth in IEC–62287–1 and is used by FCC engineers to determine the interference potential of the proposed device's operation.

Federal Communications Commission.

Bulah P. Wheeler,

Deputy Manager, Office of the Secretary, Office of Managing Director.

[FR Doc. 2011–32788 Filed 12–21–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for a license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF)—Ocean Transportation Intermediary (OTI) pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR part 515). Notice is also hereby given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a license.

Interested persons may contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by email at *OTI@fmc.gov*.

A.C.T. Logistics, LLC (NVO), 154–09 146th Avenue, 3rd Floor, Jamaica, NY 11434. Officers: Annie Chik, Co-President, (Qualifying Individual), Elaine Roman, Co-President/Secretary. Application Type: License Transfer.

Canyon Global Logistics, LLC (NVO & OFF), 2928–B Greens Road, Suite 100, Houston, TX 77032. Officers: Russell C. Daniel, President, (Qualifying Individual), Jared L. Jensen, Vice President. Application Type: New NVO & OFF License.

Delex Air Cargo, LLC dba DAC Services (OFF), JFK Int'l Airport, Cargo Plaza, Bldg. 87, Jamaica, NY 11430. Officers: Anna Shneyder, General Manager, (Qualifying Individual), Oleg Ardachev, President. Application Type: New OFF License.

Ever Reach Logistics Inc (NVO), 1169 Fairway Drive, Suite 202, City of Industry, CA 91789. Officer: Xiuji Zhang, President/Secretary/Treasurer, (Qualifying Individual). Application Type: New NVO.

Evergreen Cargo LLC (NVO), 11280 Sebring Drive, Cincinnati, OH 45240. Officers: Willy M. Lukanga, Member, (Qualifying Individual), Nana Kyereme, Managing Member. Application Type: New NVO License.

Heavy Logistics, Inc. dba BM Logistics (NVO & OFF), 3706 South Bannock Street, Englewood, Co 80110. Officers: Bernhard J. Maierhofer, President/Sales, (Qualifying Individual), Marta Witkowska, President/Operations/Secretary. Application Type: New NVO & OFF License.

Lidal Logistics Inc (NVO & OFF), 11301 Interchange Circle South, Miramar, FL 33025. Officer: Juan R. Sutil, President/Secretary/Treasurer, (Qualifying Individual). Application Type: New NVO & OFF License.

N.G.K. Corporation (NVO & OFF), 8120 NW 71 Street, Miami, FL 33166. Officer: Gladys E. Fisboin, President, (Qualifying Individual). Application Type: Add NVO Service.

Pegasus Worldwide Logistics NY, Inc. (NVO & OFF), 10 E. Merrick Road, Suite 204, Valley Stream, NY 11580. Officers: Arden S. Chan, Director/Secretary, (Qualifying Individual), Cooper Chao, Director/President. Application Type: New NVO & OFF License.

Premier Logistics Management LLC (NVO & OFF), 3727 59th Avenue Circle E., Ellenton, FL 34222. Officer: William A. Gross, Managing Member, (Qualifying Individual). Application Type: License Transfer.

Princeton Relocation Management, Inc. dba PRM International (OFF), 106 Galloping Hill Road, Basking Ridge, NJ 07920. Officers: Edwin F. Banfield, Jr, President/Treasurer, (Qualifying Individual), Suzanne M. Banfield, Corporate Secretary. Application Type: New OFF License.

Net Cargo LLC (NVO & OFF), 9619 NW 33 Street, Doral, FL 33172. Officers: Victor E. Segura, Managing Member/Treasurer, (Qualifying Individual), Jorge A. Paez, Managing Member/Secretary. Application Type: New NVO & OFF License.

Nobel Van Lines Inc. (NVO & OFF), 18255 NE 4th Court, Section A, North Miami Beach, FL 33162. Officer: Yaniv Dalei, President/Secretary/CFO, (Qualifying Individual). Application Type: New NVO & OFF License.

TGL New York LLC (NVO & OFF), 11 Sunrise Plaza, #307, Valley Stream, NY 11580. Officers: Vincent A. Sommella, Operations Manager, (Qualifying Individual), Vadim Nemirorskyi, Member. Application Type: New NVO & OFF.

World Wide Express LLC (NVO & OFF), 6000 NW 32 Court, Miami, FL 33142. Officers: Marius Marcinkevicius, Member/Manager, (Qualifying Individual), Jonas Vencius, Member/Manager. Application Type: Add NVO Service.

Dated: December 16, 2011.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2011–32712 Filed 12–21–11; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Revocation

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

License Number: 4365N.

Name: Logistics Management International, Inc.

Address: 600 Rinehart Road, Suite 1012, Lake Mary, FL 32746.

Date Revoked: November 10, 2011.

Reason: Failed to maintain a valid bond.

License Number: 017572F.
Name: Impex of Doral Logistics, Inc.
Address: 7850 NW 80th Street, Unit 3, Medley, FL 33166.
Date Revoked: November 19, 2011.
Reason: Failed to maintain a valid bond.
License Number: 018525N.
Name: Valu Freight Consolidators, Inc.
Address: 2177 NW 8th Avenue, Miami, FL 33127.
Date Revoked: November 18, 2011.
Reason: Failed to maintain a valid bond.
License Number: 020356N.
Name: C & S Shipping LLC.
Address: 10073 Valley View Street, Suite 412, Cypress, CA 90630.
Date Revoked: November 18, 2011.
Reason: Failed to maintain a valid bond.
License Number: 021301N.
Name: La Republica Cargo Express Corp.
Address: 30 Lawrence Street, Yonkers, NY 10705.
Date Revoked: November 11, 2011.
Reason: Failed to maintain a valid bond.
License Number: 021332NF.
Name: Avion Shipping Corp. dba GR Shipping.
Address: 154–09 146th Avenue, 2nd Floor, Jamaica, NY 11434.
Date Revoked: November 30, 2011.
Reason: Failed to maintain valid bonds.
License Number: 021660F.
Name: Montes Conection LLC. dba Montes Forwarding.
Address: 1050 Front Street, Suite B, Slidell, LA 70458.
Date Revoked: November 11, 2011.
Reason: Failed to maintain a valid bond.
License Number: 021690N.
Name: Scrap Freight, Inc.
Address: 801 S. Garfield Avenue, Suite 101, Alhambra, CA 91803.
Date Revoked: November 20, 2011.
Reason: Failed to maintain a valid bond.
License Number: 021722F.
Name: BDP Project Logistics, LLC.
Address: 510 Walnut Street, Philadelphia, PA 19106.
Date Revoked: November 21, 2011.
Reason: Failed to maintain a valid bond.
License Number: 022741F.
Name: Air Sea Logistics Inc.
Address: 2801 NW 7th Avenue, Suite 106, Miami, FL 33122.
Date Revoked: November 11, 2011.
Reason: Failed to maintain a valid bond.
License Number: 022915NF.
Name: Phoenician Maritime LLC.
Address: 12604 Haynes Road, Houston, TX 77066.
Date Revoked: November 11, 2011.
Reason: Failed to maintain valid bonds.

Sandra L. Kusumoto,
Director, Bureau of Certification and Licensing.

[FR Doc. 2011–32711 Filed 12–21–11; 8:45 am]
BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier OS–0990–New; 30-day notice]

Agency Information Collection Request. 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, email your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–5683. Send written comments and recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB Desk Officer; faxed to OMB at (202) 395–5806.

Proposed Project: Cross-Site Evaluation of the Minority Serving Institutions' HIV/AIDS Demonstration Initiative and Capacity-building Project (New)—OMB No. 0990–NEW—Office of HIV/AIDS Policy.

Abstract: Although minority populations comprise only 30% of the U.S. population, they account for nearly 65% of the new AIDS cases. As one strategy to address this disparity, the U.S. Department of Health and Human Services Office of HIV/AIDS Policy (OHAP) implemented the Minority Serving Institutions' (MSI) HIV/AIDS Demonstration Initiative and Capacity-building Project in 7 colleges and universities serving diverse groups of Hispanic, African American, and Native American minority students. This cross-site evaluation of the project will assess changes among students in the 7 colleges over a two-year project period regarding: (1) Awareness and knowledge of risk factors and prevention methods for HIV/AIDS transmission; (2) the occurrence of high-risk behaviors; and (3) access to HIV/AIDS prevention, counseling, testing and referral services. Implementation challenges and lessons learned also will be identified. The data collected in this evaluation will provide information about how to most effectively implement HIV/AIDS interventions at MSIs; and can be used to assist the OHAP and other federal agencies in setting future priorities for HIV/AIDS prevention activities at MSIs, and potentially other educational institutions. The data will be collected through various methods and frequencies, including annual pre and post tests and surveys, and focus groups to MSI students; annual key informant interviews to MSI staff and community partners; and semi-annual outcome data reports and monthly progress reports completed by MSI staff.

ESTIMATED ANNUALIZED BURDEN TABLE

Forms	Type of respondent	Number of respondents	Number of responses per respondent	Average burden (in hours) per response	Total burden hours
Annual Staff Key Informant Interview	MSI staff	14	1	4	56
Monthly Progress Reports	MSI HIV staff	14	12	1	168

ESTIMATED ANNUALIZED BURDEN TABLE—Continued

Forms	Type of respondent	Number of respondents	Number of responses per respondent	Average burden (in hours) per response	Total burden hours
Semi-Annual Reporting of Site Evaluation Findings.	MSI HIV staff	14	2	5	140
Annual Site Visit Partner Key Informant Interview	MSI community partners.	14	1	2	28
Pre- and Post-Surveys	Students	1,000	2	1	2,000
Pre- and Post-Tests	Students	420	2	15/60	210
Focus Groups/Interviews	Students	50	1	1	50
Total		1,526			2,652

Keith A. Tucker,

Office of the Secretary, Paperwork Reduction Act Clearance Officer.

[FR Doc. 2011–32729 Filed 12–21–11; 8:45 am]

BILLING CODE 4150–43–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HIT Policy Committee Advisory Meeting; Notice of Meeting

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meeting.

This notice announces a forthcoming meeting of a public advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meeting will be open to the public.

Name of Committee: HIT Policy Committee.

General Function of the Committee: To provide recommendations to the National Coordinator on a policy framework for the development and adoption of a nationwide health information technology infrastructure that permits the electronic exchange and use of health information as is consistent with the Federal Health IT Strategic Plan and that includes recommendations on the areas in which standards, implementation specifications, and certification criteria are needed.

Date and Time: The meeting will be held on January 10, 2012, from 10 a.m. to 3 p.m./ Eastern Time.

Location: Renaissance Hotel/Dupont Circle, 1143 New Hampshire Ave. NW., Washington, DC 20037. For up-to-date information, go to the ONC Web site, *http://healthit.hhs.gov.*

Contact Person: Mary Jo Deering, Office of the National Coordinator, HHS, 330 C Street SW., Washington, DC 20201, (202) 260–1944, Fax: (202) 690–6079, email: *maryjo.deering@hhs.gov.* Please call the contact person for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice.

Agenda: The committee will hear reports from its workgroups, including the Meaningful Use Workgroup, and updates from ONC and other Federal agencies. ONC intends to make background material available to the public no later than two (2) business days prior to the meeting. If ONC is unable to post the background material on its Web site prior to the meeting, it will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on ONC's Web site after the meeting, at *http://healthit.hhs.gov.*

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the workgroups. Written submissions may be made to the contact person on or before two days prior to the workgroup's meeting date. Oral comments from the public will be scheduled at the conclusion of each workgroup meeting. Time allotted for each presentation will be limited to three minutes. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled open public session, ONC will take written comments after the meeting until close of business on that day.

Persons attending ONC's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

ONC welcomes the attendance of the public at its advisory committee meetings. Seating is limited at the location, and ONC will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Mary Jo Deering at least seven (7) days in advance of the meeting.

ONC is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://healthit.hhs.gov* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App. 2).

Dated: December 15, 2011.

Mary Jo Deering,

Office of Policy and Planning, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2011–32792 Filed 12–21–11; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HIT Standards Committee Advisory Meeting; Notice of Meeting

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meeting.

This notice announces a forthcoming meeting of a public advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meeting will be open to the public.

Name of Committee: HIT Standards Committee.

General Function of the Committee: to provide recommendations to the National Coordinator on standards, implementation specifications, and certification criteria for the electronic exchange and use of health information for purposes of adoption, consistent with the implementation of the Federal Health IT Strategic Plan, and in accordance with policies developed by the HIT Policy Committee.

Date and Time: The meeting will be held on January 25, 2012, from 9 a.m. to 3 p.m./ Eastern Time.

Location: Renaissance Hotel/Dupont Circle, 1143 New Hampshire Ave. NW., Washington, DC 20037. For up-to-date information, go to the ONC Web site, *http://healthit.hhs.gov.*

Contact Person: Mary Jo Deering, Office of the National Coordinator, HHS, 330 C Street SW., Washington, DC 20201, (202) 260–1944, Fax: (202) 690–6079, email: *maryjo.deering@hhs.gov.* Please call the contact person for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice.

Agenda: The committee will hear reports from its workgroups, including the Clinical Operations, Vocabulary Task Force, Clinical Quality, Implementation, and Enrollment Workgroups. ONC intends to make background material available to the public no later than two (2) business days prior to the meeting. If ONC is unable to post the background material on its Web site prior to

the meeting, it will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on ONC's Web site after the meeting, at *http://healthit.hhs.gov*.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before October 17, 2011. Oral comments from the public will be scheduled between approximately 11:30 a.m. and 12:30 p.m./Eastern Time. Time allotted for each presentation will be limited to three minutes each. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled open public hearing session, ONC will take written comments after the meeting until close of business.

Persons attending ONC's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

ONC welcomes the attendance of the public at its advisory committee meetings. Seating is limited at the location, and ONC will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Mary Jo Deering at least seven (7) days in advance of the meeting.

ONC is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://healthit.hhs.gov* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App. 2).

Dated: December 15, 2011.

Mary Jo Deering,

Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2011–32790 Filed 12–21–11; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Privacy Act of 1974; System of Records Notice

AGENCY: Department of Health and Human Services (HHS), Office of the Secretary (OS), Office of the National Coordinator for Health Information Technology (ONC).

ACTION: Notice to establish a new system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, HHS/OS/ONC is establishing a new system of records, ''ONC Health IT Dashboard,'' to create datasets that will be used by ONC and its partners (including grantees in the Health IT Extension Center program and ONC program evaluation contractors) to assess, improve, and publicize the effectiveness of ONC health IT grants to States and State-designated entities. The datasets will enable ONC to (1) Evaluate the state of health IT implementation by parties registered to receive (*i.e.,* who have received or could receive) electronic health record implementation assistance from ONC grantees, (2) compare the evaluations to grantees' progress reports in order to validate claims submitted for grant payments, (3) share the evaluations with the grantees to help improve grant performance, and (4) make aggregate data (*e.g.,* national and State-level implementation estimates) publicly available on ONC's Web site at *http://www.healthit.hhs.gov.*

The parties receiving grants and health IT implementation assistance from ONC grantees include health care providers (not only provider-entities such as hospitals, but individual providers such as individual physicians), community colleges, State-designated entities, and other entities. Information about an individual provider (*e.g.,* an individual physician as opposed to a hospital, corporation or other organization) is protected by the Privacy Act. Privacy Act-protected information about each individual provider will consist of the provider's health IT implementation information, demographic information, and contact information, retrieved by his or her National Provider Identifier (NPI). The system will not contain information about patients. The system of records is more thoroughly described in the Supplementary Information section and System of Records Notice (SORN), below.

DATES: *Effective Dates:* Effective 30 days after publication. Written comments should be submitted on or before the effective date. HHS/OS/ONC may publish an amended System of Records Notice (SORN) in light of any comments received.

ADDRESSES: The public should send written comments to: ONC Dashboard Administrator, *ONCRequest@HHS.gov,* 200 Independence Ave. SW., Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Email: *ONCRequest@HHS.gov,* Telephone: 1–(202) 690–7151, 200 Independence Ave. SW., Washington, DC 20201.

SUPPLEMENTARY INFORMATION:

I. ONC Health IT Dashboard

The Office of the National Coordinator is establishing the ''ONC Health IT Dashboard'' system as part of the U.S. Department of Health and Human Service's (HHS) implementation of the Open Government Directive issued by the Office of Management and Budget (OMB) on December 8, 2009 (OMB Memorandum M–10–06). The purpose of the system is to advance open government principles and facilitate three programmatic objectives: (1) Aggregate data to create national- and State-level estimates about health IT adoption, (2) identify participants in other HHS health IT-related programs that could be assisted by ONC grantees, and (3) verify the integrity of grant payments made to ONC grantees.

The Dashboard system will enable ONC to create datasets using data from two types of sources: (1) Data created during the administration of ONC grant programs or obtained from ONC partners administering other Federal IT-related grant programs, and (2) data procured from private vendors that monitor health IT adoption trends and activity. The Dashboard system is divided into two interfaces: an internal system used by ONC researchers to create and analyze said datasets, and a public-facing Open Government internet site that will contain de-identified State-level summary statistics derived from said datasets, and pre-configured graphs, charts, and maps displaying the summarized data.

Individually-identifying information in the Dashboard system will pertain to individual office-based health care providers who are enrolled with the ONC Health IT Regional Extension Centers (RECs) and/or participate in other Federal IT-related grant programs, such as the CMS Medicare and Medicaid EHR Incentive programs. Privacy Act-protected information in this system will consist of an individual provider's contact information, demographic information, and health IT implementation information, retrieved by the provider's National Provider Identifier (NPI). Examples of records from which this information will be obtained include:

- Records from private vendors that monitor health IT adoption trends and activity, which include provider-level information such as contact and demographic information and characteristics of the electronic health records (EHR) systems and functionalities in use at the provider's site.
- ONC REC Program grant administration records, which contains the NPI, contact information, and demographic information for providers that are enrolled with ONC RECs.

• Centers for Medicare & Mediaid Services (CMS) Electronic Health Records (EHR) Incentive Program grant administration records, which include registration and attestation records containing NPI, contact information, and demographic information for providers who register to participate in that program.

Some of the datasets to be created and used by ONC and shared with ONC grantees and partners will necessarily include identifying information pertaining to particular participants in ONC and other Federal IT-related grant programs (including individual health care providers, identified by NPI); however, datasets that will be made publicly available on the ONC Web site will contain only aggregated data that cannot be identified with particular participants. Examples of both types of datasets (identifiable and aggregate) are described below:

• The system will create datasets containing NPI for use by ONC researchers, to validate the accuracy of claims for grant payment by ONC grantees.

• ONC may share versions of the above datasets containing NPI with ONC partners and grantees, to help grantees better assist registered parties in implementing health IT. An ONC partner or ONC grantee will be able to access datasets created in the system via a secure login to an internet portal. Accordingly, ONC partners and ONC grantees will only have access to data specifically pertaining to the achievement of that entity's grant or contract purpose. Further, an ONC grantee will only receive or have access to individually-identifying data about health care providers who are within the grantee's geographic area.

• The system will enable ONC to create aggregated summary tables from the above datasets that examine patterns of grants participation and health IT implementation using summary categories deriving from the provider's geography (*e.g.,* by state, region, urban/rural classification) or demographic data (*e.g.,* health care provider type, such as office-based provider, hospital or pharmacy) and not by NPI, for posting to ONC's Web site.

II. The Privacy Act

The Privacy Act (5 U.S.C. 552a) governs the means by which the U.S. Government collects, maintains, and uses information about individuals in a system of records. A ''system of records'' is a group of any records under the control of a Federal agency from which information about an individual is retrieved by the individual's name or other personal identifier. The Privacy Act requires each agency to publish in the **Federal Register** a system of records notice (SORN) identifying and describing each system of records the agency maintains, including the purposes for which the agency uses information about individuals in the system, the routine uses for which the agency discloses such information outside the agency, and how individual record subjects can exercise their rights under the Privacy Act (*e.g.,* to determine if the system contains information about them).

SYSTEM NUMBER:

09–90–1201

SYSTEM NAME:

ONC Health IT Dashboard, HHS/OS/ONC.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The server infrastructure for the system will be located at Managed Application Hosting Facility (MAHC Core Site), Reston Virginia.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system will contain information about individual office-based health care providers who are enrolled with the ONC Health IT Regional Extension Centers (REC) and/or participate in other Federal health IT-related grant programs, including the CMS EHR Incentive Programs.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system will contain the following records about individual health care providers:

• IT implementation information, such as the functionalities that are being used within a provider's electronic health record system;

• Demographic records, such as gender and ethnicity;

• Contact information, such as name, address, and phone number; and

• National Provider Identifier (NPI).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Health Information Technology for Economic and Clinical Health (HITECH) Act, enacted as part of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111–5), codified at 42 U.S.C. 300jj.

PURPOSE(S) OF THE SYSTEM:

HHS/ONC personnel will use the system to create and use datasets to assess, improve, and publicize the effectiveness of ONC health IT grants made to States and State-designated entities. Some of the datasets will contain individually identifying information about health care providers who are registered to receive health IT implementation assistance from ONC grantees. HHS/ONC personnel will use individually identifying information in the system, on a need to know basis, to (1) Evaluate the state of health IT implementation by parties registered to receive electronic health record implementation assistance from ONC grantees, (2) compare grantees' progress reports in order to validate claims submitted for grant payments, (3) share the evaluations with the grantees to help improve grant performance, and (4) make aggregate data (*e.g.,* national and State-level implementation estimates) publicly available on ONC's Web site.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The ONC Health IT Dashboard system will or may disclose datasets containing individually identifying information about providers to the following parties outside the agency, for the following routine uses:

1. To ONC grantees to help them improve grant performance and to ONC contractors that help evaluate the effectiveness of Federal health IT-related grants to States and State-designated entities. The group of ONC grantees with whom this data will be shared is available on the ONC Web site at *http://www.healthit.gov.* An ONC grantee will only receive individually identifying data about health care providers that are within the grantee's geographic service area.

2. To agency contractors, consultants, or HHS grantees who have been engaged by the agency to assist in accomplishment of an HHS function relating to the purposes of this system of records and who need to have access to the records in order to assist HHS.

3. To another Federal or State agency, agency of a State government, agency established by State law, or its fiscal agent, pursuant to agreements with HHS, as necessary to enable such agency to:

• Contribute to the accuracy of HHS's reimbursements to grantees;

• Administer a Federal health benefits program or fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds; and/or

• Assist Federal/State Medicaid programs which may require ONC Health IT Dashboard information for purposes related to this system.

4. To the Department of Justice (DOJ), a court or an adjudicatory body when:

- The agency or any component thereof, or
- Any employee of the agency in his or her official capacity, or
- Any employee of the agency in his or her individual capacity where the DOJ has agreed to represent the employee, or
- The United States Government, is a party to litigation or has an interest in such litigation and, by careful review, HHS determines that the records are both relevant and necessary to the litigation and that the use of such records by the DOJ, court or adjudicatory body is compatible with the purpose for which the agency collected the records.

5. To another Federal agency or an instrumentality of any governmental jurisdiction within or under the control of the United States (including any State or local governmental agency), that administers or has the authority to investigate potential fraud, waste or abuse in a health benefits program funded in whole or in part by Federal funds, when disclosure is deemed reasonably necessary by HHS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud, waste or abuse in such programs.

6. To appropriate Federal agencies and Department contractors that have a need to know the information for the purpose of assisting the Department's efforts to respond to a suspected or confirmed breach of the security or confidentiality of information maintained in this system of records, when the information disclosed is relevant and necessary for that assistance.

7. To the Department of Justice (DOJ) and/or the Office of Government Information Services (OGIS) for the purposes of determining whether disclosure is required under the Freedom of Information Act (FOIA), resolving disputes between FOIA requesters and Federal agencies, and reviewing agencies' FOIA policies, procedures and compliance in order to recommend policy changes to Congress and the President.

8. To the National Archives and Records Administration (NARA) in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM—

STORAGE:

Electronic records will be stored on an ONC infrastructure servers maintained at a contracted IT services unit of HHS. Electronic records containing source data, including individually identifiable information, can only be accessed from secure computer stations inside the HHS/ONC workspace by authorized users. Aggregated datasets including national and State-level EHR implementation estimates that do not include individually identifiable information will be available through the ONC Web site, *http://healthIT.gov.*

RETRIEVABILITY:

Records will be retrieved, compared and cross-checked using the National Provider Identifier (NPI).

SAFEGUARDS:

Appropriate physical, technical, and administrative safeguards will be in place to protect against unauthorized access to or disclosure of individually identifiable information from this system. The system will be secured and protected using standards established through the Federal Information Security Management Act of 2002 (44 U.S.C. 3541) and standards established by the National Institutes for Standards in Technology (NIST) for certifying and accrediting IT systems. Furthermore, access to the system's internal ONC interface (which provides the only available access to individually-identifying data) will be limited to a small group of authorized HHS/ONC researchers, and within that group, individual datasets will be micromanaged to ensure that access is restricted to the subset of ONC staff with the bona fide need to use the information. Access to any portion of the internal ONC system and or source datasets is predicated on successful user registration with the HHS IT help desk and the user's ability to abide by the HHS IT security terms of use.

Datasets created in the system for provided to an ONC grantee or contractor will contain only data specifically pertaining to that entities grant or contract purpose. Further, an ONC grantee or contractor will only receive or have access to individually-identifiable data about health care providers who are within the grantee's geographic area. An ONC partner or ONC grantee will be able to access datasets created in the system via a secure login to an internet portal. No records will be maintained in hard-copy files.

RETENTION AND DISPOSAL:

The records are currently unscheduled; the records disposition schedule will provide for records to be destroyed approximately two years after the completion of the applicable ONC health IT-related grant program that was evaluated using the records.

SYSTEM MANAGER AND ADDRESS:

ONC Dashboard Administrator, Office of the National Coordinator for Health IT, 200 Independence Avenue SW., Washington, DC 20201.

NOTIFICATION PROCEDURE:

An individual provider who wishes to know if this system contains records about him or her should write to the System Manager and include his or her National Provider Identifier (NPI).

RECORD ACCESS PROCEDURE:

An individual provider seeking access to records about him or her in this system should follow the same instructions indicated under ''Notification Procedure.'' The request should reasonably identify the record contents to which access is sought. (These procedures are in accordance with Department regulation 45 CFR 5b.5 (a)(2).)

CONTESTING RECORD PROCEDURES:

An individual provider seeking to contest the content of information about him or her in this system should follow the same instructions indicated under ''Notification Procedure.'' The request should reasonably identify the record, specify the information contested, state the corrective action sought, and provide the reasons for the correction, with supporting justification. (These procedures are in accordance with Department regulation 45 CFR 5b.7.) The right to contest records is limited to information that is incomplete, irrelevant, incorrect, or untimely (*i.e.,* obsolete).

RECORD SOURCE CATEGORIES:

The system will use data procured from private vendors that monitor health IT adoption trends and activity and grant administrative data already collected or generated in administering ONC and other Federal health IT-related grant programs. Datasets created by this system, from those sources, will be cross-checked against certain data in other HHS systems (such as the PECOS system), to ensure the datasets are valid, accurate and reliable for use in evaluating ONC grants. Most of the data used will come from records collected

directly from participants in the grant programs.

EXEMPTIONS CLAIMED FOR THIS SYSTEM:

None.

Dated: December 5, 2011.

Michael Furukawa,

Acting Director, Office of Economic Analysis, Evaluation and Modeling, Office of the National Coordinator for Health IT, U.S. Department of Health and Human Services.

[FR Doc. 2011–32791 Filed 12–21–11; 8:45 am]

BILLING CODE 199R–EC–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Agency Recordkeeping/Reporting Requirements Under Emergency Review by the Office of Management and Budget (OMB)

Title: Mother and Infant Home Visiting Program Evaluation. *(MIHOPE):* Site Recruitment.

OMB No.: New Collection.

Description: The Administration for Children and Families (ACF) and Health Resources and Services Administration (HRSA) within the U.S. Department of Health and Human Services (HHS) have launched a national evaluation called the Mother and Infant Home Visiting Evaluation Project (MIHOPE). This evaluation, mandated by the Affordable Care Act, will inform the federal government about the effectiveness of the newly established MIECHV program in its first few years of operation, and provide information to help states develop and strengthen home visiting programs in the future. By systematically estimating the effects of home visiting programs across a wide range of outcomes and studying the variation in how programs are implemented, MIHOPE will provide valuable information on the effects of these programs on parents and children. This includes investigating the effects of home visiting on maternal and child well-being, how those effects vary for different home visiting approaches, and how variations in program design and implementation influence program fidelity and impacts.

The MIHOPE study includes two phases: Phase 1 includes site recruitment, baseline data collection and implementation data; Phase 2 includes follow up data collection. The purpose of the current document is to request an emergency approval of site recruitment efforts needed for Phase 1. The overall goal for site recruitment in MIHOPE is to select 85 sites across approximately 12 states. States and their local program sites will be selected for MIHOPE in 2012 based on a variety of characteristics including: The type of home visiting model, geography, urbanicity, target population, and research feasibility. There is currently limited documentation available to aid site selection. The study team reviewed and analyzed the MIECHV implementation plans each state submitted to the U.S. Department of Health and Human Services. These plans provided a general overview, however, the plans did not consistently provide the specific answers needed for site selection. For this reason, we will need to contact states and their local programs to confirm what was collected from the plans and request some additional information. This information needs to be collected in early 2012 to ensure that baseline data collection can begin in July 2012. Site recruitment will include: emails, phone calls, and site visits with state administrators and state and local program site staff.

Respondents: The respondents will be state MIECHV administrators and home visiting program managers. Data collection activities will take place over a 1-year period.

ANNUAL BURDEN ESTIMATES

Instrument	Annual number of respondents	Number of responses per respondent	Average burden hours per response	Total annual burden hours
Information package for state representatives	30	1	0.5	15
Telephone script for state representatives	30	1	1.0	30
Telephone protocol for local program directors	80	1	1.5	120
In-person visit protocol for local program directors	40	1	3.0	120

Estimated Total Annual Burden Hours: 285.

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer. Email address: *OPREinfocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 21 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011–32824 Filed 12–21–11; 8:45 am]

BILLING CODE 4184–22–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0908]

Agency Information Collection Activities; Proposed Collection; Comment Request; Guidance for Clinical Trial Sponsors: Establishment and Operation of Clinical Trial Data Monitoring Committees

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the collection of information concerning the establishment and operation of clinical trial data monitoring committees.

DATES: Submit either electronic or written comments on the collection of information by February 21, 2012.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, (301) 796–7726, *Ila.Mizrachi@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Guidance for Clinical Trial Sponsors: Establishment and Operation of Clinical Trial Data Monitoring Committees—(OMB Control Number 0910–0581)—Extension

Sponsors are required to monitor studies evaluating new drugs, biologics, and devices (21 CFR 312.50 and 312.56 for drugs and biologics, and 21 CFR 812.40 and 812.46 for devices). Various individuals and groups play different roles in clinical trial monitoring. One such group is a data monitoring committee (DMC), appointed by a sponsor to evaluate the accumulating outcome data in some trials. A clinical trial DMC is a group of individuals with pertinent expertise that reviews on a regular basis accumulating data from one or more ongoing clinical trials. The DMC advises the sponsor regarding the continuing safety of current trial subjects and those yet to be recruited to the trial, as well as the continuing validity and scientific merit of the trial.

The guidance document referenced in this document is intended to assist sponsors of clinical trials in determining when a DMC is needed for monitoring a study and how such committees should operate. The guidance addresses the roles, responsibilities, and operating procedures of DMCs, describes certain reporting and recordkeeping responsibilities, including the following: (1) Sponsor notification to the DMC regarding waivers, (2) DMC reports based on meeting minutes to the sponsor, (3) sponsor reports to FDA on DMC recommendations related to safety, (4) standard operating procedures (SOPs) for DMCs, and (5) DMC meeting records.

1. Sponsor Notification to the DMC Regarding Waivers

The sponsor must report to FDA certain serious and unexpected adverse events in drugs and biologics trials (§ 312.32 (21 CFR 312.32)) and unanticipated adverse device effects in the case of device trials (§ 812.150(b)(1) (21 CFR 812.150(b)(1)). The Agency recommends in the guidance that sponsors notify DMCs about any waivers granted by FDA for expedited reporting of certain serious events.

2. DMC Reports of Meeting Minutes to the Sponsor

The Agency recommends in the guidance that DMCs should issue a written report to the sponsor based on the DMC meeting minutes. Reports to the sponsor should include only those data generally available to the sponsor. The sponsor may convey the relevant information in this report to other interested parties, such as study investigators. Meeting minutes or other information that include discussion of confidential data would not be provided to the sponsor.

3. Sponsor Reporting to FDA on DMC Recommendations Related to Safety

The requirement of the sponsor to report DMC recommendations related to serious adverse events in an expedited manner in clinical trials of new drugs (§ 312.32(c)) would not apply when the DMC recommendation is related to an excess of events not classifiable as serious. Nevertheless, the Agency recommends in the guidance that sponsors inform FDA about all recommendations related to the safety of the investigational product whether or not the adverse event in question meets the definition of ''serious.''

4. SOPs for DMCs

In the guidance, FDA recommends that sponsors establish procedures to do the following things:

- Assess potential conflicts of interest of proposed DMC members;
- Ensure that those with serious conflicts of interest are not included in the DMC;
- Provide disclosure to all DMC members of any potential conflicts that are not thought to impede objectivity and, thus, would not preclude service on the DMC;

• Identify and disclose any concurrent service of any DMC member on other DMCs of the same, related, or competing products;

• Ensure separation, and designate a different statistician to advise on the management of the trial, if the primary trial statistician takes on the responsibility for interim analysis and reporting to the DMC; and

• Minimize the risks of bias that are associated with an arrangement under which the primary trial statistician takes on the responsibility for interim analysis and reporting to the DMC, if it appears infeasible or highly impractical for any other statistician to take over responsibilities related to trial management.

5. DMC Meeting Records

The Agency recommends in the guidance that the DMC or the group preparing the interim reports to the DMC maintain all meeting records. This information should be submitted to FDA with the clinical study report (§ 314.50(d)(5)(ii) (21 CFR 314.50(d)(5)(ii)).

a. Description of Respondents: The submission and data collection recommendations described in this document affect sponsors of clinical trials and DMCs.

b. Burden Estimate: Table 1 of this document provides the burden estimate of the annual reporting burden for the information to be submitted in accordance with the guidance. Table 2 of this document provides the burden estimate of the annual recordkeeping burden for the information to be maintained in accordance with the guidance.

c. Reporting and Recordkeeping Burdens: Based on information from FDA review divisions, FDA estimates there are approximately 740 clinical trials with DMCs regulated by the Center for Biologics Evaluation and Research, the Center for Drugs Evaluation and Research, and the Center for Devices and Radiological Health. FDA estimates that the average length of a clinical trial is 2 years, resulting in an annual estimate of 370 clinical trials. Because FDA has no information on which to project a change in the use of DMCs, FDA estimates that the number of clinical trials with DMCs will not change significantly in the next few years. For purposes of this information collection, FDA estimates that each sponsor is responsible for approximately 10 trials, resulting in an estimated 37 sponsors that are affected by the guidance annually.

Based on information provided to FDA by sponsors that have typically used DMCs for the kinds of studies for which this guidance recommends them, FDA estimates that the majority of sponsors have already prepared SOPs for DMCs, and only a minimum amount of time is necessary to revise or update them for use for other clinical studies. FDA receives very few requests for waivers regarding expedited reporting of certain serious events; therefore, FDA has estimated one respondent per year to account for the rare instance a request may be made. Based on FDA's experience with clinical trials using DMCs, FDA estimates that the sponsor on average would issue two interim reports per clinical trial to the DMC. FDA estimates that the DMCs would hold two meetings per year per clinical trial, resulting in the issuance of two DMC reports of meeting minutes to the sponsor. One set of both of the meeting records should be maintained per clinical trial.

The ''Average Burden per Response'' and ''Average Burden per Recordkeeping'' are based on FDA's experience with comparable recordkeeping and reporting provisions applicable to FDA regulated industry. The ''Average Burden per Response'' includes the time the respondent would spend reviewing, gathering, and preparing the information to be submitted to the DMC, FDA, or the sponsor. The ''Average Burden per Recordkeeping'' includes the time to record, gather, and maintain the information.

The information collection provisions in the guidance for §§ 312.30, 312.32, 312.38, 312.55, and 312.56 have been approved under OMB control number 0910–0014; § 314.50 has been approved under OMB control number 0910–0001; and §§ 812.35 and 812.150 have been approved under OMB control number 0910–0078.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Section of guidance/reporting activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
4.4.1.2. Sponsor notification to the DMC regarding waivers	1	1	1	0.25 (15 min.)	0.25
4.4.3.2. DMC reports of meeting minutes to the sponsor	370	2	740	1	740
5. Sponsor reporting to FDA on DMC recommendations related to safety	37	1	37	0.50 (30 min.)	18.5
Total					758.75

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

Section of guidance/recordkeeping activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
4.1. and 6.4 SOPs for DMCs	37	1	37	8	296
4.4.3.2. DMC meeting records	370	1	370	2	740
Total					1,036

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: December 16, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–32776 Filed 12–21–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0508]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Blood Establishment Registration and Product Listing, Food and Drug Administration Form 2830

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by January 23, 2012.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, Fax: (202) 395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0052. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, (301) 796–7726, *Ila.Mizrachi@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Blood Establishment Registration and Product Listing, FDA Form 2830—21 CFR Part 607 (OMB Control Number 0910–0052)—Extension

Under section 510 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360), any person owning or operating an establishment that manufactures, prepares, propagates, compounds, or processes a drug or device must register with the Secretary of Health and Human Services, on or before December 31 of each year, his or her name, place of business, and all such establishments, and must submit, among other information, a listing of all drug or device products manufactured, prepared, propagated, compounded, or processed by him or her for commercial distribution. In part 607 (21 CFR part 607), FDA has issued regulations implementing these requirements for manufacturers of human blood and blood products.

Section 607.20(a), in brief, requires owners or operators of certain establishments that engage in the manufacture of blood products to register and to submit a list of every blood product in commercial distribution. Section 607.21, in brief, requires the owners or operators of establishments entering into the manufacturing of blood products to register within 5 days after beginning such operation and to submit a list of every blood product in commercial distribution at the time. If the owner or operator of the establishment has not previously entered into such operation for which a license is required, registration must follow within 5 days after the submission of a biologics license application. In addition, owners or operators of all establishments so engaged must register annually between November 15 and December 31 and must update their blood product listing information every June and December. Section 607.22 requires the use of FDA Form 2830 (Blood Establishment Registration and Product Listing) for initial registration, subsequent annual registration, and for blood product listing information. Section 607.25 sets forth the information required for establishment registration and blood product listing. Section 607.26, in brief, requires certain changes to be submitted on FDA Form 2830 as an amendment to establishment registration within 5 days of such changes. Section 607.30(a), in brief, sets forth the information required from owners or operators of establishments when updating their blood product listing information every June and December, or at the discretion of the registrant at the time the change occurs. Section 607.31 requires that additional blood product listing information be provided upon FDA request. Section 607.40, in brief, requires certain foreign blood product establishments to comply with the establishment registration and blood product listing information requirements discussed earlier in this document and to provide the name and address of the establishment and the name of the individual responsible for submitting establishment registration and blood product listing information as well as the name, address, and phone number of its U.S. agent.

Among other uses, this information assists FDA in its inspections of facilities, and its collection is essential to the overall regulatory scheme designed to ensure the safety of the Nation's blood supply. FDA Form 2830 is used to collect this information.

Respondents to this collection of information are human blood and plasma donor centers, blood banks, certain transfusion services, other blood product manufacturers, and independent laboratories that engage in quality control and testing for registered blood product establishments.

FDA estimates the burden of this collection of information based upon information obtained from FDA's Center for Biologics Evaluation and Research's database and FDA experience with the blood establishment registration and product listing requirements.

In the **Federal Register** of August 8, 2011 (76 FR 48167), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR Section	FDA Form 2830	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
607.20(a), 607.21, 607.22, 607.25, and 607.40.	Initial registration	49	1	49	1	49
607.21, 607.22, 607.25, 607.26, 607.31, and 607.40.	Re-registration	2,589	1	2,589	0.5 (30 min.)	1,295

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]—Continued

21 CFR Section	FDA Form 2830	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
607.21, 607.25, 607.30(a), 607.31, and 607.40.	Product listing update	180	1	180	0.25 (15 min.)	45
Total						1,389

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: December 19, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–32777 Filed 12–21–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0511]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Current Good Manufacturing Practices and Related Regulations for Blood and Blood Components; and Requirements for Donor Testing, Donor Notification, and ''Lookback''

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by January 23, 2012.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, Fax: (202) 395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0116. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, (301) 796–7726, *Ila.Mizrachi@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Current Good Manufacturing Practices and Related Regulations for Blood and Blood Components; and Requirements for Donor Testing, Donor Notification, and ''Lookback''—(OMB Control Number 0910–0116)—Extension

All blood and blood components introduced or delivered for introduction into interstate commerce are subject to section 351(a) of the Public Health Service Act (PHS Act) (42 U.S.C. 262). Section 351(a) of the PHS Act requires that manufacturers of biological products, which include blood and blood components intended for further manufacture into injectable products, have a license, issued upon a demonstration that the product is safe, pure, and potent and that the manufacturing establishment meets all applicable standards, including those prescribed in the FDA regulations designed to ensure the continued safety, purity, and potency of the product. In addition, under section 361 of the PHS Act (42 U.S.C. 264), by delegation from the Secretary of Health and Human Services, FDA may make and enforce regulations necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.

Section 351(j) of the PHS Act states that the Federal Food, Drug, and Cosmetic Act also applies to biological products. Blood and blood components for transfusion or for further manufacture into injectable products are drugs, as that term is defined in section 201(g)(1) of the Federal, Food, Drug, and Cosmetics Act (21 U.S.C. 321(g)(1)). Because blood and blood components are drugs under the Federal, Food, Drug, and Cosmetics Act, blood and plasma establishments must comply with the substantive provisions and related regulatory scheme of the act. For example, under section 501 of the Federal, Food, Drug, and Cosmetic Act (21 U.S.C. 351(a)), drugs are deemed ''adulterated'' if the methods used in their manufacturing, processing, packing, or holding do not conform to current good manufacturing practice (CGMP) and related regulations.

The CGMP regulations in part 606 (21 CFR part 606)) and related regulations implement FDA's statutory authority to ensure the safety, purity, and potency of blood and blood components. The public health objective in testing human blood donors for evidence of infection due to communicable disease agents and in notifying donors is to prevent the transmission of communicable disease. For example, the ''lookback'' requirements are intended to help ensure the continued safety of the blood supply by providing necessary information to users of blood and blood components and appropriate notification of recipients of transfusion who are at increased risk for transmitting human immunodeficiency virus (HIV) or hepatitis C virus (HCV) infection.

The information collection requirements in the CGMP, donor testing, donor notification, and ''lookback'' regulations provide FDA with the necessary information to perform its duty to ensure the safety, purity, and potency of blood and blood components. These requirements establish accountability and traceability in the processing and handling of blood and blood components and enable FDA to perform meaningful inspections.

The recordkeeping requirements serve preventive and remedial purposes. The disclosure requirements identify the various blood and blood components and important properties of the product, demonstrate that the CGMP requirements have been met, and facilitate the tracing of a product back to its original source. The reporting requirements inform FDA of certain information that may require immediate corrective action.

Under the reporting requirements, § 606.170(b), in brief, requires that facilities notify FDA's Center for Biologics Evaluation and Research

(CBER), as soon as possible after confirming a complication of blood collection or transfusion to be fatal. The collecting facility is to report donor fatalities, and the compatibility testing facility is to report recipient fatalities. The regulation also requires the reporting facility to submit a written report of the investigation within 7 days after the fatality. In fiscal year 2010, FDA received 76 of these reports.

Section 610.40(c)(1)(ii) in part 610 (21 CFR part 610), in brief, requires that each donation dedicated to a single identified recipient be labeled as required under § 606.121 and with a label containing the name and identifying information of the recipient.

Section 610.40(g)(2) requires an establishment to obtain written approval from FDA to ship human blood or blood components for further manufacturing use prior to completion of testing for evidence of infection due to certain communicable disease agents.

Section 610.40(h)(2)(ii)(A), in brief, requires an establishment to obtain written approval from FDA to use or ship human blood or blood components found to be reactive by a screening test for evidence of certain communicable disease agent(s) or collected from a donor with a record of a reactive screening test. Furthermore, §§ 610.40(h)(2)(ii)(C) and (h)(2)(ii)(D), in brief, require an establishment to label certain reactive human blood and blood components with the appropriate screening test results, and, if they are intended for further manufacturing use into injectable products, to include a statement on the label indicating the exempted use specifically approved by FDA. Finally, § 610.40(h)(2)(vi) requires each donation of human blood or blood components, excluding Source Plasma, that tests reactive by a screening test for syphilis and is determined to be a biological false positive to be labeled with both test results.

Section 610.42(a) requires a warning statement ''indicating that the product was manufactured from a donation found to be reactive by a screening test for evidence of infection due to the identified communicable disease agent(s)'' in the labeling for medical devices containing human blood or a blood component found to be reactive by a screening test for evidence of infection due to a communicable disease agent(s) or syphilis.

In brief, §§ 610.46 and 610.47 require blood collecting establishments to establish, maintain, and follow an appropriate system for performing HIV and HCV prospective ''lookback'' when: (1) A donor tests reactive for evidence of HIV or HCV infection; or (2) the collecting establishment becomes aware of other reliable test results or information indicating evidence of HIV or HCV infection (''prospective lookback'') (see §§ 610.46(a)(1) and 610.47(a)(1)). The requirement for ''an appropriate system'' requires the collecting establishment to design standard operating procedures (SOPs) to identify and quarantine all blood and blood components previously collected from a donor who later tests reactive for evidence of HIV or HCV infection, or when the collecting establishment is made aware of other reliable test results or information indicating evidence of HIV or HCV infection. Within 3 calendar days of the donor testing reactive by an HIV or HCV screening test or the collecting establishment becoming aware of other reliable test results or information, the collecting establishment must, among other things, notify consignees to quarantine all identified previously collected in-date blood and blood components (§§ 610.46(a)(1)(ii)(B) and 610.47(a)(1)(ii)(B)) and, within 45 days, notify the consignees of supplemental test results, or the results of a reactive screening test if there is no available supplemental test that is approved for such use by FDA (§§ 610.46(a)(3) and 610.47(a)(3)).

Consignees also must establish, maintain, and follow an appropriate system for performing HIV and HCV ''lookback'' when notified by the collecting establishment that they have received blood and blood components previously collected from donors who later tested reactive for evidence of HIV or HCV infection, or when the collecting establishment is made aware of other reliable test results or information indicating evidence of HIV or HCV infection in a donor (§§ 610.46(b) and 610.47(b)). This provision for a system requires the consignee to establish SOPs (standard operating procedures) for, among other things, notifying transfusion recipients of blood and blood components, or the recipient's physician of record or legal representative, when such action is indicated by the results of the supplemental (additional, more specific) tests or a reactive screening test if there is no available supplemental test that is approved for such use by FDA, or if under an investigational new drug application (IND) or an investigational device exemption (IDE), is exempted for such use by FDA. The consignee must make reasonable attempts to perform the notification within 12 weeks of receipt of the supplemental test result or receipt of a reactive screening test result when there is no available supplemental test that is approved for such use by FDA, or if under an IND or IDE, is exempted for such use by FDA (§§ 610.46(b)(3) and 610.47(b)(3)).

Section 630.6(a) (21 CFR 630.6(a)) requires an establishment to make reasonable attempts to notify any donor who has been deferred as required by § 610.41, or who has been determined not to be eligible as a donor. Section 630.6(d)(1) requires an establishment to provide certain information to the referring physician of an autologous donor who is deferred based on the results of tests as described in § 610.41.

Under the recordkeeping requirements, § 606.100(b), in brief, requires that written SOPs be maintained for all steps to be followed in the collection, processing, compatibility testing, storage, and distribution of blood and blood components used for transfusion and further manufacturing purposes. Section 606.100(c) requires the review of all records pertinent to the lot or unit of blood prior to release or distribution. Any unexplained discrepancy or the failure of a lot or unit of final product to meet any of its specifications must be thoroughly investigated, and the investigation, including conclusions and followup, must be recorded.

In brief, § 606.110(a) provides that the use of plateletpheresis and leukaphesis procedures to obtain a product for a specific recipient may be at variance with the additional standards for that specific product if, among other things, the physician certifies in writing that the donor's health permits plateletpheresis or leukapheresis. Section 606.110(b) requires establishments to request prior approval from CBER for plasmapheresis of donors who do not meet donor requirements. The information collection requirements for § 606.110(b) are approved under OMB control number 0910–0338 and, therefore, are not reflected in tables 1 and 2 of this document.

Section 606.151(e) requires that SOPs for compatibility testing include procedures to expedite transfusion in life-threatening emergencies; records of all such incidents must be maintained, including complete documentation justifying the emergency action, which must be signed by a physician.

So that each significant step in the collection, processing, compatibility testing, storage, and distribution of each unit of blood and blood components can be clearly traced, § 606.160 requires that legible and indelible contemporaneous records of each such step be made and maintained for no less than 10 years. Section 606.160(b)(1)(viii) requires

records of the quarantine, notification, testing and disposition performed under the HIV and HCV ''lookback'' provisions. Furthermore, § 606.160(b)(1)(ix) requires a blood collection establishment to maintain records of notification of donors deferred or determined not to be eligible for donation, including appropriate followup. Section 606.160(b)(1)(xi) requires an establishment to maintain records of notification of the referring physician of a deferred autologous donor, including appropriate followup.

Section 606.165 (21 CFR 606.165), in brief, requires that distribution and receipt records be maintained to facilitate recalls, if necessary.

Section 606.170(a) requires records to be maintained of any reports of complaints of adverse reactions arising as a result of blood collection or transfusion. Each such report must be thoroughly investigated, and a written report, including conclusions and followup, must be prepared and maintained. When an investigation concludes that the product caused the transfusion reaction, copies of all such written reports must be forwarded to and maintained by the manufacturer or collecting facility.

Section 610.40(g)(1) requires an establishment to appropriately document a medical emergency for the release of human blood or blood components prior to completion of required testing.

In addition to the CGMP regulations in part 606, there are regulations in part 640 (21 CFR part 640) that require additional standards for certain blood and blood components as follows: Sections 640.3(a)(1), (a)(2), and (f); 640.4(a)(1) and (a)(2); 640.25(b)(4) and (c)(1); 640.27(b); 640.31(b); 640.33(b); 640.51(b); 640.53(b) and (c); 640.56(b) and (d); 640.61; 640.63(b)(3), (e)(1), and (e)(3); 640.65(b)(2); 640.66; 640.71(b)(1); 640.72; 640.73; and 640.76(a) and (b). The information collection requirements and estimated burdens for these regulations are included in the part 606 burden estimates, as described in tables 1 and 2 of this document.

Respondents to this collection of information are licensed and unlicensed blood establishments that collect blood and blood components, including Source Plasma and Source Leukocytes, inspected by FDA, and other transfusion services inspected by Centers for Medicare and Medicaid Services (CMS). Based on information received from CBER's database systems, there are approximately 31 licensed Source Plasma establishments with multiple locations and approximately 1,675 registered blood collection establishments, for an estimated total of 1,706 establishments. Of these establishments, approximately 1,032 perform plateletpheresis and leukopheresis. These establishments annually collect approximately 38.3 million units of Whole Blood and blood components, including Source Plasma and Source Leukocytes, and are required to follow FDA ''lookback'' procedures. In addition, there are another 4,059 establishments that fall under the Clinical Laboratory Improvement Amendments of 1988 (formerly referred to as facilities approved for Medicare reimbursement) that transfuse blood and blood components.

The following reporting and recordkeeping estimates are based on information provided by industry, CMS, and FDA experience. Based on information received from industry, we estimate that there are approximately 21 million donations of Source Plasma from approximately 2 million donors and approximately 17.3 million donations of Whole Blood, including approximately 261,000 (approximately 1.5 percent of 17.3 million) autologous donations, from approximately 10.9 million donors. Assuming each autologous donor makes an average of 2 donations, FDA estimates that there are approximately 130,500 autologous donors.

FDA estimates that approximately 5 percent (3,600 of the 72,000 donations that are donated specifically for the use of an identified recipient) would be tested under the dedicated donors' testing provisions in § 610.40(c)(1)(ii)).

Under §§ 610.40(g)(2) and (h)(2)(ii)(A), Source Leukocytes, a licensed product that is used in the manufacture of interferon, which requires rapid preparation from blood, is currently shipped prior to completion of testing for evidence of certain communicable disease agents. Shipments of Source Leukocytes are pre-approved under a biologics license application and each shipment does not have to be reported to the Agency. Based on information from CBER's database system, FDA receives less than one application per year from manufacturers of Source Leukocytes. However, for calculation purposes, we are estimating one application annually.

Under §§ 610.40(h)(2)(ii)(C) and (h)(2)(ii)(D), FDA estimates that each manufacturer would ship an estimated 1 unit of human blood or blood components per month (12 per year) that would require two labels; one as reactive for the appropriate screening test under § 610.40(h)(2)(ii)(C), and the other stating the exempted use specifically approved by FDA under § 610.40(h)(2)(ii)(D). According to CBER's database system, there are approximately 40 licensed manufacturers that ship known reactive human blood or blood components.

Based on information we received from industry, we estimate that approximately 18,000 donations: (1) Annually test reactive by a screening test for syphilis; (2) are determined to be biological false positives by additional testing; and (3) are labeled accordingly (§ 610.40(h)(2)(vi)).

Human blood or a blood component with a reactive screening test, as a component of a medical device, is an integral part of the medical device, e.g., a positive control for an in vitro diagnostic testing kit. It is usual and customary business practice for manufacturers to include on the container label a warning statement that identifies the communicable disease agent. In addition, on the rare occasion when a human blood or blood component with a reactive screening test is the only component available for a medical device that does not require a reactive component, then a warning statement must be affixed to the medical device. To account for this rare occasion under § 610.42(a), we estimate that the warning statement would be necessary no more than once a year.

FDA estimates that approximately 3,500 repeat donors will test reactive on a screening test for HIV. We also estimate that an average of three components was made from each donation. Under §§ 610.46(a)(1)(ii)(B) and (a)(3), this estimate results in 10,500 (3,500 × 3) notifications of the HIV screening test results to consignees by collecting establishments for the purpose of quarantining affected blood and blood components, and another 10,500 (3,500 × 3) notifications to consignees of subsequent test results. We estimate an average of 10 minutes per notification of consignees.

We estimate that § 610.46(b)(3) will require 4,059 consignees to notify transfusion recipients, their legal representatives, or physicians of record an average of 0.35 times per year resulting in a total number of 1,755 (585 confirmed positive repeat donors × 3) notifications. Under § 610.46(b)(3), we also estimate 1 hour to accommodate the time to gather test results and records for each recipient and to accommodate multiple attempts to contact the recipient.

Furthermore, we estimate that approximately 7,800 repeat donors per year would test reactive for antibody to HCV. Under §§ 610.47(a)(1)(ii)(B) and 610.47(a)(3), collecting establishments

would notify the consignee 2 times for each of the 23,400 (7,800 × 3 components) components prepared from these donations, once for quarantine purposes and again with additional HCV test results for a total of 46,800 notifications as an annual ongoing burden. Under § 610.47(b)(3), we estimate that approximately 4,059 consignees would notify approximately 2,050 recipients or their physicians of record annually. Finally, we estimate 1 hour to complete notification.

Based on industry estimates, approximately 13 percent of approximately 10 million potential donors (1.3 million donors) who come to donate annually are determined not to be eligible for donation prior to collection because of failure to satisfy eligibility criteria. It is the usual and customary business practice of approximately 1,675 blood collecting establishments to notify onsite and to explain why the donor is determined not to be suitable for donating. Based on such available information, we estimate that two-thirds (1,117) of the 1,675 blood collecting establishments provided onsite additional information and counseling to a donor determined not to be eligible for donation as usual and customary business practice. Consequently, we estimate that only one-third, or 558, approximately, blood collecting establishments would need to provide, under § 630.6(a), additional information and onsite counseling to the estimated 433,000 (one-third of approximately 1.3 million) ineligible donors.

It is estimated that another 4.5 percent of 10 million potential donors (450,000 donors) are deferred annually based on test results. We estimate that approximately 95 percent of the establishments that collect 99 percent of the blood and blood components notify donors who have reactive test results for HIV, Hepatitis B Virus (HBV), HCV, Human T-Lymphotropic Virus (HTLV), and syphilis as usual and customary business practice. Consequently, 5 percent of the 1,706 establishments (85) collecting 1 percent (4,500) of the deferred donors (450,000) would notify donors under § 630.6(a).

As part of usual and customary business practice, collecting establishments notify an autologous donor's referring physician of reactive test results obtained during the donation process required under § 630.6(d)(1). However, we estimate that approximately 5 percent of the 1,675 blood collection establishments (84) may not notify the referring physicians of the estimated 2 percent of 130,500 autologous donors with the initial reactive test results (2,610) as their usual and customary business practice.

The recordkeeping chart reflects the estimate that approximately 95 percent of the recordkeepers, which collect 99 percent of the blood supply, have developed SOPs as part of their customary and usual business practice. Establishments may minimize burdens associated with CGMP and related regulations by using model standards developed by industries' accreditation organizations. These accreditation organizations represent almost all registered blood establishments.

Under § 606.160(b)(1)(ix), we estimate the total annual records based on the approximately 1.3 million donors determined not to be eligible to donate and each of the estimated 1.75 million (1.3 million + 450,000) donors deferred based on reactive test results for evidence of infection because of communicable disease agents. Under § 606.160(b)(1)(xi), only the 1,675 registered blood establishments collect autologous donations and, therefore, are required to notify referring physicians. We estimate that 4.5 percent of the 130,500 autologous donors (5,872) will be deferred under § 610.41, which in turn will lead to the notification of their referring physicians.

FDA has concluded that the use of untested or incompletely tested but appropriately documented human blood or blood components in rare medical emergencies should not be prohibited. We estimate the recordkeeping under § 610.40(g)(1) to be minimal with one or fewer occurrences per year. The reporting of test results to the consignee in § 610.40(g) does not create a new burden for respondents because it is the usual and customary business practice or procedure to finish the testing and provide the results to the manufacturer responsible for labeling the blood products.

The hours per response and hours per record are based on estimates received from industry or FDA experience with similar recordkeeping or reporting requirements.

In the **Federal Register** of July 28, 2011 (76 FR 45262), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
606.170(b) [1]	76	1	76	20	1,520
610.40(g)(2)	1	1	1	1	1
610.40(h)(2)(ii)(A)	1	1	1	1	1
Total					1,522

[1] The reporting requirement in § 640.73, which addresses the reporting of fatal donor reactions, is included in the estimate for § 606.170(b).

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN

21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
606.100(b) [1]	[4] 288	1.20	346	24	6,912
606.100(c)	[4] 288	10	2,880	1	2,880
606.110(a) [2]	[5] 52	1	52	0.50 (30 min.)	26
606.151(e)	[4] 288	12	3,456	0.08 (5 min.)	276

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN—Continued

21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
606.160 [3]	[4] 288	1,329.86	383,000	0.75 (45 min.)	287,250
606.160(b)(1)(viii)					
HIV consignee notification	1,675	12.54	21,000	.17 (10 min.)	3,570
	4,059	5.17	21,000	.17 (10 min.)	3,570
HCV consignee notification	1,675	27.94	46,800	.17 (10 min.)	7,956
	4,059	11.53	46,800	.17 (10 min.)	7,956
HIV recipient notification	4,059	0.43	1,755	.17 (10 min.)	298
HCV recipient notification	4,059	0.51	2,050	.17 (10 min.)	349
606.160(b)(1)(ix)	1,706	1,025.79	1,750,000	0.05 (3 min.)	87,500
606.160(b)(1)(xi)	1,675	3.51	5,872	0.05 (3 min.)	294
606.165	[5] 288	1,329.86	383,000	0.08 (5 min.)	30,640
606.170(a)	[5] 288	12	3,456	1	3,456
610.40(g)(1)	1,706	1	1,706	0.50 (30 min.)	853
Total					443,786

[1] The recordkeeping requirements in §§ 640.3(a)(1), 640.4(a)(1), and 640.66, which address the maintenance of SOPs, are included in the estimate for § 606.100(b).

[2] The recordkeeping requirements in § 640.27(b), which address the maintenance of donor health records for the plateletpheresis, are included in the estimate for § 606.110(a).

[3] The recordkeeping requirements in §§ 640.3(a)(2) and (f); 640.4(a)(2); 640.25(b)(4) and (c)(1); 640.31(b); 640.33(b); 640.51(b); 640.53(b) and (c); 640.56(b) and (d); 640.61; 640.63(b)(3), (e)(1), and (e)(3); 640.65(b)(2); 640.71(b)(1); 640.72; and 640.76(a) and (b), which address the maintenance of various records are included in the estimate for § 606.160.

[4] Five percent of establishments that fall under the Clinical Laboratory Improvement Amendments of 1988 that transfuse blood and components and FDA-registered blood establishments ($0.05 \times 4{,}059 + 1{,}706$).

[5] Five percent of plateletpheresis and leukopheresis establishments ($0.05 \times 1{,}032$).

TABLE 3—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN

21 CFR section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
606.170(a)	[1] 288	1.20	346	0.50 (30 min.)	173
610.40(c)(1)(ii)	1,706	2.11	3,600	0.08 (5 min.)	288
610.40(h)(2)(ii)(C) and (h)(2)(ii)(D)	40	12	480	0.20 (12 min.)	96
610.40(h)(2)(vi)	1,706	10.55	18,000	0.08 (5 min.)	1,440
610.42(a)	1	1	1	1	1
610.46(a)(1)(ii)(B)	1,675	6.27	10,500	0.17 (10 min.)	1,785
610.46(a)(3)	1,675	6.27	10,500	0.17 (10 min.)	1,785
610.46(b)(3)	4,059	0.43	1,755	1	1,755
610.47(a)(1)(ii)(B)	1,675	13.97	23,400	0.17 (10 min.)	3,978
610.47(a)(3)	1,675	13.97	23,400	0.17 (10 min.)	3,978
610.47(b)(3)	4,059	0.51	2,050	1	2,050
630.6(a) [2]	558	755.98	433,000	0.08 (5 min.)	34,640
630.6(a) [3]	85	52.94	4,500	1.50 (90 min.)	6,750
630.6(d)(1)	84	31.07	2,610	1	2,610

TABLE 3—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN—Continued

21 CFR section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
Total					61,329

[1] Five percent of establishments that fall under the Clinical Laboratory Improvement Amendments of 1988 that transfuse blood and components and FDA-registered blood establishments (0.05 × 4,059 + 1,706).
[2] Notification of donors determined not to be eligible for donation based on failure to satisfy eligibility criteria.
[3] Notification of donors deferred based on reactive test results for evidence of infection due to communicable disease agents.

Dated: December 16, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–32778 Filed 12–21–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–1977–N–0019 (formerly 1977N–0230), FDA–1977–N–0014 (formerly 977N–0231), FDA–1977–N–0022 (formerly 1977N–0316), and FDA–1977–N–0224 (formerly 1977N–0317)]

Withdrawal of Notices of Opportunity for a Hearing; Penicillin and Tetracycline Used in Animal Feed

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is withdrawing two 1977 notices of opportunity for a hearing (NOOH), which proposed to withdraw certain approved uses of penicillin and tetracyclines intended for use in feeds for food-producing animals based in part on microbial food safety concerns.[1] (Refs. 1 and 2) FDA is taking this action, and closing the corresponding dockets, because: FDA is engaging in other ongoing regulatory strategies developed since the publication of the 1977 NOOHs with respect to addressing microbial food safety issues; FDA would update the NOOHs to reflect current data, information, and policies if, in the future, it decides to move forward with withdrawal of the approved uses of the new animal drugs described in the NOOHs; and FDA would need to prioritize any withdrawal proceedings (for example, take into account which withdrawal(s) would likely have the most significant impact on the public health) if, in the future, it decides to seek withdrawal of the approved uses of any new animal drug or class of drugs. FDA is also withdrawing the companion proposed rules to these NOOHs. (Refs. 3 and 4)

DATES: This notice is effective December 22, 2011.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFV–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: William Flynn, Center for Veterinary Medicine (HFV–1), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, (240) 276–9000, email: *William.flynn@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Questions regarding the use of antimicrobial drugs in food-producing animals have been raised and debated for many years. (Ref. 5)[2] Following a report that was issued by the British government in 1969 on the use of antibiotics in veterinary medicine and animal husbandry, known as the ''Swann Report,'' the Commissioner of Food and Drugs established a task force to review the use of antibiotic drugs in animal feeds. The task force, established in 1970, included specialists on infectious diseases and animal science from FDA, the National Institutes of Health, the U.S. Department of Agriculture, and the Centers for Disease Control and Prevention, as well as representatives from universities and industry. The task force identified three primary areas of concern (human health hazard, animal health hazard, and antibiotic effectiveness) and guidelines were established to show whether the use of any antibiotic or antibacterial agent in animal feed presents a hazard to human and animal health. (Refs. 1 and 6) The task force also made certain recommendations concerning restrictions on the use of antibiotic drugs in animal feeds at growth promotion and subtherapeutic levels. (Ref. 6)

In 1972, FDA published the conclusions and recommendations of that task force and proposed to require sponsors to submit specific data for antibiotic drugs in animal feeds intended for subtherapeutic or growth promotion use when such drugs are also used in human clinical medicine. (Ref. 6) In 1973, FDA finalized this proposal in 21 CFR 135.109 (re-codified at 21 CFR 558.15 in 1974).[3] (Refs. 7, 8, and 9) This section provided that FDA would propose to revoke approved uses in animal feed of antibiotic and sulfonamide drugs unless certain data were submitted which satisfactorily addressed the outstanding safety and effectiveness issues.

By 1974, FDA had begun to review the data submitted by the sponsors of the antibiotic products and requested that the National Advisory Food and Drug Committee (NAFDC) review the data and make recommendations on the subtherapeutic uses of penicillin and tetracyclines. A subcommittee (the Antibiotics in Animal Feeds subcommittee) was appointed to work in conjunction with expert consultants to address these issues. With respect to the penicillin-containing drugs, the subcommittee recommended FDA immediately withdraw approval of the subtherapeutic uses of penicillin. The

[1] FDA's approval to withdraw the approved uses of the drugs was based on three statutory grounds: (1) The drugs are not shown to be safe (21 U.S.C. 360b(e)(1)(B)); (2) lack of substantial evidence of effectiveness (21 U.S.C. 360b(e)(1)(C)); and (3) failure to submit required reports (21 U.S.C. 360b(e)(2)(A)).

[2] The term ''antimicrobial'' refers broadly to drugs with activity against a variety of microorganisms including: Bacteria, viruses, fungi, and parasites. Antimicrobial drugs that have specific activity against bacteria are referred to as antibacterial or antibiotic drugs. However, the broader term ''antimicrobial,'' commonly used in reference to drugs with activity against bacteria, is used in this document interchangeably with the terms antibacterial or antibiotic. Antimicrobial resistance is the ability of bacteria or other microbes to resist the effects of a drug. Antimicrobial resistance, as it relates to bacterial organisms, occurs when bacteria change in some way that reduces or eliminates the effectiveness of drugs, chemicals, or other agents designed to treat bacterial infections. (Ref. 5)

[3] Since that time, portions of 21 CFR 558.15 have been removed because those portions of the regulation were determined to be redundant or obsolete. (See 75 FR 16001, March 31, 2010.)

NAFDC accepted the subcommittee's recommendation and recommended to FDA that it ''immediately withdraw approval for the subtherapeutic uses of penicillin, *i.e.,* growth promotion/feed efficiency, and disease control.'' [4] (Ref. 1) FDA accepted these recommendations. (Ref. 1)

With respect to the tetracycline-containing drugs, the subcommittee recommended that FDA: (1) Discontinue use for growth promotion and/or feed efficiency in all animal species for which effective substitutes are available; (2) permit their use for disease control where effective alternate drugs are unavailable; and (3) control the distribution of the tetracyclines to restrict their use. NAFDC did not accept the subcommittee's first two recommendations, and instead recommended that FDA make no changes in the permitted use of chlortetracycline and oxytetracycline in animal feed. (Ref. 2) The NAFDC did adopt the subcommittee's third recommendation that the addition of the tetracycline in feeds be restricted. (Ref. 2) FDA considered these recommendations and decided to propose withdrawal of approval of subtherapeutic uses of tetracyclines in animal feeds except for those conditions of use for which there are no safe and effective substitutes. (Ref. 2)

This process culminated in the 1977 publication of two NOOHs in the **Federal Register** on proposals by the Bureau of Veterinary Medicine (now Center for Veterinary Medicine) to withdraw all uses of penicillin in animal feed, and all subtherapeutic uses of tetracycline in animal feed except for: (1) Oxytetracyline, as an aid in the control of fowl cholera caused by *Pasteurella multocida* in chickens and infectious synovitis caused by *Mycoplama synoviae* in chickens and turkeys; and (2) chlortetracycline (a) as an aid in the maintenance of weight gains in the presence of respiratory diseases, such as shipping fever, in combination with sulfamethazine in beef cattle, (b) as an aid in the control of infectious synovitis caused by *M. pasteurella* in chickens and turkeys, (c) for the control of active infections of anaplasmosis in beef cattle, and (d) as an aid in reducing the incidence of virbrionic abortion in breeding sheep. (Ref. 1 and 2) [5] These NOOHs were published on August 30, 1977 (penicillin) and October 21, 1977 (tetracycline).

At the same time, FDA also published two companion proposed rules proposing to amend the regulations to delete those provisions referencing the approved penicillin and tetracycline uses that would be affected by a withdrawal. (Refs. 3 and 4) FDA did not withdraw any approved use of penicillin or tetracyclines intended for use in feeds for food-producing animals as a result of these NOOHs, or finalize the proposed companion rules, and some new animal drug approvals for the use of these new animal drugs in feeds for food-producing animals remain in effect.

Although FDA initially granted some hearing requests to provide sponsors with the opportunity to present evidence on the safety of the NOOH products, Congress intervened before any hearing was held, directing FDA to hold in abeyance the implementation of its proposed withdrawal actions pending the outcome of further research related to the use of antibiotics in animal feed. (Refs. 10, 11, and 12)

II. Discussion

At this time, FDA is withdrawing the 1977 NOOHs because: (1) FDA is engaging in other ongoing regulatory strategies developed since the publication of the 1977 NOOHs with respect to addressing microbial food safety issues; (2) FDA would update the NOOHs to reflect current data, information, and policies if, in the future, it decides to move forward with withdrawal of the approved uses of the new animal drugs described in the NOOHs; and (3) FDA would need to prioritize any withdrawal proceedings (for example, take into account which withdrawal(s) would likely have the most significant impact on the public health) if, in the future, it decides to seek withdrawal of the approved uses of any new animal drug or class of drugs.

Although FDA is withdrawing the 1977 NOOHs, FDA remains concerned about the issue of antimicrobial resistance. Today's action should not be interpreted as a sign that FDA no longer has safety concerns or that FDA will not consider re-proposing withdrawal proceedings in the future, if necessary. FDA has not ruled out the prospect of future regulatory action, either with respect to the antimicrobial new animal drugs covered by the 1977 NOOHs or any others. However, as discussed further in this document, FDA intends to focus its efforts for now on the potential for voluntary reform and the promotion of the judicious use of antimicrobials in the interest of public health. Importantly, this strategy leaves open the possibility of pursuing withdrawal proceedings at a later time if FDA's proposed strategy does not yield satisfactory results.

1. FDA Is Engaging in Other Ongoing Regulatory Strategies Developed Since the Publication of the 1977 NOOHs With Respect to Addressing Microbial Food Safety Issues

Since the 1977 NOOHs published, FDA has continued to investigate the safety concerns associated with subtherapeutic uses of antibiotics intended for use in feeds for food-producing animals. As mentioned previously, Congress directed FDA to hold proceedings with respect to the 1977 NOOHs in abeyance and instead to conduct more research on the issues in question. (Ref. 10, 11, and 12) In response, FDA contracted with the National Academy of Sciences (NAS) to conduct a study of the safety issues related to the use of antibiotics in animal feed. (Refs. 5 and 13) In particular, FDA asked the NAS to: (1) Study the human health effects of the subtherapeutic use of penicillin and tetracycline in animal feed; (2) review and analyze published and unpublished epidemiological and other data necessary to assess human health consequences of such use; (3) assess the scientific feasibility of additional epidemiological studies; and (4) make recommendations about additional research needed. (Refs. 5 and 9)

The NAS issued its report in 1980, concluding that a very limited amount of epidemiological research had been completed on either the subtherapeutic or therapeutic use of antimicrobials in animal feeds and that existing data could neither prove nor disprove the postulated hazards to human health from subtherapeutic antimicrobial use in animal feed. (Refs. 5 and 9) The report stated that ''[t]he lack of data linking human illness with subtherapeutic levels of antimicrobials must not be equated with proof that the proposed hazards do not exist. The research necessary to establish and measure a definitive risk has not been conducted and, indeed, may not be possible.'' (Refs. 5 and 13)

In 1984, FDA contracted with the Seattle-King County Health Department to complete a study intended to provide additional information regarding potential public health concerns regarding the use of antimicrobial drugs in animal feed. The study focused on

[4] Generally, FDA no longer considers disease control or prevention to be subtherapeutic uses.

[5] These matters were assigned Docket Numbers 77N–0230 and 77N–0316, respectively. Since the original dockets were opened, FDA started using a different numbering convention. Docket Number 77N–0230 is now Docket Number FDA–1977–N–0019, and Docket Number 77N–0316 is now Docket Number FDA–1977–N–0022.

the relationship between the occurrence of *Salmonella spp.* (*Salmonella*) and *Campylobacter jejuni* (*C. jejuni*) in foods of animal origin and the occurrence of human illness caused by those two organisms. The study report indicated that the bacteria obtained from human cases and those obtained from retail poultry had similar antibiotic susceptibility patterns, including similar levels of resistance to tetracycline. (Refs. 5 and 14)

In 1987, FDA asked the Institute of Medicine to conduct an independent review of the human health risks associated with the subtherapeutic uses of penicillin and tetracycline in animal feed. (Refs. 5 and 15) The IOM established a committee which developed a risk-analysis model using data on *Salmonella* infections that resulted in human death. (Refs. 5 and 15) The Committee did not find a substantial body of direct evidence establishing conclusively the presence of a human health hazard resulting from the use of subtherapeutic concentrations of penicillin and the tetracyclines in animal feeds. (Refs. 5 and 15) Nonetheless, the Committee found a considerable body of indirect evidence implicating both the subtherapeutic and therapeutic use of antimicrobials as a potential human health hazard, and made recommendations for further study of the issue.[6] (Refs. 5 and 15)

During the 1990's, FDA continued to investigate the potential risks associated with the use of antibiotic drugs intended for use in feeds for food-producing animals and how to mitigate risks associated with such use. In 1999, FDA published a concept paper titled, ''Proposed Framework For Evaluating and Assuring the Human Safety of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals'' (''Framework Document''). (Ref. 19) Among other things, the Framework Document called for revisions to the pre-approval safety assessment for antimicrobial new animal drugs, and the categorization of antimicrobial drugs based on their importance to human medicine. (Ref. 19)

In 2003, FDA published a final guidance for industry (GFI #152), outlining an approach for conducting a qualitative risk assessment to evaluate human food safety with respect to the potential microbiological effects of antimicrobial new animal drugs on food-borne bacteria of human health concern. (Ref. 20) The importance of a drug for human medical therapy is a key factor to be considered in the evaluation. (Ref. 20) Since 2003, FDA has applied the principles contained in GFI #152 when assessing antimicrobial resistance risks for antimicrobial drugs as part of the new animal drug approval process. In some cases, this has had the effect of limiting the claims for which such drugs are approved while still protecting animal and human health.

Recognizing that already-approved antimicrobial new animal drugs also have antimicrobial resistance risks associated with their use, FDA began to look at the safety of some of these already approved drugs. However, because the process of reviewing safety information for antimicrobial drugs approved before 2003 (and pursuing withdrawal proceedings if appropriate in some cases) would take many years and would impose significant resource demands on the Agency, FDA began thinking about alternate approaches to address safety concerns. As a result, in June 2010 FDA proposed a different strategy to promote the judicious use of medically important antimicrobials in food-producing animals in a draft guidance for industry titled ''The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals'' (draft GFI #209). (Ref. 5) Generally speaking, judicious uses would be those uses that are appropriate and necessary to maintaining the health of humans and animals.

Draft GFI #209 proposes two principles aimed at ensuring the judicious use of medically important antimicrobials in food-producing animals. The first principle described in the draft guidance is that the use of medically important antimicrobial drugs in food-producing animals should be limited to those uses that are considered necessary for assuring animal health. (Ref. 5) As set out in the draft guidance, FDA does not consider production uses of such drugs to be necessary for assuring animal health because, unlike other uses, production uses are not directed at any specifically identified disease, but rather are expressly indicated and used for the purpose of enhancing the production of animal-derived products (*e.g.,* promoting faster weight gain or improving feed efficiency). (Ref. 5) The second principle set out in the draft guidance is that the use of medically important antimicrobial drugs in food-producing animals should be limited to those uses that include veterinary oversight or consultation. (Ref. 5) This principle speaks to the need for the scientific and clinical training of licensed veterinarians to assure that medically important antimicrobials are used in a judicious manner.

Based on feedback the Agency received following the issuance of draft GFI #209, FDA believes that the animal pharmaceutical industry is generally responsive to the prospect of working cooperatively with the Agency to accomplish the principles recommended in draft GFI #209. FDA intends to work with sponsors who approach FDA and are interested in working cooperatively with the Agency to phase out production uses of medically important antimicrobials, and to achieve an orderly transition of medically important antimicrobials currently approved for over-the-counter use in food-producing animals to a marketing status that involves veterinary oversight (*i.e.,* veterinary feed directive (VFD) status for feed use drugs and prescription status for drugs approved for use through other routes of administration).

As part of the proposed strategy, FDA issued an advance notice of proposed rulemaking (ANPRM) on March 29, 2010 (75 FR 15387), to seek public comment on whether and to what extent efficiency improvements should be made to the current VFD process as set forth in FDA's regulation at 21 CFR 558.6. (Ref. 21) FDA received numerous public comments in response to the ANPRM and is taking those comments into account in considering possible revisions to this regulation.

FDA believes that the strategy set out in draft GFI #209 represents another pathway to achieving the same goals contemplated by the 1977 NOOHs, *i.e.,* the judicious use of medically important antimicrobial drugs. FDA believes that by implementing this strategy and proceeding in part under the statutory authority provided under the Animal

[6] FDA's draft guidance titled ''The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals'' (Draft GFI #209) contains information on additional key studies relevant to this issue. For example, in 1997, the World Health Organization (WHO) issued a report which concluded that all uses of antimicrobials lead to the selection of resistant forms of bacteria and that ''low-level, long-term exposure to antimicrobials may have greater selective potential than short-term, full-dose therapeutic use.'' (Ref. 17) The WHO report contained several recommendations, including a recommendation that the use of antimicrobial drugs for growth promotion in animals be terminated if these drugs are also prescribed for use as anti-infective agents in human medicine or if they are known to induce cross-resistance to antimicrobials used for human medical therapy. (Ref. 17) It also recommended that national practices of antimicrobial use in animals be reviewed, and policies be developed to reduce the risks of selection and dissemination of antimicrobial resistance. (Ref. 17) Further, in 1999 the National Research Council issued a report that, among other things, recommended that further development and use of antibiotics in both human and animal medicine have oversight by an interdisciplinary panel of experts. (Ref. 18)

Drug Availability Act of 1996 (ADAA)[7] to designate drugs as VFD drugs (authority which was not available in 1977), it will achieve its goal of promoting the judicious use of antimicrobial drugs in a more timely and resource-efficient manner than could be accomplished otherwise.[8]

2. FDA Would Update the NOOHs To Reflect Current Data, Information and Policies If, in the Future, it Decides To Move Forward With the Withdrawal of the Approved Uses of the New Animal Drugs Described in the NOOHs

Although FDA is optimistic that its proposed strategy to achieve the judicious use of all medically important antimicrobials, as set out in draft GFI #209, will be successful, it has not foreclosed the possibility of using the withdrawal provisions in the Federal Food, Drug, and Cosmetic Act, if necessary, in the future. This applies not only to the classes of antimicrobial drugs covered by the 1977 NOOHs, but also any other production use claims (*i.e.,* growth promotion/feed efficiency uses) for a medically important antimicrobial new animal drug or class of drugs intended for use in food-producing animals. However, if FDA were to pursue withdrawal of approval of any production use claims, it would first publish a notice in the **Federal Register** giving the sponsor(s) of the affected new animal drug(s) notice of the proposed withdrawal(s) and an opportunity for a hearing.

If, at some future time, FDA decides to proceed with the withdrawal of the production uses of penicillins and tetracyclines intended for use in feeds for food-producing animals that were the subject of the 1977 NOOHs, it would publish a new **Federal Register** notice giving sponsors an opportunity for a hearing on the matter. A new notice would be appropriate for many reasons. First, more than three decades have passed since the original notice appeared in the **Federal Register**. FDA would publish a new **Federal Register** notice to ensure all current sponsors of the approved new animal drugs are properly notified and have an opportunity to request a hearing.

Second, not all uses proposed to be withdrawn in the 1977 NOOHs are still approved. The 1977 NOOH which proposed withdrawal of all penicillin-containing premixes intended for use in animal feed also included the then-approved therapeutic uses of penicillin in feed. The stated grounds for proposing to withdraw approval of the therapeutic uses of the penicillin-containing premixes were that there was not substantial evidence of effectiveness of these products for the claimed therapeutic uses. However, there are no currently approved therapeutic uses of penicillins in animal feed.

Third, the body of scientific information relevant to the use of penicillins and tetracyclines in animal feeds has grown since 1977. If the Agency were to pursue the NOOHs, FDA would need to provide notice to the sponsors that the information available since 1977 would be used to support the proposal to withdraw the approved uses of the drugs.

For example, in the early 1990's FDA began collaborating with other government agencies to track antibiotic resistance in foodborne bacteria through a national public health surveillance system, known as the National Antimicrobial Resistance Monitoring System or ''NARMS,'' established to monitor antimicrobial susceptibility among enteric bacteria from humans, retail meats, and food animals. (Ref. 22) Also, since the 1977 NOOHs published, there have been numerous reports, including those by the National Academy of Sciences (Ref. 13), the Institute of Medicine (Ref. 15), the World Health Organization (Ref. 17), and the National Research Council (Ref. 18), that have reviewed available information and made recommendations. In addition, there have been advances in our understanding of the genetics of resistance (*e.g.,* ways in which bacteria accumulate multiple resistance genes).

Fourth, FDA would need to provide notice regarding which approved uses were the subject of the NOOH. In the past, FDA has referred to ''subtherapeutic'' uses at various times to include: (1) ''Increased rate of gain, disease prevention, etc.'' (Ref. 7); (2) ''any use of an antibacterial drug continuously in feed for longer than 14 days'' (Ref. 23); and (3) ''lower levels than therapeutic levels needed to cure disease.'' (Refs. 1 and 2) FDA's thinking on this issue has evolved over the last three decades, and FDA now generally considers disease control and prevention claims to be judicious uses (in other words, therapeutic uses), especially when the drug is administered at the direction and under the oversight of a licensed veterinarian. (Ref. 5)

3. FDA Would Need To Prioritize Any Withdrawal Proceedings (for Example, Take Into Account Which Withdrawal(s) Would Likely Have the Most Significant Impact on the Public Health) if, in the Future, It Decides To Seek Withdrawal of the Approved Uses of Any New Animal Drug or Class of Drugs

To the extent that FDA decides to move forward with withdrawal proceedings for any medically important antimicrobial drugs intended for use in feeds for food-producing animals, it would need to prioritize which withdrawal(s) to propose first based on various considerations, including which withdrawal(s) would have the most significant impact on the public health. It is possible that FDA would conclude that its judicious use goals would better be achieved by first pursuing withdrawals of drugs other than penicillins and tetracyclines. FDA notes that it would need to conduct such an evaluation regardless of the statutory grounds contemplated for the withdrawal action.

III. Conclusion

At this time, FDA is withdrawing the 1977 NOOHs because: (1) FDA is engaging in other ongoing regulatory strategies developed since the publication of the 1977 NOOHs with respect to addressing microbial food safety issues; (2) FDA would update the NOOHs to reflect current data, information, and policies if, in the future, it decides to move forward with withdrawal of the approved uses of the new animal drugs described in the NOOHs; and (3) FDA would need to prioritize any withdrawal proceedings (for example, take into account which withdrawal(s) would likely have the most significant impact on the public health) if, in the future, it decides to seek withdrawal of the approved uses of any new animal drug or class of drugs.

Although FDA is withdrawing the 1977 NOOHs, FDA continues to view antimicrobial resistance as a significant public health issue. Today's action should not be interpreted as a sign that FDA no longer has safety concerns about the use of medically important antibiotics in food producing animals or

[7] ADAA (Pub. L. 104–250), which was signed into law on October 9, 1996, introduced several amendments to the Federal Food, Drug, and Cosmetic Act that provided FDA with more flexibility in how it regulates animal drugs and animal feeds. One such amendment made by the law was to add a new ''veterinary feed directive'' category of new animal drugs to allow the approval and use of drugs in animal feed on a veterinarian's order while incorporating safeguards to help ensure the safe use of the drug.

[8] FDA's experience with contested, formal withdrawal proceedings is that the process can consume extensive periods of time and significant amounts of Agency resources. For example, when FDA withdrew a class of animal drugs called nitrofurans in 1991, the proceedings took nearly 20 years. In another proceeding, the withdrawal of diethylstilbestrol (''DES'') in animals became final in 1979, 7 years after issuance of an NOOH. More recently, the withdrawal of enrofloxacin for use in poultry took almost 5 years and cost FDA approximately $3.3 million.

that FDA will not consider re-proposing withdrawal proceedings in the future, if necessary. FDA has not ruled out the prospect of future regulatory action, either with respect to the antimicrobial new animal drugs covered by the 1977 NOOHs or any others. However, for now, FDA's efforts will focus on promoting voluntary reform and the judicious use of antimicrobials in the interest of best using the agency's overall resources to protect the public health. Importantly, this strategy leaves open the possibility of pursuing withdrawal proceedings at a later time if FDA's proposed strategy does not yield satisfactory results.

As indicated previously, as part of the withdrawal of the two 1977 NOOHs, the Agency will close their corresponding dockets. However, we encourage interested persons to submit comments to the docket established in connection with draft GFI #209. The docket number associated with draft GFI #209 is FDA–2010–D–0094.

IV. Penicillin and Tetracycline Uses in Animal Feed

FDA is withdrawing the 1977 NOOHs, and the related companion proposed rules, because: (1) FDA is engaging in other ongoing regulatory strategies developed since the publication of the 1977 NOOHs with respect to addressing microbial food safety issues; (2) FDA would update the NOOHs to reflect current data, information, and policies if, in the future, it decides to move forward with withdrawal of the approved uses of the new animal drugs described in the NOOHs; and (3) FDA would need to prioritize any withdrawal proceedings (for example, take into account which withdrawal(s) would likely have the most significant impact on the public health) if, in the future, it decides to seek withdrawal of the approved uses of any new animal drug or class of drugs.

V. References

The following references are on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20857, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday (except on Federal holidays). We have verified all Web site addresses, but we are not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register.**

1. 42 FR 43772 (August 30, 1977).
2. 42 FR 56264 (October 21, 1977).
3. 42 FR 43770 (August 30, 1977).
4. 42 FR 56254 (October 21, 1977).
5. Draft GFI #209, ''The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals,'' June 28, 2010; *http://www.fda.gov/downloads/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/UCM216936.pdf.*
6. 37 FR 2444 (February 1, 1972).
7. 38 FR 9811 (April 20, 1973).
8. 21 CFR 135.109 (revised as of April 1, 1974).
9. 21 CFR 558.15 (revised as of April 1, 1975).
10. H. Rept. 95–1290, ''Agriculture, Rural Development and Related Agencies Appropriation Bill, 1979,'' June 13, 1978.
11. H. Rept. 96–1095, ''Agriculture, Rural Development and Related Agencies Appropriation Bill, 1981,'' June 17, 1980.
12. S. Rept. 97–248, ''Agriculture, Rural Development and Related Agencies Appropriation Bill, 1982,'' October 23 (legislative day, October 14), 1981.
13. National Academy of Sciences/National Research Council, ''The Effects on Human Health of Subtherapeutic Uses of Antimicrobials in Animal Feeds,'' 1980, pp. 53–54.
14. 1984 Seattle-King County Study: ''Surveillance of the Flow of Salmonella and Campylobacter in a Community.''
15. National Academy of Sciences/Institute of Medicine, ''Human Health Risks With the Subtherapeutic Use of Penicillin or Tetracyclines in Animal Feed,'' 1988.
16. 68 FR 47272, 47275 (August 8, 2003).
17. 1997 World Health Organization (WHO) Report, '' The Medical Impact of Antimicrobial Use in Food Animals,'' *http://whqlibdoc.who.int/hq/1997/WHO_EMC_ZOO_97.4.pdf*
18. 1999 National Research Council (NRC) Report: ''The Use of Drugs in Food Animals–Benefits and Risks.''
19. A Proposed Framework for Evaluating and Assuring the Human Safety of the Microbial Effects of Antimicrobial New Animal Drugs Intended for Use in Food-Producing Animals, *http://www/fda/gov/AdvisoryCommittees/CommitteesMeetingMaterials/VeterinaryMedicineAdvisoryCommittee/ucm126607.htm.*
20. Final Guidance for Industry #152, ''Evaluating the Safety of Antimicrobial New Animal Drugs With Regard to Their Microbiological Effects on Bacteria of Human Health Concern,'' October 23, 2003.
21. 75 FR 15387 (March 29, 2010).
22. *http://www/fda/gov/AnimalVeterinarySafetyHealth/AntimicrobialResistance/NationalAntimmicrobialResistanceMonitoringSystem/default.htm.*
23. 41 FR 8282 (February 25, 1976).

Dated: December 16, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–32775 Filed 12–21–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0411]

Bristol-Myers Squibb Co. et al.; Withdrawal of Approval of 70 New Drug Applications and 97 Abbreviated New Drug Applications; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** of June 8, 2011 (76 FR 33310). The document announced the withdrawal of approval of 70 new drug applications (NDAs) and 97 abbreviated new drug applications (ANDAs) from multiple applicants, effective July 8, 2011. The document indicated that FDA was withdrawing approval of the following three ANDAs after receiving a request from the ANDA holder, A.H. Robins Co., c/o Wyeth Pharmaceuticals, Inc., P.O. Box 8299, Philadelphia, PA 19101–8299: ANDA 086661, DONNATAL (phenobarbital, hyoscyamine sulfate, atropine sulfate, scopolamine (HBr)) Elixir; ANDA 086676, DONNATAL (phenobarbital, hyoscyamine sulfate, atropine sulfate, scopolamine (HBr)) Tablets; and ANDA 086677, DONNATAL (phenobarbital, hyoscyamine sulfate, atropine sulfate, scopolamine (HBr)) Capsules. Before withdrawal of these ANDAs became effective, PBM Pharmaceuticals, Inc., acquired the rights to the ANDAs and informed FDA that it did not want them withdrawn. Because the basis for withdrawal would have been a request from the ANDA holder and the request was timely withdrawn, the approval of ANDAs 086661, 086676, and 086677 is still in effect.

FOR FURTHER INFORMATION CONTACT: Florine Purdie, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6366, Silver Spring, MD 20993–0002, (301) 796–3601.

SUPPLEMENTARY INFORMATION: In FR Doc. 2011–14164 appearing on page 33310, in the **Federal Register** of Wednesday, June 8, 2011, the following correction is made:

On page 33313, in Table 1, the entries for ANDAs 086661, 086676, and 086677 are removed.

Dated: December 16, 2011.

Janet Woodcock,

Director, Center for Drug Evaluation and Research.

[FR Doc. 2011–32822 Filed 12–21–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: National Institute of Mental Health (NIMH), HHS.

ACTION: 30-Day notice of submission of information collection approval from the Office of Management and Budget and request for comments.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, NIMH has submitted a Generic Information Collection Request (Generic ICR): ''Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery'' to OMB for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*).

DATES: Comments must be submitted within 30 days after publication in FR.

ADDRESSES: Written comments may be submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attn: NIH Desk Officer, by Email to *OIRA_submission@omb.eop.gov,* or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: To request additional information, please contact: Keisha Shropshire, Health Science Analyst, NIMH, Office of Science Policy, Planning, and Communication, Science Policy & Evaluation Branch, 6001 Executive Blvd., MSC 9667, MD 20892–9667, or Email your request, including your address to *kshropsh@mail.nih.gov.*

SUPPLEMENTARY INFORMATION: *Title:* Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery. *Abstract:* The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

No comments were received in response to the 60-day notice published in the **Federal Register** of December 22, 2010 (75 FR 80542).

Below we provide NIMH's projected average estimates for the next three years:

Current Actions: New collection of information.

Type of Review: New Collection.

Affected Public: Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

Average Expected Annual Number of Activities: 5.

Respondents: 28,450.

Annual Responses: 28,450.

Frequency of Response: Once per request.

Average Minutes per Response: 30.

Burden Hours: 4,408.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number.

Dated: December 5, 2011.

Keisha Shropshire,

Health Science Analyst, Office of Science Policy, Planning, and Communication; Science Policy and Evaluation Branch, National Institute of Mental Health, National Institutes of Health.

[FR Doc. 2011–32834 Filed 12–21–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Rehabilitation and Motor Control.

Date: January 19, 2012.

Time: 4 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Rajiv Kumar, Ph.D., Chief, MOSS IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4216, MSC 7802, Bethesda, MD 20892, (301) 435–1212, *kumarra@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 15, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–32837 Filed 12–21–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–121]

Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request Technical Assistance and Capacity Building Under the Transformation Initiative (OneCPD and Core Curricula)

AGENCY: Office of the Chief Information Officer.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date: January 3, 2012.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within fourteen (10) days from the date of this Notice. Comments should refer to the proposal by name/or OMB approval number (2506–Pending) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; email: *OIRA–Submission@omb.eop.gov;* fax: (202) 395–3086.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email *Colette.Pollard@HUD.gov;* telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

This Notice Also Lists the Following Information

Title of Proposal: Technical Assistance and Capacity Building under the Transformation Initiative (OneCPD and Core Curricula).

Description of Information Collection:

The Narratives, Matrices and Reporting Requirements associated with the One CPD Technical Assistance (NSPTA) Program will allow CPD to accurately assess the experience, expertise, and overall capacity of applicants for technical assistance under the NSPTA FY 2011 Program NOFA. They will also allow CPD to monitor and evaluate TA progress over the course of each grant and make necessary interventions. The new format for this type of collection also makes it easier for applicants to apply and report by reducing the time required for filling out an application and reporting forms, while retaining the utility of the previous collection methods.

OMB Control Number: 2506–Pending.

Agency Form Numbers: HUD–40040; HUD–40044.

Members of Affected Public: Eligible applicants (states, units of local government, public housing authorities, non-profit organizations, for-profit entities, and consortia).

Estimation of the total numbers of hours needed to prepare the information collection including number of responses, frequency of responses, and hours of responses: For OneCPD TA, total burden for applicants is estimated at 50 applicants × 60 hours. For awardees, the additional burden is estimated at 15 grant recipients × 33 hours for post-award and reporting requirements.

Status of the proposed information collection: New Collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 16, 2011.

Colette Pollard,

Departmental Reports Management Officer, Officer of the Chief Information Officer.

[FR Doc. 2011–32734 Filed 12–21–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5484–N–38]

Notice of Submission for Extension of a Currently Approved Information Collection to OMB; Comment Request Applications for Housing Assistance Payments and Special Claims Processing

AGENCY: Office of Program Systems Management.

ACTION: Notice extension of a currently approved information collection.

SUMMARY: The information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for an extension of the currently approved collection, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date: February 21, 2012.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–(800) 877–8339).

FOR FURTHER INFORMATION CONTACT: Program Contact, Director, Office of Multi-Family Program Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–2121 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: This Notice informs the public that the U.S. Department of Housing and Urban Development (HUD) has submitted to OMB for processing, an extension of a currently approved collection for submission of Applications for Housing Assistance Payments and Special Claims Processing.

This Notice is soliciting comments from members of the public and affected agencies concerning the extension of the approved collection of information to: (1) Evaluate whether the collection remains necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (2) Evaluate accuracy of the agency's estimate of the burden of the collection of information; (3) Enhance the quality, utility, and clarity of the information to

be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology e.g., permitting electronic submission of responses.

This Notice Also Lists the Following Information

Title of Proposal: Applications for Housing Assistance Payments and Special Claims Processing.

Description of Information Collection: This is an extension of a currently approved collection for submitting Applications for Housing Assistance Payments for Section 8, Rent Supplement, Rental Assistance Payment (RAP), Section 202 Project Assistance Contracts (PACs) and Section 811 and 202 Project Rental Assistance Contracts (PRACS) program units. Special Claims for damages, unpaid rent loss, and vacancy claims are available for the Section 8, Section 202 PACs, and Section 811 and Section 202 PRACS programs.

Each HUD program has an assistance payments contract. These contracts indicate that HUD will make monthly assistance payments to Project Owners/Management Agents on behalf of the eligible households who reside in the assisted units. Project Owners are required to sign a certification on the Housing Owner's Certifications and Application for Housing Assistance form which states: (1) Each tenant's eligibility and assistance payments was computed in accord with HUD's regulations administrative procedures and the Contract, and are payable under the Contract; (2) The units for which assistance is being billed are decent, safe, sanitary, and occupied or available for occupancy; (3) No amount included on the bill has been previously billed or paid; (4) All facts and data on which the payment request is based are true and accurate; and (5) That no payments have been paid or will be paid from the tenant or any public or private source for units beyond that authorized by the assistance contract, or lease, unless permitted by HUD.

This extended information collection provides a standard for Project Owners/Management Agents to report Adjustments to Schedule of Tenant Assistance Payments Due, Miscellaneous Accounting Request for Schedule of Tenant Assistance Due and Approved Special Claims for Schedule of Tenant Assistance Payments Due utilizing data already available in their software applications.

OMB Control Number: 2502–0182.

Agency Form Numbers: HUD–52670, HUD–52670–A Part 1, HUD–52670–A Part 2, HUD–52670–A Part 3, HUD–52670–A Part 4, HUD–52670–A Part 5, and HUD–52671–A/B/C/D.

Members of Affected Public: Not-for-profit institutions.

Estimation of the total numbers of hours needed to prepare the information collection (2502–0182) including number of respondents, frequency of responses, and hours of response: An estimation of the annual total number of hours needed to prepare the information collection is 301,951, number of respondents is 21,787, frequency response is 12 per annum, and the total hours per respondent is 6.65.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 16, 2011.

Ronald Y. Spraker,

Acting General Deputy Assistant Secretary for Housing.

[FR Doc. 2011–32815 Filed 12–21–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5592–N–01]

Annual Indexing of Basic Statutory Mortgage Limits for Multifamily Housing Programs

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: In accordance with Section 206A of the National Housing Act, HUD has adjusted the Basic Statutory Mortgage Limits for Multifamily Housing Programs for Calendar Year 2012.

DATES: *Effective Date:* January 1, 2012.

FOR FURTHER INFORMATION CONTACT: Robert A. Arbios, Director, Policy-Division, Office of Multifamily Development, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410–8000, telephone (202) 402–2913 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The FHA Down Payment Simplification Act of 2002 (Pub. L. 107–326, approved December 4, 2002) amended the National Housing Act by adding a new Section 206A (12 U.S.C. 1712a). Under Section 206A, the following are affected:

(1) Section 207(c)(3)(A) (12 U.S.C. 1713(c)(3)(A));

(2) Section 213(b)(2)(A) (12 U.S.C. 1715e(b)(2)(A));

(3) Section 220(d)(3)(B)(iii)(I) (12 U.S.C. 1715k(d)(3)(B)(iii)(I));

(4) Section 221(d)(3)(ii)(I) (12 U.S.C. 1715l(d)(3)(ii)(I));

(5) Section 221(d)(4)(ii)(I) (12 U.S.C. 1715l(d)(4)(ii)(I));

(6) Section 231(c)(2)(A) (12 U.S.C. 1715v(c)(2)(A)); and

(7) Section 234(e)(3)(A) (12 U.S.C. 1715y(e)(3)(A)).

The Dollar Amounts in these sections, which are collectively referred to as the 'Dollar Amounts,' shall be adjusted annually (commencing in 2004) on the effective date of the Federal Reserve Board's adjustment of the $400 figure in the Home Ownership and Equity Protection Act of 1994 (HOEPA) (Pub. L. 103–325, approved September 23, 1994). The adjustment of the Dollar Amounts shall be calculated using the percentage change in the Consumer Price Index for All Urban Consumers (CPI–U) as applied by the Federal Reserve Board for purposes of the above-described HOEPA adjustment.

HUD has been notified of the percentage change in the CPI–U used for the HOEPA adjustment and the effective date of the HOEPA adjustment. The percentage change in the CPI–U is 3.2% and the effective date of the HOEPA adjustment is January 1, 2012. The Dollar Amounts have been adjusted correspondingly and have an effective date of January 1, 2012.

The adjusted Dollar Amounts for Calendar Year 2012 are shown below:

Basic Statutory Mortgage Limits For Calendar Year 2012

Multifamily Loan Program

- Section 207—Multifamily Housing.
- Section 207 pursuant to Section 223(f)—Purchase or Refinance Housing.
- Section 220—Housing in Urban Renewal Areas.

Bedrooms	Non-Elevator	Elevator
0	$47,553	54,872
1	52,676	61,456
2	62,920	75,358
3	77,553	94,382
4+	87,799	106,719

- Section 213—Cooperatives.

Bedrooms	Non-Elevator	Elevator
0	$51,534	54,872
1	59,419	62,169
2	71,662	75,597
3	91,728	97,798

Bedrooms	Non-Elevator	Elevator
4+	102,190	107,354

• Section 221(d)(3)—Moderate Income Housing.

• Section 234—Condominium Housing.

Bedrooms	Non-Elevator	Elevator
0	$52,586	55,339
1	60,632	63,438
2	73,124	77,140
3	93,601	99,794
4+	104,275	109,543

• Section 221(d)(4)—Moderate Income Housing.

Bedrooms	Non-Elevator	Elevator
0	$47,325	51,121
1	53,720	58,604
2	64,934	71,261
3	81,504	92,188
4+	92,358	101,195

• Section 231—Housing for the Elderly.

Bedrooms	Non-Elevator	Elevator
0	$44,995	51,121
1	50,300	58,604
2	60,065	71,261
3	72,285	92,188
4+	84,983	101,195

• Section 207—Manufactured Home Parks Per Space—$21,831.

Dated: December 16, 2011.

Ronald Spraker,

Associate General Deputy Assistant Secretary Housing—Federal Housing Commissioner.

[FR Doc. 2011–32811 Filed 12–21–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement (BSEE)

[Docket ID No. BSEE–2011–0005; OMB Control Number 1014–NEW]

Information Collection Activities: Operations in the Outer Continental Shelf for Minerals Other than Oil, Gas, and Sulphur; Submitted for Office of Management and Budget (OMB) Review; Comment Request

ACTION: 60-day Notice.

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), BSEE is inviting comments on a collection of information that we will submit to the Office of Management and Budget (OMB) for review and approval. The information collection request (ICR) concerns a revision to the paperwork requirements in the regulations under 30 CFR part 282, ''Operations in the Outer Continental Shelf for Minerals Other than Oil, Gas, and Sulphur''.

DATES: Submit comments by February 21, 2012.

ADDRESSES: You may submit comments by either of the following methods listed below.

• *Electronically:* go to *http://www.regulations.gov.* In the entry titled ''Enter Keyword or ID,'' enter BSEE–2011–0005 then click search. Follow the instructions to submit public comments and view all related materials. We will post all comments.

• *Email: cheryl.blundon@bsee.gov.* Mail or hand-carry comments to the Department of the Interior; Bureau of Safety and Environmental Enforcement; Regulations Development Branch; Attention: Cheryl Blundon; 381 Elden Street, MS–4024; Herndon, Virginia 20170–4817. Please reference ICR 1014–NEW in your comment and include your name and return address.

FOR FURTHER INFORMATION CONTACT: Cheryl Blundon, Regulations Development Branch at (703) 787–1607 to request additional information about this ICR.

SUPPLEMENTARY INFORMATION:

Title: 30 CFR part 282, Operations in the Outer Continental Shelf for Minerals other than Oil, Gas, and Sulphur.

OMB Control Number: 1014–NEW.

Abstract: The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1334 and 43 U.S.C. 1337(k)), authorizes the Secretary of the Interior to implement regulations to grant leases of any mineral other than oil, gas, and sulphur to qualified parties. This regulation governs mining operations within the OCS and establishes a comprehensive leasing and regulatory program for such minerals. This regulation has been designed to: (a) Recognize the differences between the OCS activities associated with oil, gas, and sulphur discovery and development and those associated with the discovery and development of other minerals; (b) facilitate participation by States directly affected by OCS mining activities; (c) provide opportunities for consultation and coordination with other OCS users and uses; (d) balance development with environmental protection; (e) insure a fair return to the public; (f) preserve and maintain free enterprise competition; and (g) encourage the development of new technology.

The authorities and responsibilities described above are among those delegated to BSEE. This ICR addresses the regulations at 30 CFR part 282, Operations in the Outer Continental Shelf for Minerals Other than Oil, Gas, and Sulphur. It should be noted that there has been no activity in the OCS for minerals other than oil, gas and sulphur for many years and no information collected. However, because these are regulatory requirements, the potential exists for information to be collected; therefore, we are requesting this collection of information be approved by OMB. To accommodate the split of regulations from the Bureau of Ocean Energy Management, Regulation and Enforcement to BSEE, BSEE is requesting OMB approval of the already approved burden hours that were previously under 1010–0081 to reflect BSEE's new 1014 numbering system.

Regulations at 30 CFR part 282 implement these statutory requirements. We use the information to determine if lessees are complying with the regulations that implement the mining operations program for minerals other than oil, gas, and sulphur. Specifically, BSEE will use the information to: (a) To ensure that operations for the production of minerals other than oil, gas, and sulphur in the OCS are conducted in a manner that will result in orderly resource recovery, development, and the protection of the human, marine, and coastal environments; (b) to ensure that adequate measures will be taken during operations to prevent waste, conserve the natural resources of the OCS, and to protect the environment, human life, and correlative rights; (c) to determine if suspensions of activities are in the national interest, to facilitate proper development of a lease including reasonable time to develop a mine and construct its supporting facilities, or to allow for the construction or negotiation for use of transportation facilities; (d) to identify and evaluate the cause(s) of a hazard(s) generating a suspension, the potential damage from a hazard(s) and the measures available to mitigate the potential for damage; and (e) for technical evaluations that provide a basis for BSEE to make informed decisions to approve, disapprove, or require modification of the proposed activities.

We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR part 2) and 30 CFR 282.5, 282.6, and 282.7. No items of a

sensitive nature are collected. Responses are mandatory.

Frequency: On occasion; and as a result of situations encountered.

Description of Respondents: Potential respondents comprise Federal OCS lessees and/or operators.

Estimated Reporting and Recordkeeping Hour Burden: We estimate that the reporting burden for this collection will be approximately 156 hours. The following chart details the individual components and respective hour burden estimates of this ICR. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

Citation 30 CFR 282	Reporting or recordkeeping requirement	Hour Burden
		Non-Hour Cost Burden
Subpart A—General		
5	Request non-disclosure of G&G info	10.
6	Governor(s) of adjacent State(s) request for proprietary data, information, samples, etc., and disclosure agreement with BSEE.	1.
7	Governor of affected State requests negotiation to settle jurisdictional controversy, etc.; enters into an agreement with BSEE.	1.
Subpart B—Jurisdiction and Responsibilities of Director		
11(d)(1);	Request consolidation of two or more OCS mineral leases or portions	1.
11(d)(1); 12(f)(l), (2); 13(d), (e)(2);.	Submit delineation plan, including environmental information, contingency plan, monitoring program, and various requests for approval referred to throughout; submit modifications to plan.	40.
11(d)(1); 12(f)(l), (2); 13(d), (e)(2);.	Submit testing delineation plan, including environmental information, contingency plan, monitoring program, and various requests for approval referred to throughout; submit modifications to plan.	40.
11(d)(1); 12(f)(1), (2); 13(d), (e)(2);.	Submit mining delineation plan, including environmental information, contingency plan, monitoring program, and various requests for approval referred to throughout; submit modifications to plan.	40.
11(d)(4)	State requests different method of allocating production	1.
12(f)(1), (h);	Request approval of operations or departure from operating requirements [burden included with applicable operation].	0.
13(b), (f)(2); 31	Request suspension or temporary prohibition or production or operations	2.
13(e)	Submit site-specific study plan and results	8
		$100,000 per study.
14	Submit "green" response copy of Form BSEE–1832 indicating date violations (INCs) corrected.	2.
Subpart C—Obligations and Responsibilities of Lessees		
27(b)	Request use of new or alternative technologies, techniques, etc	1.
27(c)	Notify BSEE of death or serious injury; fire, explosion, or other hazardous event; submit report	1.
27(d)(2)	Request reimbursement for furnishing food, quarters, and transportation for BSEE representatives (no requests received in many years; minimal burden).	2.
27(e)	Identify vessels, platforms, structures, etc., with signs	1.
27(f)(2)	Log all drill holes susceptible to logging; submit copies of logs to BSEE	3.
27(h)(3), (4)	Mark equipment; record items lost overboard; notify BSEE	1.
28(d)	Demonstrate effectiveness procedure(s) for mitigating environmental impacts	1.
28(k)	Enter weight, quality, and/or quantity of each mineral produced [burden covered under 1010–0081]	0.
Subpart E—Appeals		
50	File an appeal [burden exempt under 5 CFR 1320.4(a)(2), (c)].	0.

Estimated Reporting and Recordkeeping Non-Hour Cost Burden: We have identified one non-hour cost burden associated with § 282.13(e)(1), a site specific study. Since this has not been done to date, we estimated that the study would cost industry approximately $100,000 to comply with the requirement. We have not identified any other non-hour paperwork cost burdens associated with this collection.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

Comments: Before submitting an ICR to OMB, PRA section 3506(c)(2)(A) requires each agency "* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *". Agencies must specifically solicit comments to: (a) Evaluate whether the collection is necessary or useful; (b) evaluate the accuracy of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of technology.

Agencies must also estimate the non-hour paperwork cost burdens to respondents or recordkeepers resulting from the collection of information. Therefore, if you have other than hour burden costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup cost components or annual

operation, maintenance, and purchase of service components. For further information on this burden, refer to 5 CFR 1320.3(b)(1) and (2), or contact the Bureau representative listed previously in this notice.

We will summarize written responses to this notice and address them in our submission for OMB approval. As a result of your comments, we will make any necessary adjustments to the burden in our submission to OMB.

Public Comment Procedures: Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: December 15, 2011.

Douglas W. Morris,

Chief, Office of Offshore Regulatory Programs.

[FR Doc. 2011–32862 Filed 12–21–11; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF INTERIOR

Bureau of Land Management

[LLCO956000.L14200000 BJ0000]

Notice of Filing of Plats

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats; Colorado.

SUMMARY: The Bureau of Land Management (BLM) Colorado State Office is publishing this notice to inform the public of the intent to file the land survey plats listed below, and to afford all affected parties a proper period of time to protest this action, prior to the plat filing.

DATES: Unless there are protests of this action, the filing of the plats described in this notice will happen on January 23, 2012.

ADDRESSES: BLM Colorado State Office, Cadastral Survey, 2850 Youngfield Street, Lakewood, Colorado 80215–7093.

FOR FURTHER INFORMATION CONTACT: Randy Bloom, Chief Cadastral Surveyor for Colorado, (303) 239–3856.

SUPPLEMENTARY INFORMATION: The plat and field notes of the dependent resurvey and survey in Township 50 North, Range 7 East, New Mexico Principal Meridian, Colorado, were accepted on November 18, 2011.

The plat and field notes of the dependent resurvey and remonumentation of certain corners in Township 15 South, Range 71 West, Sixth Principal Meridian, Colorado, were accepted on December 2, 2011.

Randy Bloom,

Chief Cadastral Surveyor for Colorado.

[FR Doc. 2011–32840 Filed 12–21–11; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDT000000.L11200000.DD0000.241A.00]

Notice of Public Meetings, Twin Falls District Resource Advisory Council, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA), the Federal Advisory Committee Act of 1972 (FACA), and the Federal Lands Recreation Enhancement Act of 2004 (FLREA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Twin Falls District Resource Advisory Council (RAC) and subcommittee for the Jarbidge Resource Management Plan (RMP) will meet as indicated below.

DATES: On January 25, 2012, the Twin Falls District RAC members will meet at the Best Western Sawtooth Inn at 2653 S. Lincoln Street, Jerome, Idaho. The meeting will begin at 9 a.m. and end no later than 5 p.m. The public comment period for the RAC meeting will take place 9:15 a.m. to 9:45 a.m.

FOR FURTHER INFORMATION CONTACT: Heather Tiel-Nelson, Twin Falls District, Idaho, 2536 Kimberly Road, Twin Falls, Idaho 83301, (208) 736–2352.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho. During the January 25th meeting, there will be a new member orientation, EIS updates for the Shoshone Basin Grazing Permit Renewal, Gateway West Transmission Project, China Mountain Wind Project and the Draft Jarbidge Resource Management Plan. RAC members will also discuss rock climbing, camping, staging and trail-building issues at Cedar Fields and Castle Rocks.

Additional topics may be added and will be included in local media announcements. More information is available at *www.blm.gov/id/st/en/res/resource_advisory.3.html.* RAC meetings are open to the public. For further information about the meeting, please contact Heather Tiel-Nelson, Public Affairs Specialist for the Twin Falls District, BLM at (208) 736–2352.

Dated: December 13, 2011.

Bill Baker,

District Manager.

[FR Doc. 2011–32829 Filed 12–21–11; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDC00000.L11200000.MR0000.241A.0; 4500030921]

Notice of Public Meeting, Coeur d'Alene District Resource Advisory Council Meeting; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Coeur d'Alene District Resource Advisory Council (RAC) will meet as indicated below.

DATES: January 24, 2012. The meeting will begin at 10 a.m. and end no later than 3:30 p.m. The public comment period will be held from 1 p.m. to 1:30 p.m. The meeting will be held at the Idaho Department of Labor Building located at 1350 Troy Rd, Suite 1, Moscow, Idaho 83843.

FOR FURTHER INFORMATION CONTACT: Suzanne Endsley, RAC Coordinator, BLM Coeur d'Alene District, 3815 Schreiber Way Coeur d'Alene, Idaho 83815 or telephone at (208) 769–5004.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho. The agenda will include the following topic: Bureau of Land Management recreation fee proposals (Recreation RAC Subcommittee). Additional agenda topics or changes to the agenda will be announced in local press releases. More information is available at *http://*

www.blm.gov/id/st/en/res/resource_advisory.html.

All meetings are open to the public. The public may present written comments to the RAC in advance of or at the meeting. Each formal RAC meeting will also have time allocated for receiving public comments. Depending upon the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the BLM as provided above.

Dated: December 14, 2011.

Gary D. Cooper,

District Manager.

[FR Doc. 2011–32838 Filed 12–21–11; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–PWR–PWRO–1108–8862; 2031–A038–409]

Draft Environmental Impact Statement/General Management Plan, Golden Gate National Recreation Area, CA

AGENCY: National Park Service, Interior.

ACTION: Notice of Extended Public Comment Period for Draft Environmental Impact Statement/General Management Plan, Golden Gate National Recreation Area.

SUMMARY: The National Park Service has prepared a Draft General Management Plan and Environmental Impact Statement (Plan/DEIS). The Plan/DEIS evaluates four alternatives for updating the current approach to management in Golden Gate National Recreation Area (GGNRA) and Muir Woods National Monument. The original Notice of Availability (published in the **Federal Register** on September 12, 2011) announced a 60-day public comment period. In recognition of the complexity of the proposed plan alternatives, and with deference to interest from the public and interested organizations, the comment period has been reopened and extended through December 9, 2011.

SUPPLEMENTARY INFORMATION: It will not be necessary for individuals, organizations, and agencies that have already commented to do so again. All other comments must now be postmarked or transmitted no later than December 9, 2011. Respondents wishing to comment electronically may do so online *http://parkplanning.nps.gov/goga,* or letters may be submitted via regular mail to: Frank Dean, General Superintendent, GGNRA, Ft. Mason, Bldg. 201, San Francisco, CA 94123.

Up-to-date information may be obtained by contacting GGNRA at (415) 561–4930.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: November 3, 2011.

John H. Williams,

Acting Regional Director, Pacific West Region.

[FR Doc. 2011–32833 Filed 12–21–11; 8:45 am]

BILLING CODE 4310–70–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–721]

Certain Portable Electronic Devices And Related Software; Submission for OMB Review; Comment Request; Determination To Review In Part A Final Initial Determination; Schedule for Filing Written Submissions

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the final initial determination (''ID'') issued by the presiding administrative law judge (''ALJ'') on October 17, 2011, finding no violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, in this investigation.

FOR FURTHER INFORMATION CONTACT: Amanda S. Pitcher, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2737. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 17, 2010, based on a complaint filed by HTC Corporation (''HTC'') of Taiwan. 75 FR 34,484–85 (June 17, 2010). The complaint alleged violations of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and sale within the United States after importation of certain portable electronic devices and related software by reason of infringement of various claims of United States Patent Nos. 6,999,800 (''the '800 patent''); 5,541,988 (''the '988 patent''); 6,320,957 (''the '957 patent''); 7,716,505 (''the '505 patent''); and 6,058,183 (''the '183 patent'') (subsequently terminated from the investigation). The complaint named Apple Inc. as the Respondent.

October 17, 2011, the ALJ issued his final ID, finding no violation of section 337 by the respondent. Specifically, the ALJ found that the Commission has subject matter jurisdiction and that Apple did not contest that the Commission has *in rem* and *in personam* jurisdiction. The ALJ also found that there was an importation into the United States, sale for importation, or sale within the United States after importation of the accused portable electronic devices and related software. Regarding infringement, the ALJ found that Apple does not infringe claims 1–3 and 8–10 of the 800 patent, claims 1 and 10 of the '988 patent, claims 8–9 of the '957 patent and claims 1–2 of the '505 patent. With respect to invalidity, the ALJ found that the asserted claims are not invalid. Finally, the ALJ concluded that an industry exists within the United States that practices the '988 and '957 patents, but not the '800 and '505 patents as required by 19 U.S.C. 1337(a)(2).

On October 31, 2011 HTC filed a petition for review of the ID, which also included a contingent petition for review. Also on October 31, 2011, Apple filed a contingent petition for review. On November 8, 2011, the parties filed responses to the petition and contingent petitions for review.

Having examined the record of this investigation, including the ALJ's final ID, the petitions for review, and the responses thereto, the Commission has determined to review the final ID in part. Specifically, the Commission has determined to review the ALJ's findings

with respect to the '800 patent. The Commission also determined to review the ALJ's construction and finding that the accused portable electronic devices and related software do not meet the ''manually operable selector'' limitation of independent claim 1 of the '988 patent and independent claim 8 of the '957 patent. Having reviewed this limitation, the Commission declines to a take position on it. The Commission has determined not to review any other issues in the ID. The investigation is therefore terminated with respect to the '500, '988 and '957 patents.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in a response to the following questions:

1. In the Accused iPhones, is the applications processor power management unit (AP PMU) a part of the personal digital assistant (PDA), the mobile phone system, or both?

2. In the Accused iPhones, when the VDD_FAULT_LOWER threshold is met, irrespective of whether the SOC1 threshold is met, does the PDA, the mobile phone system, or both, switch between modes? In the Accused iPhones, when the SOC1 threshold is met, irrespective of whether the VDD_FAULT_LOWER threshold is met, does the PDA, the mobile phone system, or both, switch between modes?

3. Do the claims, specification, or prosecution history require that only one of the systems (*i.e.,* either the mobile phone system or PDA) power off when each of the thresholds is met?

4. Are there separate thresholds in HTC's domestic industry products that result in the mobile phone system turning off separately from the PDA? If the mobile phone and PDA systems turn off simultaneously, is there record evidence proving that the thresholds are separately set to the same limits?

5. Is claim 1 of the '800 patent anticipated by the Qualcomm pdQ device? Please explain where each element is present in the pdQ device.

6. Do the Accused iPhones meet the ''switching the mobile phone system from standby mode to sleep mode when the mobile phone system has been idle for a first period of time'' limitation of claim 1 of the '800 patent? [1]

7. Do the HTC domestic industry products meet the ''switching the mobile phone system from standby mode to sleep mode when the mobile phone system has been idle for a first period of time'' limitation of claim 1 of the '800 patent?

8. Do the Accused iPhones meet the ''switching the PDA system from normal mode to sleep mode when the PDA system has been idle for a second period of time'' limitation of claim 1 of the '800 patent?

9. Although the Commission has determined to review the '800 patent in its entirety, can the parties respond to Apple's argument that, because HTC did not petition for review of the limitations of claim 1 of the '800 patent on which the ALJ made no findings concerning infringement, ''HTC has therefore waived any argument on review that these claim limitations are present in the accused iPhones?'' Respondent Apple Inc.'s Response to HTC's Petition for Review of Initial Determination at 3. In your response, please reference any relevant Section 337 or Federal Circuit precedent.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see In the Matter of Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation. If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. See Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainant and OUII are also requested to submit proposed remedial orders for the Commission's consideration.

Complainant is also requested to state the date that the '800 patent expires and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on Friday, December 30, 2011. Reply submissions must be filed no later than the close of business on Friday, January 6, 2012. No further submissions on these issues will be permitted unless otherwise ordered by the Commission. The page limit for the parties' initial submissions on the questions posed by the Commission is 50 pages. The parties reply submissions, if any, are limited to 25 pages.

Persons filing written submissions must file on or before the deadlines stated above and by noon the following business day submit 8 true copies thereof with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons

[1] Questions 6 and 7 pertain to issues argued by the parties but not addressed in the ID. The Commission's rules of practice and procedure provide that the initial determination of the ALJ shall include ''* * * conclusions and the reasons or bases therefor necessary for the disposition of all material issues of fact, law, or discretion presented in the record * * *.'' 19 CFR 210.42(d). The Commission generally anticipates that the ALJs will adjudicate all issues presented in the record.

why the Commission should grant such treatment. *See* 19 CFR 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All non-confidential written submissions will be available for public inspection on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.42–46 and 210.50 of the Commission's Rules of Practice and Procedure (19 CFR 210.42–46 and 210.50).

By order of the Commission.

Issued: December 16, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–32732 Filed 12–21–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–11–039]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: January 5, 2012 at 11 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: none.
2. Minutes.
3. Ratification List.
4. Vote in Inv. No. 731–TA–410 (Third Review) (Light-Walled Rectangular Pipe from Taiwan). The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before January 17, 2012.
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: December 20, 2011.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. 2011–32986 Filed 12–20–11; 4:15 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on December 15, 2011, a proposed Consent Decree (the Consent Decree) in *United States of America* v. *The Coeur d'Alenes Company,* Civil Action No. 11–CV–00633–EJL, was lodged with the United States District Court for the District of Idaho.

In this action the United States sought reimbursement under Section 107 of CERCLA for past costs incurred at the Conjecture Mine Superfund Site (the Site), located in Bonner County, Idaho. The United States also sought injunctive relief under Section 106 of CERCLA, as well as a declaratory judgment under Section 113 of CERCLA for future costs to be incurred at the Site. Under the proposed Consent Decree, which is based on ability to pay, The Coeur d'Alenes Company has agreed to pay $350,000.

The Consent Decree includes a covenant not to sue the Coeur d'Alenes Company pursuant to Sections 106 and 107 of CERCLA, 42 U.S.C. 9606 & 9607, and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973.

For thirty (30) days after the date of this publication, the Department of Justice will receive comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to pubcomment-ees.enrd@usdoj.gov or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611. In either case, the comments should refer to *United States of America* v. *The Coeur d'Alenes Company,* DJ. Ref. 90–11–3–10110/1. Commenters may request an opportunity for a public meeting in the affected area in accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d).

During the comment period, the Consent Decree may be examined on the following Department of Justice Web site: *http://www.justice.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or emailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $7.00 (25 cents per page reproduction cost) payable to the United States Treasury or, if by email or fax, please forward a check in that amount to the Consent Decree Library at the stated address.

Robert E. Maher, Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–32831 Filed 12–21–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Water Act

Notice is hereby given that on December 14, 2011, a proposed Consent Decree (''Decree'') in *United States, et al.* v. *Metropolitan Water Reclamation District of Greater Chicago,* Civil Action No. 1:11–cv–08859, was lodged with the United States District Court for the Northern District of Illinois.

In this action the United States, on behalf of the U.S. Environmental Protection Agency (''U.S. EPA''), and the State of Illinois sought penalties and injunctive relief under the Clean Water Act (''CWA'') against the Metropolitan Water Reclamation District of Greater Chicago (''Defendant'') relating to discharges from its combined sewer outfalls (''CSOs''). The Complaint alleges that Defendant violated the following CSO-related provisions of its CWA permits: The prohibition on discharging pollutants into waters of the United States that cause or contribute to violations of applicable water quality standards for dissolved oxygen, solids, and floatables. The United States also alleges that Defendant violated the requirement of its National Pollutant Discharge Elimination System or NPDES permits to provide the equivalent of primary treatment for at least ten times the average dry weather flow for the average design year. The proposed Consent Decree between Defendant, the United States, and the State of Illinois requires the following: (1) A schedule for completion of the Tunnel and Reservoir Program (''TARP''), the long term control plan to increase Defendant's capacity to handle wet weather events and address CSO discharges in Chicago area waterways; (2) a plan to control floatables in such waterways; (3) post construction monitoring following completion of TARP; (4) payment of a civil penalty of $675,000, of which $350,000 will be paid to the United States and $325,000 to the State of Illinois; and (5) a green infrastructure program to reduce CSO

discharges, localized flooding and stormwater impacts.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States, et al.* v. *Metropolitan Water Reclamation District of Greater Chicago,* D.J. Ref. 90–5–1–1–07679. During the public comment period, the Decree may be examined on the Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or emailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax No. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $31.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by email or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2011–32773 Filed 12–21–11; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Employment and Training Administration

Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2012 Adverse Effect Wage Rates

AGENCY: Employment and Training Administration, Department of Labor.

ACTION: Notice.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (Department) is issuing this notice to announce the 2012 Adverse Effect Wage Rates (AEWRs) for the employment of temporary or seasonal nonimmigrant foreign workers to perform agricultural labor or services (H–2A workers).

AEWRs are the minimum wage rates the Department has determined must be offered and paid by employers to H–2A workers and workers in corresponding employment for a particular occupation and area so that the wages of similarly employed U.S. workers will not be adversely affected. 20 CFR 655.100(b). In this notice, the Department announces the AEWRs for 2012.

DATES: *Effective Date:* This notice is effective *December 22, 2011.*

FOR FURTHER INFORMATION CONTACT: William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, U.S. Department of Labor, Room C–4312, 200 Constitution Avenue NW., Washington, DC 20210. Telephone: (202) 693–3010 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The U.S. Citizenship and Immigration Services of the Department of Homeland Security will not approve an employer's petition for the admission of H–2A nonimmigrant temporary agricultural workers in the U.S. unless the petitioner has received from the Department an H–2A labor certification. The labor certification provides that: (1) There are not sufficient U.S. workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the foreign worker(s) in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1101(a)(15)(H)(ii)(b), 1184(c)(1), and 1188(a); 8 CFR 214.2(h)(5) and (6).

Adverse Effect Wage Rates for 2012

The Department's H–2A regulations at 20 CFR 655.120(l) provide that employers must pay their H–2A workers and workers in corresponding employment at least the highest of: (i) The AEWR; (ii) the prevailing wage; (iii) the prevailing piece rate; (iv) the agreed-upon collective bargaining wage, if applicable; or (v) the Federal or State minimum wage, in effect at the time the work is performed.

Except as otherwise provided in 20 CFR part 655, subpart B, the region-wide AEWR for all agricultural employment (except those occupations deemed inappropriate under the special procedure provisions of 20 CFR 655.102) for which temporary H–2A certification is being sought is equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the United States Department of Agriculture (USDA). 20 CFR 655.120(c) requires the Administrator of the Office of Foreign Labor Certification publish the USDA field and livestock worker (combined) wage data as AEWRs in a **Federal Register** notice. Accordingly, the 2012 AEWRs to be paid for agricultural work performed by U.S. and H–2A workers on or after the effective date of this notice are set forth in the table below:

TABLE—2012 ADVERSE EFFECT WAGE RATES

State	2012 AEWRs
Alabama	$9.39
Arizona	9.94
Arkansas	9.30
California	10.24
Colorado	10.43
Connecticut	10.56
Delaware	10.34
Florida	9.54
Georgia	9.39
Hawaii	12.26
Idaho	10.19
Illinois	11.10
Indiana	11.10
Iowa	11.50
Kansas	11.61
Kentucky	9.38
Louisiana	9.30
Maine	10.56
Maryland	10.34
Massachusetts	10.56
Michigan	10.78
Minnesota	10.78
Mississippi	9.30
Missouri	11.50
Montana	10.19
Nebraska	11.61
Nevada	10.43
New Hampshire	10.56
New Jersey	10.34
New Mexico	9.94
New York	10.56
North Carolina	9.70
North Dakota	11.61
Ohio	11.10
Oklahoma	9.88
Oregon	10.92
Pennsylvania	10.34
Rhode Island	10.56
South Carolina	9.39
South Dakota	11.61
Tennessee	9.38
Texas	9.88
Utah	10.43
Vermont	10.56
Virginia	9.70
Washington	10.92
West Virginia	9.38
Wisconsin	10.78
Wyoming	10.19

Pursuant to the H–2A regulations at 20 CFR 655.173, the Department will publish a separate **Federal Register** notice in early 2012 to announce (1) the allowable charges for 2012 that employers seeking H–2A workers may charge their workers for providing them three meals a day; and (2) the maximum

travel subsistence reimbursement which a worker with receipts may claim in 2012.

Signed in Washington, DC this 6th day of December, 2011.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2011–32842 Filed 12–21–11; 8:45 am]

BILLING CODE 4510–FP–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 11–15]

Report on the Selection of Eligible Countries for Fiscal Year 2012

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: This report is provided in accordance with section 608(d)(1) of the Millennium Challenge Act of 2003, Public Law 108–199, Division D, (the ''Act''), 22 U.S.C. 7708(d)(1).

Dated: December 16, 2011.

Melvin F. Williams, Jr.,

VP/General Counsel and Corporate Secretary, Millennium Challenge Corporation.

Report on the Selection of Eligible Countries for Fiscal Year 2012

Summary

This report is provided in accordance with section 608(d)(1) of the Millennium Challenge Act of 2003, Public Law 108–199, Division D, (the ''Act'') (22 U.S.C. 7707(d)(1)).

The Act authorizes the provision of Millennium Challenge Account (''MCA'') assistance under section 605 of the Act (22 U.S.C. 7704) to countries that enter into compacts with the United States to support policies and programs that advance the progress of such countries in achieving lasting economic growth and poverty reduction, and are in furtherance of the Act. The Act requires the Millennium Challenge Corporation (''MCC'') to determine the countries that will be eligible to receive MCA assistance during the fiscal year, based on their demonstrated commitment to just and democratic governance, economic freedom, and investing in their people, as well as on the opportunity to reduce poverty and generate economic growth in the country. The Act also requires the submission of reports to appropriate congressional committees and the publication of notices in the **Federal Register** that identify, among other things:

The countries that are ''candidate countries'' for MCA assistance during fiscal year 2012 (''FY12'') based on their per-capita income levels and their eligibility to receive assistance under U.S. law, and countries that would be candidate countries but for specified legal prohibitions on assistance (section 608(a) of the Act (22 U.S.C. 7707(a)));

The criteria and methodology that the Board of Directors of MCC (the ''Board'') will use to measure and evaluate the policy performance of the ''candidate countries'' consistent with the requirements of section 607 of the Act in order to select ''MCA eligible countries'' from among the ''candidate countries'' (section 608(b) of the Act (22 U.S.C. 7707(b))); and

The list of countries determined by the Board to be ''MCA eligible countries'' for FY12, with justification for eligibility determination and selection for compact negotiation, including with which of the MCA eligible countries the Board will seek to enter into MCA compacts (section 608(d) of the Act (22 U.S.C. 7707(d))).

This is the third of the above-described reports by MCC for FY12. It identifies countries determined by the Board to be eligible under section 607 of the Act (22 U.S.C. 7706) for FY12 and countries with which the Board will seek to enter into compacts under section 609 of the Act (22 U.S.C. 7708), as well as the justification for such decisions. This year, for the first time, the report also identifies countries determined by the Board to be eligible for MCC's Threshold Program under section 616 of the Act (22 U.S.C. 7715).

Eligible Countries

The Board met on December 15, 2011, to select countries that will be eligible for MCA compact assistance under section 607 of the Act (22 U.S.C. 7706) for FY12. The Board selected the following countries as eligible for such assistance for FY12: Benin, Cape Verde, El Salvador, Georgia, Ghana, and Zambia.

Criteria

In accordance with the Act and with the ''Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in Fiscal Year 2012'' formally submitted to the Congress on September 29, 2011, selection was based primarily on a country's overall performance in three broad policy categories: *Ruling Justly, Encouraging Economic Freedom, and Investing in People.* The Board relied, to the maximum extent possible, upon transparent and independent indicators to assess countries' policy performance and demonstrated commitment in these three broad policy areas. The Board compared countries' performance on the indicators relative to their income-level peers, evaluating them in comparison to either the group of low income countries (''LIC'') or the group of lower-middle income countries (''LMIC'').

As outlined in the ''Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in Fiscal Year 2012'', a number of changes were adopted to update the criteria and methodology for FY12. MCC published and the Board considered both the traditional and updated scorecards this year. MCC plans to transition to exclusive use of the updated scorecard in the future, and there was deeper consideration of performance on the new scorecard for FY12. When performance differed across the scorecards, MCC outlined the reasons for the Board. Scorecards reflecting each country's performance on the indicators are available on MCC's Web site at *http://www.mcc.gov/scorecards.*

The Board also considered whether any adjustments should be made for data gaps, data lags, or recent events since the indicators were published, as well as strengths or weaknesses in particular indicators. Where appropriate, the Board took into account additional quantitative and qualitative information, such as evidence of a country's commitment to fighting corruption, investments in human development outcomes, or poverty rates. In keeping with legislative directives, the Board also considered the opportunity to reduce poverty and promote economic growth in a country, in light of the overall information available, as well as the availability of appropriated funds.

This was the third year the Board considered the eligibility of countries for subsequent compacts, as permitted under section 609(k) of the Act (22 U.S.C. 7708(k)). MCC has no explicit preference for either new or subsequent compacts, and sees the Board's selection decision as an annual opportunity to determine where MCC funds can be most effectively invested to support poverty reduction through economic growth in relatively well-governed, poor countries. However, in light of the fact that a large share of the best-governed low and lower-middle income countries are already MCC partners, subsequent compacts are likely to be a consistent part of MCC's compact portfolio.

In determining subsequent compact eligibility, the Board considered—in addition to the criteria outlined above—the country's performance implementing its first compact, including the nature of the country partnership with MCC, the degree to which the country has demonstrated a commitment and capacity to achieve program results, and the degree to which the country has implemented the compact in accordance with MCC's core policies and standards. To the greatest extent possible, this was assessed using pre-existing monitoring and evaluation targets and regular quarterly reporting. This information was supplemented with direct surveys and consultation with MCC staff responsible for compact implementation, monitoring, and evaluation.

As with previous years, a number of countries that performed well on the quantitative elements of the selection criteria (i.e., on the policy indicators) were not chosen as eligible countries for FY12. MCC is aware that some stakeholders expressed concern that using the updated scorecard criteria might make the Board less selective in its eligibility decisions. This was not the case. The selection of two new compact countries and two new threshold countries is consistent with the highly selective standard the Board has previously established.

Countries Newly Selected for Compact Eligibility

Using the criteria described above, Benin and El Salvador were selected as eligible for MCA assistance for a second compact under section 607 of the Act (22 U.S.C. 7706).

As a candidate country under section 606(a) of the Act (22 U.S.C. 7705(a)), Benin is one of the poorest countries in the world, but maintains relatively strong policy performance. It is particularly strong in the Ruling Justly category, where it passes all six indicators, and is recognized as a stable, democratic country in West Africa. In FY12, Benin passed the new indicator criteria, but it did not pass the old indicator criteria, due to performance in the Investing in People category. Both scorecards for Benin can be found here: *http://www.mcc.gov/scorecards.* By compact conclusion, Benin delivered all core construction targets and undertook an ambitious and complex series of policy reforms. This included letting a major port concession, undertaking changes to customs and port procedures designed to reduce corruption and improve port efficiency, and making improvements in the microfinance regulatory system. These activities allowed the Government of Benin to address some of their greatest development challenges and create new opportunities for economic growth. Over the next 20 years, MCC's port investment in Benin is expected to affect a regional import-export facility that not only serves the entire population of Benin, but also provides meaningful trade capacity for Mali, Niger, Burkina Faso, and Nigeria. Increased imports and exports could also open up the potential for new market and trade opportunities for U.S. businesses.

This port project serves as an example of MCC and the Government of Benin working together to address a complex project that combined ambitious infrastructure investments and policy reform. While projects with this level of complexity are difficult, they embody MCC's mandate of reducing poverty through economic growth in poor, well-governed countries.

As a candidate country under section 606(b) of the Act (22 U.S.C. 7705(b)), El Salvador is a reform oriented country with a strong democracy and favorable investment policies. In FY12, El Salvador passed the new indicator criteria, but it did not pass the old indicator criteria, due to performance in the Investing in People category. Both scorecards for El Salvador can be found here: *http://www.mcc.gov/scorecards.* El Salvador's current compact is on track to achieving re-scoped objectives, and the investment is managed by a strong country-led MCA unit. At the compact mid-point, MCA-El Salvador was able to assume procurement responsibilities directly, which was a key step in resolving early delays in the procurement process, and setting the compact on track to achieve key targets. Throughout compact development and implementation, El Salvador has consistently demonstrated a commitment to take positive actions in pursuit of poverty reduction and economic growth. El Salvador is one of only four countries to be included as a pilot country for the Partnership for Growth (PFG) initiative. El Salvador's role as a pilot PFG country makes it uniquely situated to utilize compact resources effectively. In 2011, El Salvador completed an economic constraints analysis, an exercise that forms the basis of MCC's compact development process. There is a high-capacity and experienced MCA team already in operation, and the Government of El Salvador and U.S. Government have, through the PFG, both committed to focusing energy and resources towards combating specific constraints to growth.

Countries Re-Selected To Continue Compact Development

Four of the countries selected as eligible for MCA compact assistance in FY12 were previously selected as eligible. Reselection allows them to continue compact development and receive funding from FY 2012. Two of these countries are in the LIC category: Ghana and Zambia. Two countries, Georgia and Cape Verde, are in the LMIC category.

The Board reselected these countries based on their continued good performance since their prior selection. The Board determined that since their initial selection, there has been no material change in their performance on the indicator criteria that indicates a serious decline in policy performance. All four countries pass both sets of scorecards.

Countries Newly Selected for Threshold Program Eligibility

For FY12, the Board selected Nepal and Honduras as eligible for threshold assistance. Nepal has not only been a consistently strong scorecard performer for multiple years (in FY12, it passed both scorecards), but it has also achieved a recent breakthrough in the implementation of its peace process, which is expected to help move forward the process of drafting a constitution and normalizing the political process. Honduras passes 16 of 20 indicators on the scorecard and performs just below the median on Control of Corruption. Honduras was a good partner and successfully completed a compact in 2010. Since suffering a serious setback—the political crisis of 2009—the government has taken a number of significant steps to restore the country's positive trajectory, in particular, taking steps to improve control of corruption through improved fiscal transparency.

These selections are consistent with the recently re-designed threshold program. In FY 2010, MCC completed a review of its Threshold Program and developed a body of lessons learned. Under the re-designed concept, the new threshold country programs will no longer focus explicitly on trying to move indicator scores. Rather, the program will allow countries to diagnose binding constraints to economic growth and demonstrate the capacity and political will to make difficult policy reforms in partnership with MCC. This will contribute directly to the Board's understanding of a country's capacity to undertake the type of policy reforms typically required to enable a compact investment to have maximum sustainable impact.

Ongoing Review of Partner Countries' Policy Performance

The Board also reviewed the policy performance of countries that are implementing compacts. These countries do not need to be reselected each year in order to continue implementation. Once MCC makes a commitment to a country through a compact agreement, MCC does not consider the country for reselection on an annual basis during the term of its compact. The Board emphasized the need for all partner countries to continue to improve their environment. If it is determined that a country has demonstrated a significant policy reversal, MCC can hold it accountable by applying MCC's Suspension and Termination Policy.

Selection To Initiate the Compact Process

The Board also authorized MCC to invite Benin and El Salvador to submit a proposal for a second compact, as described in section 609 of the Act (22 U.S.C. 7708).

Submission of a proposal is not a guarantee that MCC will finalize a compact with an eligible country. Any MCA assistance provided under section 605 of the Act (22 U.S.C. 7704) will be contingent on the successful negotiation of a mutually agreeable compact between the eligible country and MCC, approval of the compact by the Board, and the availability of funds.

[FR Doc. 2011–32733 Filed 12–21–11; 8:45 am]

BILLING CODE 9211–03–P

PENSION BENEFIT GUARANTY CORPORATION

Premium Changes Based On Recharacterization of Contributions

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Policy statement.

SUMMARY: This policy statement addresses PBGC's policy on accepting and responding to amended premium filings based on recharacterization of contributions. Recharacterization of contributions refers to a situation in which contributions originally designated as being for the plan year in which they were made are retroactively redesignated as being for the preceding plan year. This makes plan assets for the current year higher, and the plan's variable-rate premium lower, than originally reported. Such recharacterization seeks not to correct a factual error but to change a valid designation and is not an appropriate basis for an amended premium filing or premium refund.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion (*klion.catherine@pbgc.gov*), Manager, or Deborah C. Murphy (*murphy.deborah@pbgc.gov*), Attorney, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington DC 20005–4026; (202) 326–4024. (TTY and TDD users may call the Federal relay service toll free at 1–(800) 877–8339 and ask to be connected to (202) 326–4024.)

SUPPLEMENTARY INFORMATION:

The Pension Benefit Guaranty Corporation (PBGC) administers the pension insurance program under title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Under sections 4006 and 4007 of ERISA, plans covered by title IV must pay premiums to PBGC. For single-employer plans, premiums include an amount (the variable-rate premium, or VRP) based on unfunded vested benefits (the excess, if any, of the value of vested benefits over the value of plan assets).

A contribution made to a pension plan during the first eight-and-a-half months of a plan year may be characterized as being either for the current year (the plan year in which it is made) or for the prior year (the preceding plan year). The characterization affects when the contribution is first reflected in plan assets. If a contribution is characterized as being for the prior year, it is treated as a receivable (which increases plan assets) as of the beginning of the current year and thus reduces any VRP for the current year. If a contribution is characterized as being for the current year, it does not increase plan assets as of the beginning of the current year and thus does not affect VRP for the current year.

The year for which a contribution is made is designated on Schedule SB (formerly Schedule B) (actuarial information) to the annual report for the plan on IRS/DOL/PBGC Form 5500. PBGC has received a number of amended premium filings, showing increased assets and decreased VRP, supported by amended Schedules SB (or B) that reflect recharacterization of contributions, and submitted with a view to obtaining premium refunds. PBGC has in practice accepted such amended filings and granted the refunds. Upon further consideration of the matter, however, PBGC has concluded that in general, such amendments should be rejected and the associated premium refunds denied.

Permitting the amendment of premium filings gives filers a way to correct mistakes in the data reported in the filings. Where the correction of erroneous data results in a lower premium, it is appropriate to refund the amount of the overpayment. However, recharacterization of a contribution does not correct a mistake; rather, it seeks to undo a valid designation of the year for which the contribution was made. Thus, it is not an appropriate basis for amending the relevant premium filing and claiming a refund.[1]

PBGC's consideration of amended premium filings takes into account the facts and circumstances of each case. In general, however, as explained above, PBGC's policy will be to reject amended filings and deny refunds based on recharacterization of contributions.

For questions about premium filings, contact Robert Callahan (*callahan.robert@pbgc.gov*) or Bill O'Neill (*oneill.bill@pbgc.gov*), Financial Operations Department; (202) 346–4067.

Issued in Washington, DC, this 16th day of December, 2011.

Joshua Gotbaum,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2011–32804 Filed 12–21–11; 8:45 am]

BILLING CODE 7709–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65991; File No. 4–566]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Notice of Filing and Order Approving and Declaring Effective an Amendment to the Plan for the Allocation of Regulatory Responsibilities Among BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE Amex LLC, and NYSE Arca, Inc. Relating to the Surveillance, Investigation, and Enforcement of Insider Trading Rules

December 16, 2011.

Notice is hereby given that the Securities and Exchange Commission

[1] The same principles would apply to an amended filing made with a view to obtaining a credit against the next year's premium.

(''Commission'') has issued an Order, pursuant to Section 17(d) of the Securities Exchange Act of 1934 (''Act''),[1] approving and declaring effective an amendment to the plan for allocating regulatory responsibility (''Plan'') filed pursuant to Rule 17d–2 of the Act,[2] by and among BATS Exchange, Inc. (''BATS''), BATS Y-Exchange, Inc. (''BYX''), Chicago Board Options Exchange, Incorporated (''CBOE''), Chicago Stock Exchange, Inc. (''CHX''), EDGA Exchange, Inc. (''EDGA''), EDGX Exchange, Inc. (''EDGX''), the Financial Industry Regulatory Authority, Inc. (''FINRA''), NASDAQ OMX BX, Inc., (''NASDAQ OMX BX''), NASDAQ OMX PHLX LLC, (''NASDAQ OMX PHLX''), The NASDAQ Stock Market LLC (''Nasdaq''), National Stock Exchange, Inc. (''NSX''), New York Stock Exchange LLC (''NYSE''), NYSE Amex LLC (''NYSE Amex''), and NYSE Arca, Inc. (''NYSE Arca'') (each a ''Participating Organization'' and collectively, ''Participating Organizations'' or ''parties'').

I. Introduction

Section 19(g)(1) of the Act,[3] among other things, requires every self-regulatory organization (''SRO'') registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d)[4] or Section 19(g)(2)[5] of the Act. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO (''common members''). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act[6] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[7] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[8] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority (''DEA'') to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[9] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO's obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.[10] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

II. The Plan

On September 12, 2008, the Commission declared effective the Participating Organizations' Plan for allocating regulatory responsibilities pursuant to Rule 17d–2.[11] The Plan is designed to eliminate regulatory duplication by allocating regulatory responsibility over Common FINRA Members[12] (collectively ''Common Members'') for the surveillance, investigation, and enforcement of common insider trading rules (''Common Rules'').[13] The Plan assigns regulatory responsibility over Common FINRA Members to FINRA for surveillance, investigation, and enforcement of insider trading by broker-dealers, and their associated persons, with respect to Listed Stocks (as defined in the Plan), irrespective of the marketplace(s) maintained by the Participating Organizations on which the relevant trading may occur.

III. Proposed Amendment to the Plan

On November 3, 2011, the Participating Organizations submitted an amendment to the Plan. The proposed amendment was submitted to reflect the addition of BATS as a Listing Market (as defined in the Plan) and to expand the coverage of Listed Stocks to include an equity security that is listed on BATS.[14] Other similar conforming amendments were made to reflect this addition. The Participating Organizations also amended the Plan to update the contact information and SRO rules that are covered by the Agreement. In addition, the Participating Organizations entered into a regulatory services agreement that addresses investigation and enforcement in situations involving Insider Trading by non-Common FINRA Members. The text of the proposed amended 17d–2 plan is as follows (except for paragraph headings, which are *italicized,* additions are *italicized;* deletions are [bracketed]):

* * * * *

[1] 15 U.S.C. 78q(d).

[2] 17 CFR 240.17d–2.

[3] 15 U.S.C. 78s(g)(1).

[4] 15 U.S.C. 78q(d).

[5] 15 U.S.C. 78s(g)(2).

[6] 15 U.S.C. 78q(d)(1).

[7] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

[8] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[9] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

[10] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

[11] *See* Securities Exchange Act Release No. 58536 (September 12, 2008), 73 FR 54646 (September 22, 2008). *See also* Securities Exchange Act Release Nos. 58806 (October 17, 2008), 73 FR 63216 (October 23, 2008); 61919 (April 15, 2010), 75 FR 21051 (April 22, 2010); 63103 (October 14, 2010), 75 FR 64755 (October 20, 2010); and 63750 (January 21, 2011), 76 FR 4948 (January 27, 2011).

[12] Common FINRA Members include members of FINRA and at least one of the Participating Organizations.

[13] Common rules are defined as: (i) Federal securities laws and rules promulgated by the Commission pertaining to insider trading, and (ii) the rules of the Participating Organizations that are related to insider trading. *See* Exhibit A to the Plan.

[14] *See* Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (Order approving proposed rule change to adopt rules for the qualification, listing and delisting of companies on BATS).

Agreement for the Allocation of Regulatory Responsibility of Surveillance, Investigation and Enforcement for Insider Trading pursuant to § 17(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78q(d), and Rule 17d–2 Thereunder

This agreement (the ''Agreement'') by and among BATS Exchange, Inc. (''BATS''), BATS Y-Exchange, Inc. (''BYX''), Chicago Board Options Exchange, Inc. (''CBOE'') *, Chicago Stock Exchange, Inc. (''CHX''), EDGA Exchange, Inc. (''EDGA''), EDGX Exchange, Inc. (''EDGX''), Financial Industry Regulatory Authority, Inc. (''FINRA''), NASDAQ OMX BX, Inc. (''NASDAQ OMX BX''), NASDAQ OMX PHLX LLC (''NASDAQ OMX PHLX''), The NASDAQ Stock Market LLC (''NASDAQ''), National Stock Exchange, Inc. (''NSX''), New York Stock Exchange LLC (''NYSE''), NYSE Amex LLC (''NYSE Amex''), and NYSE Arca, Inc. (''NYSE Arca'') (each a ''Participating Organization'' and together, the ''Participating Organizations''), is made pursuant to § 17(d) of the Securities Exchange Act of 1934 (the ''Act''), 15 U.S.C. 78q(d), and Securities and Exchange Commission (''SEC'') Rule 17d–2, which allow for plans to allocate regulatory responsibility among self-regulatory organizations (''SROs''). Upon approval by the SEC, this Agreement shall amend and restate the agreement among the Participating Organizations approved by the SEC on [October 14, 2010] *January 21, 2011.*

Whereas, the Participating Organizations desire to: (a) Foster cooperation and coordination among the SROs; (b) remove impediments to, and foster the development of, a national market system; (c) strive to protect the interest of investors; and (d) eliminate duplication in their regulatory surveillance, investigation and enforcement of insider trading;

Whereas, the Participating Organizations are interested in allocating to FINRA regulatory responsibility for Common FINRA Members (as defined below) for surveillance, investigation and enforcement of Insider Trading (as defined below) in Listed Stocks (as defined below) irrespective of the marketplace(s) maintained by the Participating Organizations on which the relevant trading may occur in violation of Common Insider Trading Rules (as defined below);

Whereas, the Participating Organizations will request regulatory allocation of these regulatory responsibilities by executing and filing with the SEC a plan for the above stated purposes (this Agreement, also known herein as the ''Plan'') pursuant to the provisions of § 17(d) of the Act, and SEC Rule 17d–2 thereunder, as described below; and

Whereas, the Participating Organizations will also enter into a Regulatory Services Agreement (the ''Insider Trading RSA''), of even date herewith, to provide for the investigation and enforcement of suspected Insider Trading against broker-dealers, and their associated persons, that are not Common FINRA Members in the case of Insider Trading in Listed Stocks.

Now, therefore, in consideration of the mutual covenants contained hereafter, and other valuable consideration to be mutually exchanged, the Participating Organizations hereby agree as follows:

1. *Definitions.* Unless otherwise defined in this Agreement, or the context otherwise requires, the terms used in this Agreement will have the same meaning they have under the Act, and the rules and regulations thereunder. As used in this Agreement, the following terms will have the following meanings:

a. ''Rule'' of an ''exchange'' or an ''association'' shall have the meaning defined in Section 3(a)(27) of the Act.

b. ''Common FINRA Members'' shall mean members of FINRA and at least one of the Participating Organizations.

c. ''Common Insider Trading Rules'' shall mean (i) the federal securities laws and rules thereunder promulgated by the SEC pertaining to insider trading, and (ii) the rules of the Participating Organizations that are related to insider trading, as provided on Exhibit A to this Agreement.

d. ''Effective Date'' shall have the meaning set forth in paragraph 28.

e. ''Insider Trading'' shall mean any conduct or action taken by a natural person or entity related in any way to the trading of securities by an insider or a related party based on or on the basis of material non-public information obtained during the performance of the insider's duties at the corporation, or otherwise misappropriated, that could be deemed a violation of the Common Insider Trading Rules.

f. ''Intellectual Property'' will mean any: (1) Processes, methodologies, procedures, or technology, whether or not patentable; (2) trademarks, copyrights, literary works or other works of authorship, service marks and trade secrets; or (3) software, systems, machine-readable texts and files and related documentation.

g. ''Plan'' shall mean this Agreement, which is submitted as a Plan for the allocation of regulatory responsibilities of surveillance for insider trading pursuant to § 17(d) of the Act, 15 U.S.C. 78q(d), and SEC Rule 17d–2.

h. ''Listed Stock(s)'' shall mean NYSE Listed Stock(s), NASDAQ Listed Stock(s), NYSE Amex Listed Stock(s), NYSE Arca Listed Stock(s*), BATS Listed Stock(s)* or CHX Solely Listed Stock(s).

i. ''NYSE Listed Stock'' shall mean an equity security that is listed on the NYSE.

j. ''NASDAQ Listed Stock'' shall mean an equity security that is listed on NASDAQ.

k. ''NYSE Amex Listed Stock'' shall mean an equity security that is listed on NYSE Amex.

l. ''NYSE Arca Listed Stock'' shall mean an equity security that is listed on NYSE Arca.

m. *''BATS Listed Stock'' shall mean an equity security that is listed on BATS.*

n. ''CHX Solely Listed Stock'' shall mean an equity security that is listed only on the CHX.

[n]*o.* ''Listing Market'' shall mean NYSE Amex, NASDAQ, NYSE, [or] NYSE Arca *or BATS,* but not CHX.

2. *Assumption of Regulatory Responsibilities.* On the Effective Date of the Plan, FINRA will assume regulatory responsibilities for surveillance, investigation and enforcement of Insider Trading by broker-dealers, and their associated persons, for Common FINRA Members with respect to Listed Stocks, irrespective of the marketplace(s) maintained by the Participant Organizations on which the relevant trading may occur in violation of the Common Insider Trading Rules (''Regulatory Responsibilities'').

3. *Certification of Insider Trading Rules.*

a. *Initial Certification.* By signing this Agreement, the Participating Organizations, other than FINRA, hereby certify to FINRA that their respective lists of Common Insider Trading Rules contained in Exhibit A hereto are correct, and FINRA hereby confirms that such rules are Common Insider Trading Rules as defined in this Agreement.

b. *Yearly Certification.* Each year following the commencement of operation of this Agreement, or more frequently if required by changes in the rules of the Participating Organizations, each Participating Organization shall submit a certified and updated list of Common Insider Trading Rules to

* CBOE's allocation of certain regulatory responsibilities to FINRA under this Agreement is limited to the activities of the CBOE Stock Exchange, LLC, a facility of CBOE.

FINRA for review, which shall (i) add Participating Organization rules not included in the then-current list of Common Insider Trading Rules that qualify as Common Insider Trading Rules as defined in this Agreement; (ii) delete Participating Organization rules included in the current list of Common Insider Trading Rules that no longer qualify as Common Insider Trading Rules as defined in this Agreement; and (iii) confirm that the remaining rules on the current list of Common Insider Trading Rules continue to be Participating Organization rules that qualify as Common Insider Trading Rules as defined in this Agreement. FINRA shall review each Participating Organization's annual certification and confirm whether FINRA agrees with the submitted certified and updated list of Common Insider Trading Rules by each of the Participating Organizations.

4. *No Retention of Regulatory Responsibility.* The Participating Organizations do not contemplate the retention of any responsibilities with respect to the regulatory activities being assumed by FINRA under the terms of this Agreement.

5. *Dually Listed Stocks.* Stocks that are listed on more than one Participating Organization shall be designated as an NYSE Listed Stock, a NASDAQ Listed Stock, an NYSE Arca Listed Stock or an NYSE Amex Listed Stock based on the applicable transaction reporting plan for the equity security as set forth in paragraph 1.b. of Exhibit B.

6. *Fees.* FINRA shall charge Participating Organizations for performing the Regulatory Responsibilities, as set forth in the Schedule of Fees, attached as Exhibit B.

7. *Applicability of Certain Laws, Rules, Regulations or Orders.* Notwithstanding any provision hereof, this Agreement shall be subject to any statute, or any rule or order of the SEC. To the extent such statute, rule, or order is inconsistent with one or more provisions of this Agreement, the statute, rule, or order shall supersede the provision(s) hereof to the extent necessary to be properly effectuated and the provision(s) hereof in that respect shall be null and void.

8. *Exchange Committee; Reports.*

a. *Exchange Committee.* The Participating Organizations shall form a committee (the ''Exchange Committee''), which shall act on behalf of all of Participating Organizations in receiving copies of the reports described below and in reviewing issues that arise under this Agreement. Each Participating Organization shall appoint a representative to the Exchange Committee. The Exchange Committee representatives shall report to their respective executive management bodies regarding status or issues under this Agreement. The Participating Organizations agree that the Exchange Committee will meet regularly up to four (4) times a year, with no more than one meeting per calendar quarter. At these meetings, the Exchange Committee will discuss the conduct of the Regulatory Responsibilities and identify issues or concerns with respect to this Agreement, including matters related to the calculation of the cost formula and accuracy of fees charged and provision of information related to the same. The SEC shall be permitted to attend the meetings as an observer.

b. *Reports.* FINRA shall provide the reports set forth in Exhibit C hereto and any additional reports related to this Agreement reasonably requested by a majority vote of all representatives to the Exchange Committee at each Exchange Committee meeting, or more often as the Participating Organizations deem appropriate, but no more often than once every quarterly billing period.

9. *Customer Complaints.* If a Participating Organization receives a copy of a customer complaint relating to Insider Trading or other activity or conduct that is within FINRA's Regulatory Responsibilities as set forth in this Agreement, the Participating Organization shall promptly forward to FINRA, as applicable, a copy of such customer complaint.

10. *Parties to Make Personnel Available as Witnesses.* Each Participating Organization shall make its personnel available to FINRA to serve as testimonial or non-testimonial witnesses as necessary to assist FINRA in fulfilling the Regulatory Responsibilities allocated under this Agreement. FINRA shall provide reasonable advance notice when practicable and shall work with a Participating Organization to accommodate reasonable scheduling conflicts within the context and demands as the entity with ultimate regulatory responsibility. The Participating Organization shall pay all reasonable travel and other expenses incurred by its employees to the extent that FINRA requires such employees to serve as witnesses, and provide information or other assistance pursuant to this Agreement.

11. *Market Data; Sharing of Work-Papers, Data and Related Information.*

a. *Market Data.* FINRA shall obtain raw market data necessary to the performance of regulation under this Agreement from (a) the Consolidated Tape Association (''CTA'') as the exclusive securities information processor (''SIP'') for all NYSE Listed Stocks, NYSE Amex Listed Stocks, NYSE Arca Listed Stocks, *BATS Listed Stocks* and CHX Solely Listed Stocks and (b) the NASDAQ Unlisted Trading Privileges Plan as the exclusive SIP for all NASDAQ Listed Stocks.

b. *Sharing.* A Participating Organization shall make available to FINRA information necessary to assist FINRA in fulfilling the Regulatory Responsibilities assumed under the terms of this Agreement. Such information shall include any information collected by a Participating Organization in the course of performing its regulatory obligations under the Act, including information relating to an on-going disciplinary investigation or action against a member, the amount of a fine imposed on a member, financial information, or information regarding proprietary trading systems gained in the course of examining a member (''Regulatory Information''). This Regulatory Information shall be used by FINRA solely for the purposes of fulfilling its Regulatory Responsibilities.

c. *No Waiver of Privilege.* The sharing of documents or information between the parties pursuant to this Agreement shall not be deemed a waiver as against third parties of regulatory or other privileges relating to the discovery of documents or information.

d. *Intellectual Property.*

(i) *Existing Intellectual Property.* FINRA is and will remain the owner of all right, title and interest in and to the proprietary Intellectual Property it employs in the provision of regulation hereunder (including the SONAR and Stock Watch systems), and any derivative works thereof. To the extent certain elements of FINRA's systems, or portions thereof, may be licensed or leased from third parties, all such third party elements shall remain the property of such third parties, as applicable. Likewise, any other Participating Organization is and will remain the owner of all right, title and interest in and to its own existing proprietary Intellectual Property.

(ii) *Enhancements to Existing Intellectual Property or New Developments.* In the event FINRA (a) makes any changes, modifications or enhancements to its Intellectual Property for any reason, or (b) creates any newly developed Intellectual Property for any reason, including as a result of requested enhancements or new development by the Exchange Committee (collectively, the ''New IP''), the Participating Organizations acknowledge and agree that FINRA shall

be deemed the owner of the New IP created by it (and any derivative works thereof), and shall retain all right, title and interest therein and thereto, and each other Participating Organization hereby irrevocably assigns, transfers and conveys to FINRA without further consideration all of its right, title and interest in or to all such New IP (and any derivative works thereof).

(iii) *Fees for New IP.* FINRA will not charge the Participating Organizations any fees for any New IP created and used by FINRA; provided, however, that FINRA will be permitted to charge fees for software maintenance work performed on systems used in the discharge of its duties hereunder.

12. *Special or Cause Examinations.* Nothing in this Agreement shall restrict or in any way encumber the right of a party to conduct special or cause examinations of Common FINRA Members as any party, in its sole discretion, shall deem appropriate or necessary.

13. *Dispute Resolution Under this Agreement.*

a. *Negotiation.* The parties to this Agreement will attempt to resolve any disputes through good faith negotiation and discussion, escalating such discussion up through the appropriate management levels until reaching the executive management level. In the event a dispute cannot be settled through these means, the parties shall refer the dispute to binding arbitration.

b. *Binding Arbitration.* All claims, disputes, controversies, and other matters in question between the parties to this Agreement arising out of or relating to this Agreement or the breach thereof that cannot be resolved by the parties will be resolved through binding arbitration. Unless otherwise agreed by the parties, a dispute submitted to binding arbitration pursuant to this paragraph shall be resolved using the following procedures:

(i) The arbitration shall be conducted in the city of New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof; and

(ii) There shall be three arbitrators, and the chairperson of the arbitration panel shall be an attorney.

14. *Limitation of Liability.* As between the Participating Organizations, no Participating Organization, including its respective directors, governors, officers, employees and agents, will be liable to any other Participating Organization, or its directors, governors, officers, employees and agents, for any liability, loss or damage resulting from any delays, inaccuracies, errors or omissions with respect to its performing or failing to perform regulatory responsibilities, obligations, or functions, except (a) as otherwise provided for under the Act, (b) in instances of a Participating Organization's gross negligence, willful misconduct or reckless disregard with respect to another Participating Organization, (c) in instances of a breach of confidentiality obligations owed to another Participating Organization, or (d) in the case of any Participating Organization paying fees hereunder, for any payments due. The Participating Organizations understand and agree that the Regulatory Responsibilities are being performed on a good faith and best effort basis and no warranties, express or implied, are made by any Participating Organization to any other Participating Organization with respect to any of the responsibilities to be performed hereunder. This paragraph is not intended to create liability of any Participating Organization to any third party.

15. *SEC Approval.*

a. The parties agree to file promptly this Agreement with the SEC for its review and approval. FINRA shall file this Agreement on behalf, and with the explicit consent, of all Participating Organizations.

b. If approved by the SEC, the Participating Organizations will notify their members of the general terms of this Agreement and of its impact on their members.

16. *Subsequent Parties; Limited Relationship.* This Agreement shall inure to the benefit of and shall be binding upon the Participating Organizations hereto and their respective legal representatives, successors, and assigns. Nothing in this Agreement, expressed or implied, is intended or shall: (a) Confer on any person other than the Participating Organizations hereto, or their respective legal representatives, successors, and assigns, any rights, remedies, obligations or liabilities under or by reason of this Agreement, (b) constitute the Participating Organizations hereto partners or participants in a joint venture, or (c) appoint one Participating Organization the agent of the other.

17. *Assignment.* No Participating Organization may assign this Agreement without the prior written consent of all the other Participating Organizations, which consent shall not be unreasonably withheld, conditioned or delayed; provided, however, that any Participating Organization may assign this Agreement to a corporation controlling, controlled by or under common control with the Participating Organization without the prior written consent of any other party.

18. *Severability.* Any term or provision of this Agreement that is invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining terms and provisions of this Agreement or affecting the validity or enforceability of any of the terms or provisions of this Agreement in any other jurisdiction.

19. *Termination.*

a. Any Participating Organization may cancel its participation in this Agreement at any time, provided that it has given 180 days written notice to the other Participating Organizations (or in the case of a change of control in ownership of a Participating Organization, such other notice time period as that Participating Organization may choose), and provided that such termination has been approved by the SEC. The cancellation of its participation in this Agreement by any Participating Organization shall not terminate this Agreement as to the remaining Participating Organizations.

b. The Regulatory Responsibilities assumed under this Agreement by FINRA may be terminated by FINRA against any Participating Organization as follows. The Participating Organization will have thirty (30) days from receipt to satisfy the invoice. If the Participating Organization fails to satisfy the invoice within thirty (30) days of receipt (''Default''), FINRA will notify the Participating Organization of the Default. The Participating Organization will have thirty (30) days from receipt of the Default notice to satisfy the invoice.

c. FINRA will have the right to terminate the Regulatory Responsibilities assumed under this Agreement if a Participating Organization has Defaulted in its obligation to pay the invoice on more than three (3) occasions in any rolling twenty-four (24) month period.

20. *Intermarket Surveillance Group (''ISG'').* In order to participate in this Agreement, all Participating Organizations to this Agreement must be members of the ISG.

21. *General.* The Participating Organizations agree to perform all acts and execute all supplementary instruments or documents that may be reasonably necessary or desirable to carry out the provisions of this Agreement.

22. *Liaison and Notices.* All questions regarding the implementation of this Agreement shall be directed to the

persons identified below, as applicable. All notices and other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given upon (i) actual receipt by the notified party or (ii) constructive receipt (as of the date marked on the return receipt) if sent by certified or registered mail, return receipt requested, to the following addresses:

* * * * *

23. *Confidentiality.* The parties agree that documents or information shared shall be held in confidence, and used only for the purposes of carrying out their respective regulatory obligations under this Agreement. No party shall assert regulatory or other privileges as against the other with respect to Regulatory Information that is required to be shared pursuant to this Agreement, as defined by paragraph 11, above.

24. *Regulatory Responsibility.* Pursuant to Section 17(d)(1)(A) of the Act, and Rule 17d–2 thereunder, the Participating Organizations jointly and severally request the SEC, upon its approval of this Agreement, to relieve the Participating Organizations, jointly and severally, of any and all responsibilities with respect to the matters allocated to FINRA pursuant to this Agreement for purposes of §§ 17(d) and 19(g) of the Act.

25. *Governing Law.* This Agreement shall be deemed to have been made in the State of New York, and shall be construed and enforced in accordance with the law of the State of New York, without reference to principles of conflicts of laws thereof. Each of the parties hereby consents to submit to the jurisdiction of the courts of the State of New York in connection with any action or proceeding relating to this Agreement.

26. *Survival of Provisions.* Provisions intended by their terms or context to survive and continue notwithstanding delivery of the regulatory services by FINRA, the payment of the Fees by the Participating Organizations, and any expiration of this Agreement shall survive and continue.

27. *Amendment.*

a. This Agreement may be amended to add a new Participating Organization, provided that such Participating Organization does not assume regulatory responsibility, solely by an amendment executed by FINRA and such new Participating Organization. All other Participating Organizations expressly consent to allow FINRA to add new Participating Organizations to this Agreement as provided above. FINRA will promptly notify all Participating Organizations of any such amendments to add a new Participating Organization.

b. All other amendments must be approved by each Participating Organization. All amendments, including adding a new Participating Organization, must be filed with and approved by the SEC before they become effective.

28. *Effective Date.* The Effective Date of this Agreement will be the date the SEC declares this Agreement to be effective pursuant to authority conferred by § 17(d) of the Act, and SEC Rule 17d–2 thereunder.

29. *Counterparts.* This Agreement may be executed in any number of counterparts, including facsimile, each of which will be deemed an original, but all of which taken together shall constitute one single agreement between the parties.

* * * * *

Exhibit A: Common Insider Trading Rules

1. Securities Exchange Act of 1934 Section 10(b), and rules and regulations promulgated there under in connection with insider trading, including SEC Rule 10b–5 (as it pertains to insider trading), which states that:

Rule 10b–5—Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

a. To employ any device, scheme, or artifice to defraud,

b. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

c. To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

2. Securities Exchange Act of 1934 Section 17(a), and rules and regulations promulgated there under in connection with insider trading, including SEC Rule 17a–3 (as it pertains to insider trading).

3. The following SRO Rules as they pertain to violations of insider trading:

FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade)

FINRA Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices)

FINRA NASD Rule 3010 (Supervision)

FINRA NASD Rule 3110(a) and (c) (Books and Records; Financial Condition)

[NYSE Rule 401(a) (Business Conduct)]

[NYSE Rule 476(a) (Disciplinary Proceedings Involving Charges Against Members, Member Organizations, Allied Members, Approved Persons, Employees, or Others)]

[NYSE Rule 440 (Books and Records)]

NYSE Rule 342 (Offices—Approval, Supervision and Control)

NYSE Rule 440 (Books and Records)

NYSE Rule 476(a) (Disciplinary Proceedings Involving Charges Against Members, Member Organizations, Principal Executives, Approved Persons, Employees, or Others)

NYSE Rule 2010 (Standards of Commercial Honor and Principles of Trade)

NYSE Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices)

NYSE Amex Equities Rule 342 (Offices—Approval, Supervision and Control)

NYSE Amex Equities Rule 440 (Books and Records)

NYSE Amex Equities Rule 476(a) (Disciplinary Proceedings Involving Charges Against Members, Member Organizations, Principal Executives, Approved Persons, Employees, or Others)

NYSE Amex Equities Rule 2010 (Standards of Commercial Honor and Principles of Trade)

NYSE Amex Equities Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices)

[NYSE Amex Cons. Art. II Sec. 3 Confidential Information]

[NYSE Amex Cons. Art. V Sec. 4 Suspension or Expulsion (b), (h), (i), (j) and (r)]

[NYSE Amex Cons. Art. XI Sec. 4 Controlled Corporations and Associations—Responsibility for Corporate Subsidiary; Duty to Produce Books]

[NYSE Amex Rule 3 General Prohibitions and Duty to Report (d), (h) (j) and (l)]

[NYSE Amex Rule 3 AEMI General Prohibitions and Duty to Report (d) and (h)]

[NYSE Amex Rule 16 Business Conduct]

[NYSE Amex Rule 320 Offices—Approval, Supervision and Control]

[NYSE Amex Rule 324 Books and Records]

NASDAQ OMX Rule 2110 (Standards of Commercial Honor and Principles of Trade)

NASDAQ OMX Rule 2120 (Use of Manipulative, Deceptive or Other Fraudulent Devices)
NASDAQ OMX Rule 3010 (Supervision)
NASDAQ OMX Rule 3110 (a) and (c) (Books and Records; Financial Condition)
CHX Article 8, Rule 3 (Fraudulent Acts)
CHX Article 9, Rule 2 (Just & Equitable Trade Principles)
CHX Article 11, Rule 2 (Maintenance of Books and Records)
CHX Article 6, Rule 5 (Supervision of Registered Persons and Branch and Resident Offices)
CBOE Rule 4.1 (Practices inconsistent with just and equitable principles)
CBOE Rule 4.2 (adherence to law)
CBOE Rule 4.7 (Manipulation)
CBOE Rule 4.18 (Prevention of the misuse of material non public information)
NASDAQ OMX PHLX Rule 707 (Conduct Inconsistent with Just and Equitable Principles of Trade)
NASDAQ OMX PHLX Rule 748 (Supervision)
NASDAQ OMX PHLX Rule 760 (Maintenance, Retention and Furnishing of Books, Records and Other Information)
NASDAQ OMX PHLX Rule 761 (Supervisory Procedures Relating to ITSFEA and to Prevention of Misuse or Material Nonpublic Information)
NASDAQ OMX PHLX Rule 782 (Manipulative Operations)
NYSE Arca Equities Rule 2.24 (ETP Books and Records)
NYSE Arca *Equities* Rule 6.3 (Prevention of the Misuse of Material, Nonpublic Information)
NYSE Arca *Equities* Rule 6.2(b) *(*Prohibited Acts (J&E)*)*
NYSE Arca *Equities* Rule 6.1 *(*Adherence to Law*)*
NYSE Arca *Equities* Rule 6.18 *(*Supervision*)*
NYSE Arca *Equities* Rule 9.1(c) *(*Office Supervision*)*
NYSE Arca *Equities* Rule 9.2(b) *(*Account Supervision*)*
NYSE Arca *Equities* Rule 9.2(c) *(*Customer Records*)*
NYSE Arca Equities Rule 2010 (Standards of Commercial Honor and Principles of Trade)
NYSE Arca Equities Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices)
[NYSE Arca Rule 9.17 Books and Records]
NSX Rule 3.1 *(*Business Conduct of ETP Holders*)*
NSX Rule 3.2 *(*Violations Prohibited*)*
NSX Rule 3.3 *(*Use of Fraudulent Devices*)*
NSX Rule 4.1 *(*Requirements*)*
NSX Rule 5.1 *(*Written Procedures*)*
NSX Rule 5.3 *(*Records*)*
NSX Rule 5.5 *(*Chinese Wall Procedures*)*
NASDAQ OMX BX Rule 2110 (Standards of Commercial Honor and Principles of Trade)
NASDAQ OMX BX Rule 2120 (Use of Manipulative, Deceptive or Other Fraudulent Devices)
NASDAQ OMX BX Rule 3010 (Supervision)
NASDAQ OMX BX Rule 3110 (a) and (c) (Books and Records; Financial Condition)
BATS Rule 3.1 *(*Business Conduct of Members*)*
BATS Rule 3.2 *(*Violations Prohibited*)*
BATS Rule 3.3 *(*Use of Fraudulent Devices*)*
BATS Rule 4.1 *(*Requirements*)*
BATS Rule 5.1 *(*Written Procedures*)*
BATS Rule 5.3 *(*Records*)*
BATS Rule 5.5 *(*Prevention of the Misuse of Material, Non-Public Information*)*
BATS Rule 12.4 *(*Manipulative Transactions*)*
BYX Rule 3.1 *(*Business Conduct of ETP Holders*)*
BYX Rule 3.2 *(*Violations Prohibited*)*
BYX Rule 3.3 *(*Use of Fraudulent Devices*)*
BYX Rule 4.1 *(*Requirements*)*
BYX Rule 5.1 *(*Written Procedures*)*
BYX Rule 5.3 *(*Records*)*
BYX Rule 5.5 *(*Prevention of the Misuse of Material, Non-Public Information*)*
BYX Rule 12.4 *(*Manipulative Transactions*)*
EDGA 3.1 *(*Business Conduct of Members*)*
EDGA 3.2 *(*Violations Prohibited*)*
EDGA 3.3 *(*Use of Fraudulent Devices*)*
EDGA 4.1 *(*Requirements*)*
EDGA 5.1 *(*Written Procedures*)*
EDGA 5.3 *(*Records*)*
EDGA 5.5 *(*Prevention of *M*[m]isuse of *M*[m]aterial, *N*[n]onpublic *I*[i]nformation*)*
EDGA 12.4 *(*Manipulative Transactions*)*
EDGX 3.1 *(*Business Conduct of Members*)*
EDGX 3.2 *(*Violations Prohibited*)*
EDGX 3.3 *(*Use of Fraudulent Devices*)*
EDGX 4.1 *(*Requirements*)*
EDGX 5.1 *(*Written Procedures*)*
EDGX 5.3 *(*Records*)*
EDGX 5.5 *(*Prevention of *M*[m]isuse of *M*[m]aterial, *N*[n]onpublic *I*[i]nformation*)*
EDGX 12.4 *(*Manipulative Transactions*)*

Exhibit B: Fee Schedule

1. *Fees.* FINRA shall charge each Participating Organization a Quarterly Fee in arrears for the performance of FINRA's Regulatory Responsibilities under the Plan (each, a ''Quarterly Fee,'' and together, the ''Fees'').

a. *Quarterly Fees.*

(1) Quarterly Fees for each Participating Organization will be charged by FINRA according to the Participating Organization's ''Percentage of Publicly Reported Trades'' occurring over three-month billing periods. The ''Percentage of Publicly Reported Trades'' shall equal a Participating Organization's number of reported Listed Stock trades during the relevant period (the ''Numerator''), divided by the total number of all Listed Stock trades for the same period (the ''Denominator''). For purposes of clarification, ADF and Trade Reporting Facility (''TRF'') activity will be included in the Denominator. Additionally, with regard to TRFs, TRF trade volume will be charged to FINRA. Consequently, for purposes of calculating the Quarterly Fees, the volume for each Participant Organization's TRF will be calculated separately (that is, TRF volume will be broken out from the Participating Organization's overall Percentage of Publicly Reported Trades) and the fees for such will be billed to FINRA in accordance with paragraph 1a.(2), rather than to the applicable Participating Organization.

(2) The Quarterly Fees shall be determined by FINRA in the following manner for each Participating Organization:

(a) Less than 1.0%: If the Participating Organization's Percentage of Publicly Reported Trades for the relevant three-month billing period is less than 1.0%, the Quarterly Fee shall be $6,250, per quarter (''Static Fee'');

(b) Less than 2.0% but No Less than 1.0%: If the Participating Organization's Percentage of Publicly Reported Trades for the relevant three-month billing period is less than 2.0% but no less than 1.0%, the Quarterly Fee shall be $18,750, per quarter (''Static Fee'');

(c) 2.0% or Greater: If the Participating Organization's Percentage of Publicly Reported Trades for the relevant three-month billing period is 2.0% or greater, the Quarterly Fee shall be the amount equal to the Participating Organization's Percentage of Publicly Reported Trades multiplied by FINRA's total charge (''Total Charge'') for its performance of Regulatory Responsibilities for the relevant three-month billing period.

(3) Increases in Static Fees. FINRA will re-evaluate the Quarterly Fees on an annual basis during the annual budget process outlined in paragraph 1.c. below. During each annual re-evaluation, FINRA will have the discretion to increase the Static Fees by a percentage no greater than the percentage increase in the Final Budget

over the preceding year's Final Budget. Any changes to the Static Fees shall not require an amendment to this Agreement, but rather shall be memorialized through the budget process.

(4) Increases in Total Charges. Any change in the Total Charges (whether a Final Budget increase or any mid year change) shall not require an amendment to this Agreement, but rather shall be memorialized through the budget process.

b. *Source of Data.* For purposes of calculation of the Percentage of Publicly Reported Trades for each Participating Organization, FINRA shall use (a) the Consolidated Tape Association (''CTA'') as the exclusive securities information processor (''SIP'') for all NYSE Listed Stocks, NYSE Amex Listed Stocks, NYSE Arca Listed Stocks, *BATS Listed Stocks* and CHX Solely Listed Stocks, and (b) the Unlisted Trading Privileges Plan as the exclusive SIP for NASDAQ Listed Stocks.

c. *Annual Budget Forecast.* FINRA will notify the Participating Organizations of the forecasted costs of its insider trading program for the following calendar year by close of business on October 15 of the then-current year (the ''Forecasted Budget''). FINRA shall use best efforts to provide as accurate a forecast as possible. FINRA shall then provide a final submission of the costs following approval of such costs by its Board of Governors (the ''Final Budget''). Subject to paragraph 1d. below, in the event of a difference between the Forecasted Budget and the Final Budget, the Final Budget will govern.

d. *Increases in Fees over Five Percent.*

(1) In the event that any proposed increase to Fees by FINRA for a given calendar year (which increase may arise either during the annual budgetary forecasting process or through any mid-year increase) will result in a cumulative increase in such calendar year's Fees of more than five percent (5%) above the preceding calendar year's Final Budget (a ''Major Increase''), then senior management of any Participating Organization (a) that is a Listing Market or (b) for which the Percentage of Publicly Reported Trades is then currently twenty percent (20%) or greater, shall have the right to call a meeting with the senior management of FINRA in order to discuss any disagreement over such proposed Major Increase. By way of example, if FINRA provides a Final Budget for 2011 that represents an 4% increase above the Final Budget for 2010, the terms of this paragraph 1.d.(1) shall not apply; if, however, in April of 2011, FINRA notifies the Exchange Committee of an increase in Fees that represents an additional 3% increase above the Final Budget for 2010, then the increase shall be deemed a Major Increase, and the terms of this paragraph 1.d.(1) shall become applicable (i.e., 4% and 3% represents a cumulative increase of 7% above the 2010 Final Budget).

(2) In the event that senior management members of the involved parties are unable to reach an agreement regarding the proposed Major Increase, then the matter shall be referred back to the Exchange Committee for final resolution. Prior to the matter being referred back to the Exchange Committee, nothing shall prohibit the parties from conferring with the SEC. Resolution shall be reached through a vote of no fewer than all Participating Organizations seated on the Exchange Committee, and a simple majority shall be required in order to reject the proposed Major Increase.

e. *Time Tracking.* FINRA shall track the time spent by staff on insider trading responsibilities under this Agreement; however, time tracking will not be used to allocate costs.

2. *Invoicing and Payment.* FINRA shall invoice each Participating Organization for the Quarterly Fee associated with the regulatory activities performed pursuant to this Agreement during the previous three-month billing period within forty five (45) days of the end of such previous 3-month billing period. A Participating Organization shall have thirty (30) days from date of invoice to make payment to FINRA on such invoice. The invoice will reflect the Participating Organization's Percentage of Publicly Reported Trades for that billing period.

3. *Disputed Invoices; Interest.* In the event that a Participating Organization disputes an invoice or a portion of an invoice, the Participating Organization shall notify FINRA in writing of the disputed item(s) within fifteen (15) days of receipt of the invoice. In its notification to FINRA of the disputed invoice, the Participating Organization shall identify the disputed item(s) and provide a brief explanation of why the Participating Organization disputes the charges. FINRA may charge a Participating Organization interest on any undisputed invoice or the undisputed portions of a disputed invoice that a Participating Organization fails to pay within thirty (30) days of its receipt of such invoice. Such interest shall be assessed monthly. Interest will mean one and one half percent per month, or the maximum allowable under applicable law, whichever is less.

4. *Taxes.* In the event any governmental authority deems the regulatory activities allocated to FINRA to be taxable activities similar to the provision of services in a commercial context, the other Participating Organizations agree that they shall bear full responsibility, on a joint and several basis, for the payment of any such taxes levied on FINRA, or, if such taxes are paid by FINRA directly to the governmental authority, the other Participating Organizations agree that they shall reimburse FINRA for the amount of any such taxes paid.

5. *Audit Right; Record Keeping.*

a. *Audit Right.*

(i) Once every rolling twelve (12) month period, FINRA shall permit no more than one audit (to be performed by one or more Participating Organizations) of the Fees charged by FINRA to the Participating Organizations hereunder and a detailed cost analysis supporting such Fees (the ''Audit''). The Participating Organization or Organizations that conduct this Audit will select a nationally-recognized independent auditing firm (or may use its regular independent auditor, providing it is a nationally-recognized auditing firm) (''Auditing Firm'') to act on its, or their behalf, and will provide reasonable notice to other Participating Organizations of the Audit. FINRA will permit the Auditing Firm reasonable access during FINRA's normal business hours, with reasonable advance notice, to such financial records and supporting documentation as are necessary to permit review of the accuracy of the calculation of the Fees charged to the Participating Organizations. The Participating Organization, or Organizations, as applicable, other than FINRA, shall be responsible for the costs of performing any such audit.

(ii) If, through an Audit, the Exchange Committee determines that FINRA has inaccurately calculated the Fees for any Participating Organization, the Exchange Committee will promptly notify FINRA in writing of the amount of such difference in the Fees, and, if applicable, FINRA shall issue a reimbursement of the overage amount to the relevant Participating Organization(s), less any amount owed by the Participating Organization under any outstanding, undisputed invoice(s). If such an Audit reveals that any Participating Organization paid less than what was required pursuant to the Agreement, then that Participating Organization shall promptly pay FINRA the difference between what the Participating Organization owed pursuant to the Agreement and what that Participating Organization

originally paid FINRA. If FINRA disputes the results of an Audit regarding the accuracy of the Fees, it will submit the dispute for resolution pursuant to the dispute resolution procedures in paragraph 13 of the Agreement.

(iii) In the event that through the review of any supporting documentation provided during the Audit, any one or more Participating Organizations desire to discuss with FINRA the supporting documentation and any questions arising therefrom with regard to the manner in which regulation was conducted, the Participating Organization(s) shall call a meeting with FINRA. FINRA shall in turn notify the Exchange Committee of this meeting in advance, and all Participating Organizations shall be welcome to attend (the ''Fee Analysis Meeting''). The parties to this Agreement acknowledge and agree that while FINRA commits to discuss the supporting documentation at the Fee Analysis Meeting, FINRA shall not be subject, by virtue of the above Audit rights or any discussions during the Fee Analysis Meeting or otherwise, to any limitation whatsoever, other than the Increase in Fee provisions set forth in paragraph 1.d. of this Exhibit, on its discretion as to the manner and means by which it conducts its regulatory efforts in its role as the SRO primarily liable for regulatory decisions under this Agreement. To that end, no disagreement among the Participating Organizations as to the manner or means by which FINRA conducts its regulatory efforts hereunder shall be subject to the dispute resolution procedures hereunder, and no Participating Organization shall have the right to compel FINRA to alter the manner or means by which it conducts its regulatory efforts. Further, a Participating Organization shall not have the right to compel a rebate or reassessment of fees for services rendered, on the basis that the Participating Organization would have conducted regulatory efforts in a different manner than FINRA in its professional judgment chose to conduct its regulatory efforts.

b. *Record Keeping.* In anticipation of any audit that may be performed by the Exchange Committee under paragraph 5.a. above, FINRA shall keep accurate financial records and documentation relating to the Fees charged by it under this Agreement.

Exhibit C: Reports

FINRA shall provide the following information in reports to the Exchange Committee, which information covers activity occurring under this Agreement:

1. *Alert Summary Statistics:* Total number of surveillance system alerts generated by quarter along with associated number of reviews and investigations. In addition, this paragraph shall also reflect the number of reviews and investigations originated from a source other than an alert. A separate table would be presented for NYSE Listed Stock, NYSE Amex Listed Stock, NYSE Arca Listed Stock, NASDAQ Listed Stock, *BATS Listed Stock* and CHX Solely Listed Stock trading activity.

2008	Surveillance alerts	Investigations
1st Quarter		
2nd Quarter		
3rd Quarter		
4th Quarter		
2008 Total		

2. *Aging of Open Matters:* Would reflect the aging for all currently open matters for the quarterly period being reported. A separate table would be presented for NYSE Listed Stock, NYSE Amex Listed Stock, NYSE Arca Listed Stock, NASDAQ Listed Stock, *BATS Listed Stock* and CHX Solely Listed Stock trading activity.

Example:

	Surveillance alerts	Investigations
0–6 months		
6–9 months		
9–12 months		
12+ months		
Total		

3. *Timeliness of Completed Matters:* Would reflect the total age of those matters that were completed or closed during the quarterly period being reported. FINRA will provide total referrals to the SEC.

Example:

	Surveillance Alerts	Investigations
0–6 months		
6–9 months		
9–12 months		
12+ months		
Total		

4. *Disposition of Closed Matters:* Would reflect the disposition of those matters that were completed or closed during the quarterly period being reported. A separate table would be presented for NYSE Listed Stock, NYSE Amex Listed Stock, NYSE Arca Listed Stock, NASDAQ Listed Stock, *BATS Listed Stock* and CHX Solely Listed Stock trading activity.

Example:

	Surveillance YTD	Investigations YTD
No Further Review		
Letter of Caution/Admonition/Fine		
Referred to Legal/Enforcement		
Referred to SEC/SRO		
Merged		
Other		
Total		

5. *Pending Reviews.* In addition to the above reports, the Chief Regulatory Officer (CRO) (or his or her designee) of any Participating Organization that is also a Listing Market (including CHX) may inquire about pending reviews involving stocks listed on that Participating Organization's market. FINRA will respond to such inquiries from a CRO; provided, however, that (a) the CRO must hold any information provided by FINRA in confidence and (b) FINRA will not be compelled to provide information in contradiction of any mandate, directive or order from the SEC, US Attorney's Office, the Office of any State Attorney General or court of competent jurisdiction.

* * * * *

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number 4–566 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–566. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan that are filed with the Commission, and all written communications relating to the proposed plan between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the plan also will be available for inspection and copying at the principal offices of BATS, BYX, CBOE, CHX, EDGA, EDGX, FINRA, NASDAQ OMX BX, NASDAQ OMX Phlx, NASDAQ, NSX, NYSE, NYSE Amex, and NYSE Arca. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4–566 and should be submitted on or before January 12, 2012.

V. Discussion

The Commission finds that the Plan, as proposed to be amended, is consistent with the factors set forth in Section 17(d) of the Act [15] and Rule 17d–2 [16] thereunder in that it is necessary or appropriate in the public interest and for the protection of investors, fosters cooperation and coordination among SROs, and removes impediments to and fosters the development of the national market system. The Commission continues to believe that the Plan, as amended, should reduce unnecessary regulatory duplication by allocating regulatory responsibility for the surveillance, investigation, and enforcement of Common Rules to FINRA. Accordingly, the proposed amendment to the Plan promotes efficiency by consolidating these regulatory functions in a single SRO. Under paragraph (c) of Rule 17d–2, the Commission may, after appropriate notice and comment, declare a plan, or any part of a plan, effective. In this instance, the Commission believes that appropriate notice and comment can take place after the proposed amendment is effective. The purpose of the amendment is to amend the Plan to reflect that BATS has adopted rules for the qualification, listing, and delisting of companies on BATS. Accordingly, the amendment expands the coverage of Listed Stocks to include an equity security that is listed on BATS. The Commission believes that the amended Plan should become effective without undue delay in order to reflect the expanded coverage to BATS-listed securities.

In addition, the Commission notes that the prior version of this Plan was published for comment, and the Commission did not receive any comments thereon.[17] Finally, the Commission does not believe that the amendment to the Plan raises any new regulatory issues that the Commission has not previously considered.

VI. Conclusion

This order gives effect to the amended Plan submitted to the Commission that is contained in File No. 4–566.

It is therefore ordered, pursuant to Section 17(d) of the Act,[18] that the Plan, as amended, is hereby approved and declared effective.

It is further ordered that the Participating Organizations are relieved of those regulatory responsibilities allocated to FINRA under the amended Plan to the extent of such allocation.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32753 Filed 12–21–11; 8:45 am]

BILLING CODE 8011–01–P

[15] 15 U.S.C. 78q(d).

[16] 17 CFR 240.17d–2

[17] *See supra* note 11.

[18] 15 U.S.C. 78q(d).

[19] 17 CFR 200.30–3(a)(34)

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65968; File No. SR–ISE–2011–83]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Penny Pilot Program

December 15, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 2, 2011, International Securities Exchange, LLC (the ''Exchange'' or ''ISE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend its rules relating to a pilot program to quote and to trade certain options in pennies (''Penny Pilot Program''). The text of the proposed rule change is as follows, with deletions in [brackets] and additions are *underlined:*

Rule 710. Minimum Trading Increments

(a) The Board may establish minimum trading increments for options traded on the Exchange. Such changes by the Board will be designated as a stated policy, practice, or interpretation with respect to the administration of this Rule 710 within the meaning of subparagraph (3)(A) of Section 19(b) of the Exchange Act and will be filed with the SEC as a rule change for effectiveness upon filing. Until such time as the Board makes a change in the increments, the following principles shall apply:

(1) If the options contract is trading at less than $3.00 per option, $.05; and

(2) If the options contract is trading at $3.00 per option or higher, $.10.

(b) Minimum trading increments for dealings in options contracts other than those specified in paragraph (a) may be fixed by the Exchange from time to time for options contracts of a particular series.

(c) Notwithstanding the above, the Exchange may trade in the minimum variation of the primary market in the underlying security.

Supplementary Material to Rule 710

.01 Notwithstanding any other provision of this Rule 710, the Exchange will operate

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

a pilot program, *scheduled to expire on June 30, 2012,* to permit options classes to be quoted and traded in increments as low as $.01. The Exchange will specify which options trade in such pilot, and in what increments, in Regulatory Information Circulars filed with the Commission pursuant to Rule 19b–4 under the Exchange Act and distributed to Members.

The Exchange may replace [, on a semi-annual basis,] any penny pilot issues that have been delisted with the next most actively traded multiply listed options classes that are not yet included in the penny pilot, based on trading activity in the previous six months. The replacement issues may be added to the penny pilot on the second trading day following January 1, *2012* [2011 and July 1, 2011].

.02 No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Under the Penny Pilot Program, the minimum price variation for all participating options classes, except for the Nasdaq-100 Index Tracking Stock (''QQQQ''), the SPDR S&P 500 Exchange Traded Fund (''SPY'') and the iShares Russell 2000 Index Fund (''IWM''), is $0.01 for all quotations in options series that are quoted at less than $3 per contract and $0.05 for all quotations in options series that are quoted at $3 per contract or greater. QQQQ, SPY and IWM are quoted in $0.01 increments for all options series. The Penny Pilot Program is currently scheduled to expire on December 31, 2011.[3] The Exchange proposes to extend the time period of the Penny Pilot Program through June 30, 2012, and to provide revised dates for adding replacement issues to the Penny Pilot program. The Exchange proposes that any Penny Pilot Program issues that have been delisted may be replaced on the second trading day following January 1, 2012. The replacement issues will be selected based on trading activity for the six month period beginning June 1, 2011, and ending November 30, 2011. This filing does not propose any substantive changes to the Penny Pilot Program: All classes currently participating will remain the same and all minimum increments will remain unchanged. The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

The Exchange agrees to submit reports to the Commission that will analyze the impact of the Penny Pilot Program on market quality and options systems capacity. These reports will include, but are not limited to: (1) Data and analysis on the number of quotations generated for options included in the report; (2) an assessment of the quotation spreads for the options included in the report; (3) an assessment of the impact of the Penny Pilot Program on the capacity of the ISE's automated systems; (4) data reflecting the size and depth of markets; and (5) any capacity problems or other problems that arose related to the operation of the Penny Pilot Program and how the Exchange addressed them.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Exchange Act'') for this proposed rule change is found in Section 6(b)(5), in that the proposed rule change is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the proposed rule change, which extends the Penny Pilot Program for an additional six months, will enable public customers and other market participants to express their true prices to buy and sell options for the benefit of all market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[4] and Rule 19b–4(f)(6)(iii) thereunder.[5] The Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing the proposed rule change as required by Rule 19b–4(f)(6).[6]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–ISE–2011–83 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–ISE–2011–83. This file number should be included on the subject line if email is used. To help the

[3] *See* Exchange Act Release No. 63437 (December 6, 2010), 75 FR 77032 (December 10, 2010).

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6)(iii).

[6] 17 CFR 240.19b–4(f)(6).

Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–ISE–2011–83 and should be submitted on or before January 12, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32748 Filed 12–21–11; 8:45 am]

BILLING CODE 8011–01–P

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65994; File No. SR–DTC–2011–12]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rules Relating to DTC's Deposits Service Guide

December 16, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 14, 2011, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I and II below, which items have been prepared primarily by DTC. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act and Rule 19b–4(f)(4) thereunder so that the proposed rule change was effective upon filing with the Commission.[2] The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The purpose of this proposed rule change is to update DTC's Deposits Service Guide in order to streamline the document and to mitigate certain risks associated with certain deposit processes.[3]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[4]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

DTC's deposits service allow participants to use a full range of safekeeping and processing services for various types of eligible securities. DTC is now proposing to update its Deposits Service Guide (''Deposits Guide'') in order to streamline the document and to mitigate risk associated with certain deposit processes. DTC is also proposing to make some ministerial changes regarding methods of notification, definitions, and communication inputs in order to provide a more precise version of the Deposits Guide.[5]

Specifically, DTC is proposing to make the following updates to the Deposits Guide:

(a) DTC is proposing to update the procedure associated with the use of Medallion Signature Guarantee stamps as it relates to its Branch Deposit Service in order to document the process that it takes to safeguard the use and storage of such stamps.

(b) DTC is proposing to add a section to the Deposits Guide detailing its Paperless Legal Transfer Program.[6]

(c) DTC is proposing to remove the narrative describing its custody services because such services are fully described in DTC's Custody Service Guide.[7]

(2) Statutory Basis

The proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to DTC because proposed changes to the procedures associated with DTC's deposit service should facilitate the prompt and accurate clearance and settlement of securities transactions by reducing the costs, inefficiencies, and risks associated with the physical safekeeping of securities. In so doing, the proposal should in turn also enhance the use of DTC's existing services.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited DTC. DTC will notify the Commission of any written comments received by DTC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act[8] and Rule 19b–4(f)(4)[9] thereunder because it is a change in an existing service that does not adversely affect the safeguarding of

[2] 15 U.S.C. 78s(b)(3)(A)(iii) and 17 CFR 240.19b–4(f)(4).

[3] The text of the proposed rule change is attached as Exhibit 5 to DTC's filing, which is available at *www.dtcc.com/downloads/legal/rule_filings/2011/dtc/2011-12.pdf.*

[4] The Commission has modified the text of the summaries prepared by DTC.

[5] For example, DTC detailed the PBS functions that participants have the ability to use with the deposit service and made changes to phone numbers and contact information.

[6] For more information regarding DTC's Paperless Legal Transfer Program, see Important Notices B#6931 (September 29, 2004), B#7139 (December 1, 2004), and B#9787 (June 21, 2006).

[7] The language DTC is proposing to eliminate from the Deposit Guide continues to be included in the Custody Service Guide.

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(4).

securities or funds in the custody or control of the clearing agency and does not significantly affect the respective rights or obligations of the clearing agency or persons using the service. At any time within sixty days of the filing of such rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–DTC–2011–12 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–DTC–2011–12. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings will also be available for inspection and copying at the principal office of DTC and on DTC's Web site at *http://www.dtcc.com/downloads/legal/rule_filings/2011/dtc/2011–12.pdf.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–DTC–2011–12 and should be submitted on or before January 12, 2012.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32756 Filed 12–21–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65995; File No. SR–NYSE–2011–63]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Bond Trading License and the Bond Liquidity Provider Pilot Program Until the Earlier of the Approval of the Securities and Exchange Commission to Make Such Pilot Permanent or January 19, 2013

December 16, 2011.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that December 8, 2011, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the bond trading license and the Bond Liquidity Provider pilot program, which is currently scheduled to expire on January 19, 2012, until the earlier of the approval of the Securities and Exchange Commission (''Commission'') to make such pilot permanent or January 19, 2013. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend the bond trading license and the Bond Liquidity Provider (''BLP'') pilot program, which is currently scheduled to expire on January 19, 2012, until the earlier of the Commission's approval to make such pilot permanent or January 19, 2013.

On November 23, 2010, NYSE submitted a proposed rule change to establish a twelve-month pilot program to (1) adopt new Rule 87 to create a bond trading license for member organizations that desire to trade only debt securities on the NYSE, and (2) adopt new Rule 88 to establish BLPs, a new class of debt market participants.[4] The proposed rule change was approved on January 19, 2011.[5] The purpose of pilot program is to encourage market participants to bring additional liquidity to the Exchange's bond marketplace by providing incentives for quoting and adding liquidity to the market and to offer investors an alternative to over-the-counter trading for debt securities. Under Rule 87, a member organization that chooses to trade only bonds, or a new member organization that desires to trade only bonds, may apply for a bond trading license, which is available to any approved NYSE member organization. Under Rule 88, the Exchange provides incentives for

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[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 63444 (Dec. 6, 2010), 75 FR 77024 (Dec. 10, 2011) (SR–NYSE–2010–74).

[5] *See* Securities Exchange Act Release No. 63736 (Jan. 19, 2011), 76 FR 4959 (Jan. 27, 2011) (SR–NYSE–2010–74).

quoting and adding liquidity to the bond market in the form of rebates to BLPs that provide liquidity to the Exchange's bond market. The Exchange believes that the rebates encourage the additional utilization of, and interaction with, the NYSE; improve price discovery and liquidity; and encourage competitive quotes and price improvement opportunities. These incentives encourage BLPs to make more liquid and competitive markets. In return, BLPs must meet certain qualification and quoting obligations under the Rule.

Through this filing, the Exchange seeks to extend the current operation of the pilot program until January 19, 2013. The Exchange believes that the program has added meaningful liquidity to the marketplace and improved both NYSE and overall market quality. The Exchange will continue to monitor the efficacy of the program during the proposed extended pilot period.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[6] in general, and furthers the objectives of Section 6(b)(5) of the Act,[7] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes the proposed rule change is consistent with these principles in that it seeks to extend a pilot rule that expands the number of member organizations that can trade debt securities on the NYSE and creates incentives for BLPs to provide additional liquidity to the bond market, thereby promoting competition and a free and open market. The Exchange believes that investors benefit from increased transparency, competition, and liquidity in its bond marketplace.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[8] and Rule 19b-4(f)(6) thereunder.[9] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[10] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2011–63 on the subject line.

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii).

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2011–63. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSE–2011–63 and should be submitted on or before January 12, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32817 Filed 12–21–11; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65953; File No. SR–NYSEAMEX–2011–93]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adopting the Text of Financial Industry Regulatory Authority Rule 5210, Which Prohibits the Publication of Manipulative or Deceptive Quotations or Transactions, as NYSE Amex Equities Rule 5210

December 14, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1], and Rule 19b–4 [2] thereunder, notice is hereby given that on December 7, 2011, NYSE Amex LLC (the ''Exchange'' or ''NYSE Amex'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to adopt the text of Financial Industry Regulatory Authority (''FINRA'') Rule 5210, which prohibits the publication of manipulative or deceptive quotations or transactions, as NYSE Amex Equities Rule 5210. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt the text of FINRA Rule 5210, which prohibits the publication of manipulative or deceptive quotations or transactions, as NYSE Amex Rule 5210.[3]

Background

On July 30, 2007, the National Association of Securities Dealers, Inc. (''NASD''), and NYSE Regulation, Inc. (''NYSER'') consolidated their member firm regulation operations into a combined organization, FINRA, and entered into a Regulatory Services Agreement (''RSA''), under which FINRA agreed to perform certain regulatory functions of the Exchange on behalf of the Exchange. NYSE Amex became a party to the RSA effective December 15, 2008.[4] On June 14, 2010, FINRA also assumed responsibility for performing the market surveillance and enforcement functions performed by NYSER. To facilitate FINRA's performance of these enforcement functions and further harmonize the rules of FINRA and NYSE Amex, the Exchange is proposing to adopt the text of FINRA Rule 5210.[5] FINRA Rule 5210 prohibits members from publishing or circulating, or causing to be published or circulated, any communication that purports to report any transaction as a purchase or sale of any security, unless such member believes that such transaction was a bona fide purchase or sale of such security. The Rule also prohibits members from publishing or circulating, or causing to be published or circulated, any communication that purports to quote the bid price or asked price for any security, unless the member believes that such quotation represents a bona fide bid for, or offer of, such security.

The Exchange believes that the proposed rule change will strengthen FINRA's ability to bring sanctions on behalf of the Exchange against a member organization for engaging in manipulative forms of quoting behavior, for example, quote stuffing and layering. FINRA Rule 5210 (formerly NASD Rule 3310 and IM 3310) [6] was successfully used in the Acceptance, Waiver and Consent announced in September 2010 by FINRA against Trillium Brokerage Services and other individual Respondents.[7] The Exchange believes that the proposed rule change would augment FINRA's ability on behalf of the Exchange to take action against manipulative quoting behavior on the Exchange.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[8] in general, and furthers the objectives of Section 6(b)(5),[9] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. Specifically, the Exchange believes that the proposed rule change would provide an additional basis for bringing enforcement actions against Exchange member organizations that engage in deceptive and manipulative quoting activity. To the extent the Exchange has proposed changes that differ from the FINRA version of the Rules, such changes are technical in nature and do not change the substance of the FINRA Rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

[3] *See* Securities Exchange Act Release No. 60835 (Oct. 16, 2009), 74 FR 54616 (Oct. 22, 2009) (SR–FINRA–2009–055). The Exchange's affiliates, New York Stock Exchange LLC and NYSE Arca, Inc., are proposing to adopt a substantially similar rule.

[4] *See* Securities Exchange Act Release Nos. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (order approving the RSA); 56147 (July 26, 2007), 72 FR 42166 (August 1, 2007) (SR–NASD–2007–054) (order approving the incorporation of certain NYSE Rules as ''Common Rules''); and 60409 (July 30, 2009), 74 FR 39353 (August 6, 2009) (order approving the amended and restated RSA, adding NYSE Amex LLC as a party).

[5] For consistency with Exchange rules, the Exchange proposes to change all references from ''member'' to ''member organization.''

[6] *See supra* n. 3.

[7] *See http://www.finra.org/web/groups/industry/@ip/@enf/@ad/documents/industry/p122044.pdf.*

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b-4(f)(6) thereunder.[11]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because such waiver will allow FINRA to more effectively carry out its enforcement activities on behalf of the Exchange. Therefore, the Commission designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEAMEX–2011–93 on the subject line.

Paper Comments

Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. All submissions should refer to File Number SR–NYSEAMEX–2011–93. This file number should be included on the subject line if email is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NYSEAMEX–2011–93, and should be submitted on or before January 12, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32816 Filed 12–21–11; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66001; File No. SR–ICC–2011–03]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change To Adopt ICC's Enhanced Margin Methodology

December 16, 2011.

I. Introduction

On November 4, 2011, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–ICC–2011–03 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on November 10, 2011.[3] The Commission received three comment letters regarding the proposal.[4] For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

This rule permits ICC to make certain modifications to its Risk Management Framework for clearing credit default swap (''CDS'') contracts. These modifications are collectively referred to as the ''Portfolio Decomposition Model.'' A fundamental aspect of ICC's Portfolio Decomposition Model is the recognition that CDS contracts cleared by ICC referencing broad-based securities indices are essentially compositions of specific single-name CDS contracts. Under the Portfolio Decomposition Model, ICC would, among other things, decompose CDS contracts referencing broad-based

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 34–65699 (November 7, 2011), 76 FR 70206 (November 10, 2011). In its filing with the Commission, ICC included statements concerning the purpose of and basis for the proposed rule change. The text of these statements is incorporated into the discussion of the proposed rule change in Section II below.

[4] *See* comment letter from Michael Hisler, Swaps & Derivatives Market Association, dated December 5, 2011 (''SDMA Letter'') and comment letters from John Williams, Allen & Overy LLP, on behalf of Bank of America Merrill Lynch, Barclays Capital, BNP Paribas, Citi, Credit Suisse Securities (USA), Deutsche Bank AG, JPMorgan Chase & Co., Morgan Stanley and UBS Securities LLC, dated December 1, 2011 and December 5, 2011 (''Allen & Overy Letters''). Allen & Overy LLP's December 5, 2011 letter amended its December 1, 2011 letter, with the sole change consisting of the addition of The Goldman Sachs Group, Inc., Nomura Securities International, and The Royal Bank of Scotland plc as signatories.

securities indices into single-name, index-derived positions with notional amounts corresponding to their relative weight in the index.

In connection with the decomposition of CDS contracts referencing broad-based securities indices, ICC will incorporate jump-to-default risk as a component of the risk margin associated with the clearing of CDS index products. Because ICC's prior methodology did not include jump-to-default margin requirements for CDS index products, this change will result in a better measurement of the risk associated with clearing these contracts. ICC believes that the Portfolio Decomposition Model also reflects a number of other enhancements to the ICC Risk Management Framework. Examples of these changes include: Replacing standard deviation with mean absolute deviation as a measure of spread volatility, implementing an auto-regressive process to obtain multi-horizon risk measures, expanding spread response scenarios, introducing liquidity margin requirements for CDS index products, and base concentration charges.

In addition, implementation of the Portfolio Decomposition Model will also allow ICC to provide portfolio margin treatment between index CDS contracts and offsetting single-name CDS contracts. These portfolio benefits will generally involve ICC providing margin offsets across single-name CDS contracts and index CDS contracts that are held in a clearing participant's portfolio based on correlation measurements.

To date, ICC has not offered such portfolio margin treatment strictly for operational reasons. However, ICC has informed the Commission that it will be operationally ready to offer portfolio margining with respect to its clearing participants' proprietary positions sometime in mid-December 2011. In its filing with the Commission, ICC noted that the portfolio margining treatment will only be available to ICC clearing participants' proprietary positions because ICC does not currently clear single-name CDS contracts for customer-related transactions. Accordingly, there are currently no customer-related positions in single-name CDS contracts that would qualify for portfolio margining treatment. Because the portfolio margining benefits afforded by the enhancements to the model are available to all of ICC's participants with respect to their proprietary positions, ICC believes that the proposed rule change does not unfairly discriminate with respect to similarly-situated participants.[5]

According to ICC, the enhancements effected by this proposed rule change have been reviewed and/or recommended by the ICC Risk Working Group, ICC Risk Committee, ICC Board of Managers, the Federal Reserve Bank of New York and the New York State Banking Department. In addition, ICC commissioned a third-party risk-management consultant to complete a model assessment of ICC's Portfolio Decomposition Model.

III. Comments

The Commission received three comment letters on the proposed rule change from two commenters, both of which were supportive of the changes.[6] Specifically, one commenter noted that by permitting portfolio margining to occur with respect to clearing participants' proprietary accounts, ICC's proposed Portfolio Decomposition Model would optimize more efficient risk management through netting, thereby promoting greater stability for central clearing.[7] This commenter noted that, because of the high degree of correlation between single-name CDS contracts and index CDS contracts, market participants often maintain hedged portfolios of these products, thereby increasingly the impact that these changes are likely to have throughout the market. The second commenter, which represented a group of eight large financial firms, expressed a similar view with respect to the ability of portfolio margining to bring about a more stable central clearing regime and concluded that the proposed rule change represented ''an initial positive step for the industry.'' [8]

IV. Discussion

Section 19(b)(2)(B) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[9] For example, Section 17A(b)(3)(F) of the Act [10] requires, among other things, that the rules of a clearing agency be designed to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions and to assure the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible.

If approved, the proposed rule change would allow ICC to provide portfolio margining offsets to its participants to the extent that the participants maintain proprietary portfolios that hedge index CDS products against single-name CDS products. ICC believes that these changes promote greater capital efficiency and further contribute to the development of a national system for the prompt and accurate clearance and settlement of CDS contracts. The Commission carefully reviewed the proposed changes to ICC's Risk Management Framework to ensure that those changes continue to allow ICC to adequately manage the risks associated with the clearing of both index and single-name CDS contracts. In particular, the Commission notes that the Portfolio Decomposition Model will introduce new requirements to provide additional margin to address liquidity and jump-to-default risks in connection with the clearing of index CDS products. After considering these changes, including each of the representations made by ICC in the filing, the Commission believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act, including ICC's obligation to ensure that its rules be designed to assure the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible.

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act [11] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the

[5] ICC further indicated in its rule filing that it would expect to offer portfolio margining treatment to customer-related transactions following: (i) The commencement of clearing single-name CDS contracts for customer-related transactions and (ii) the granting of certain relief by the Commission and the Commodity Futures Trading Commission (''CFTC'') in response to requests by ICC. Specifically, on November 7, 2011, ICC formally filed with the Commission a petition to provide portfolio margining treatment for customer-related positions in anticipation of ICC offering clearing of single-name CDS contracts for customer-related transactions in the future. Available at: *http://www.sec.gov/rules/petitions.shtml.* ICC filed a similar request with the CFTC on October 4, 2011, available at: *http://www.cftc.gov/PressRoom/PressReleases/pr6145-11.*

[6] *See supra* note 4.

[7] *See* SDMA Letter.

[8] *See* Allen & Overy Letters.

[9] 15 U.S.C. 78s(b)(2)(B).

[10] 15 U.S.C. 78q–1(b)(3)(F).

[11] 15 U.S.C. 78q–1.

[12] 15 U.S.C. 78s(b)(2).

proposed rule change (File No. SR–ICC–2011–03) be, and hereby is, approved.[13]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32781 Filed 12–21–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65990; File No. SR–OCC–2011–17]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Novation of Trades at OCC

December 16, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] notice is hereby given that on December 12, 2011, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''the Commission'') the proposed rule change as described in Items I and II below, which items have been prepared primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[2] and Rule 19b–4(f)(4) thereunder[3] so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of Terms of Substance of the Proposed Rule Change

The proposed rule change would make clarifying amendments to provisions of OCC's By-Laws relating to the timing of OCC's acceptance or ''novation'' of exchange transactions in order to provide clearing members with certainty as to when their credit exposure to the original counterparty to a trade is terminated and OCC becomes obligated with respect to such trades.[4]

II. Self-Regulatory Organization's Statement of Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of Purpose of, and Statutory Basis for, the Proposed Rule Change

Recently, certain OCC clearing members have expressed uncertainty as to the time when an exchange transaction is accepted for clearing and the ''novation'' of such transaction occurs under OCC's By-Laws and Rules. The purpose of this proposed rule change is to make clarifying amendments to provisions of OCC's By-Laws relating to the timing of OCC's acceptance or ''novation'' of exchange transactions in order to provide clearing members with certainty as to when their credit exposure to the original counterparty to a trade is terminated and OCC becomes obligated with respect to such trades.

Background

Article VI, Section 5 of OCC's By-Laws generally establishes that exchange transactions (*i.e.,* matched trades in an option, future, or other cleared contract) are deemed to be accepted by OCC for clearing at the ''commencement time'' for such transactions, or in the case of a future, when a matched trade has been properly reported to OCC. The definition of ''commencement time'' in Article I of OCC's By-Laws contains substantive provisions establishing specific times when exchange transactions are deemed accepted for clearing for the majority of exchange transactions (*i.e.,* commencement time is when daily position reports are made available to clearing members) as well as exceptions establishing different commencement times for cross-rate currency options, FX Index Options and certain non-competitively executed transactions in cleared futures. However, neither Section 5 of Article VI nor the definition of ''commencement time'' expressly state that OCC's ''novation'' of trades occurs at this time, and the term ''novation'' is used only once in OCC's By-Laws—in an interpretation following Section 6 of Article IV (Issuance of Cleared Contracts).

Confusion may also arise from the fact that Article VI, Section 5 of the By-Laws states that futures contracts are accepted for clearing when they are properly reported to OCC, rather than at the commencement time of such transactions. This provision appears to give futures contracts more favorable treatment than options, although there is no such result as a practical matter. Section 8 of Article VI provides that, except with respect to trades in certain narrow categories of options, OCC generally has no right to reject any exchange options transaction due to the failure of the purchasing clearing member to pay any amount due to OCC at or before the settlement time.[5] Accordingly, exchange transactions in most option products will inevitably be accepted for clearing and novated under the rules at the commencement time of such transactions simply due to the passage of time. Prior to the 1987 crash, OCC reserved the right to reject trades in options due to non-payment of premiums. However, OCC subsequently gave up that right (with limited exceptions) in order to create greater certainty for clearing members.[6] Therefore, the right to reject an exchange transaction for non-payment is now the exception rather than the rule. When OCC began clearing futures, it was deemed appropriate to state in the By-Laws that futures contracts would be accepted when properly reported because futures do not require premium payments.[7]

Proposed By-Law Changes

OCC proposes to amend the definition of ''commencement time'' in Article I of the By-Laws to (i) remove the substantive provisions establishing the specific times when exchange transactions in various products are deemed accepted for clearing (as such provisions should be placed in the

[13] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(iii).

[3] 17 CFR 240.19b–4(f)(4).

[4] The proposed rule change neither alters the rights of members nor the timing of OCC's novation. Telephone conference between Steve Szarmack, Vice President and Associate General Counsel, OCC, and Pamela Kesner, Special Counsel, Securities and Exchange Commission Division of Trading and Markets on December 14, 2011.

[5] The exceptions are contained in the Articles governing specific products. For example, Section 5 of Article XX (addressing cross-rate foreign currency options and Section 7 of Article XXIII (addressing FX Index Options) condition OCC's acceptance of trades in those products for clearing on the completion of settlement payments in respect of such trades. These exceptions apply because settlements involving foreign currencies in different time zones create heightened exposure to OCC if a Clearing Member were to default.

[6] The staff notes that this change was adopted in filing SR–OCC–90–05. *See* Securities Exchange Act Release No. 29853 (October 25, 1991), 56 FR 55968 (October 30, 1991).

[7] Article XII, Section 7 of the By-Laws makes an exception for non-competitively executed futures trades. Because such trades may be executed away from the market price, OCC does not accept them until the initial variation payment is made.

Articles governing those products), and (ii) add a cross reference within the definition that will direct the reader to the locations within the By-Laws where the specific times can be found. In connection therewith, OCC proposes to amend Section 5 of Article VI, Section 7 of Article XII, Section 1 of Article XX and Section 1 of Article XXIII to establish the specific commencement times for transactions in various products. OCC also proposes to amend Section 5 of Article VI (i) to expressly state that novation occurs when exchange transactions are accepted for clearing by OCC, and (ii) to delete the language that appears to give futures contracts more favorable treatment than options. Finally, OCC proposes to amend the bracketed language following the definitions in Section 1 of Article XX and Section 1 of Article XXIII to eliminate unnecessary complexity and conform such language stylistically to similar language elsewhere in the By-laws (*e.g.,* the bracketed language following the definitions in Section 1 of Article XXII).

OCC believes that the proposed changes to OCC's By-Laws are consistent with the purposes and requirements of Section 17A of the Securities Exchange Act of 1934, as amended (the ''Exchange Act''), because they are clarifying amendments that do not adversely affect OCC's obligations with respect to the prompt and accurate clearance and settlement of securities transactions or the protection of securities investors and the public interest.[8] The proposed rule change is not inconsistent with any rules of OCC.

B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change will have any impact or impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

OCC has not solicited or received written comments relating to the proposed rule change.

[8] The staff notes that Rule 19b–4(f)(4) provides that a proposed rule change may take effect upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Exchange Act if the change does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and does not significantly affect the respective rights or obligations of the clearing agency or persons using the service.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [9] and Rule 19b–4(f)(4) [10] and became effective on filing. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–OCC–2011–17 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–OCC–2011–17. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings also will be available for inspection and copying at OCC's principal office and OCC's Web site (*http://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_11_17.pdf*). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–OCC–2011–17 and should be submitted on or before January 12, 2012.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32780 Filed 12–21–11; 8:45 am]

BILLING CODE 8011–01–P

[9] *Supra* note 2.

[10] *Supra* note 3.

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65993; File No. SR–DTC–2011–11]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rules Relating To Update DTC's Custody Service Guide

December 16, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 7, 2011, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I and II below, which items have been prepared primarily by DTC. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act and Rule 19b–4(f)(4) thereunder so that the proposed rule change was effective upon filing with the Commission.[2] The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The purpose of this proposed rule change is to update DTC's Custody Service Guide in order to streamline the

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(iii) and 17 CFR 240.19b–4(f)(4).

document and to mitigate certain risks associated with custody processes.[3]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[4]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

DTC's custody service enables DTC participants to deposit securities with DTC for safe-keeping. Certificates deposited through the custody service (''Custody Issue'') are held by DTC but remain registered in the name of the participant's customer or in the name of the participant (*i.e.,* the securities are not registered in DTC's nominee name, Cede & Co.). Therefore, a security deposited through the custody service is not eligible for DTC's book-entry services, but may be eligible for other depository services, unless the depositing participant directs DTC to transfer the position originally credited to the participant's custody free account to the participant's general free account.

DTC is proposing to update its Custody Service Guide in order to streamline the document and to address certain risks associated with various aspects of its custody processes. Specifically, DTC is proposing, among other technical changes, to clarify its rules relating to imaging requests and required methods of notification in order to provide a more concise and coherent description of the procedures. In order to mitigate risks associated with the use of Medallion Signature Guarantee stamps, Attorney Release stamps, and Tax waiver/Cede & Co. Assignment stamps, DTC is also proposing to update its procedures regarding the process used at DTC to safeguard the use and storage of such stamps.[5] Finally, DTC is proposing to remove the detailed narrative describing its branch deposit services because the description of this service and participants' compliance obligations are currently described in DTC's Deposit Service Guide.[6]

(2) Statutory Basis

The proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to DTC because the proposed revisions to the procedures associated with DTC's custody service should facilitate the prompt and accurate clearance and settlement of securities transactions by reducing the costs, inefficiencies and risks associated with the physical safekeeping of securities. In so doing, these revisions should in turn also enhance the use of DTC's existing services.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited DTC. DTC will notify the Commission of any written comments received by DTC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act[7] and Rule 19b–4(f)(4)[8] thereunder because it is a change in an existing service that does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency and does not significantly affect the respective rights or obligations of the clearing agency or persons using the service. At any time within sixty days of the filing of such rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–DTC–2011–11 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–DTC–2011–11. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings will also be available for inspection and copying at the principal office of NSCC and on NSCC's Web site at *http://www.dtcc.com/downloads/legal/rule_filings/2011/dtc/2011-11.pdf.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that

[3] The text of the proposed rule change is attached as Exhibit 5 to DTC's filing, which is available at *www.dtcc.com/downloads/legal/rule_filings/2011/dtc/2011-11.pdf.*

[4] The Commission has modified the text of the summaries prepared by DTC.

[5] When processing certificates in connection with its custody services, DTC may use a participant's Medallion Signature Guarantee stamp, Attorney Release stamp, Tax waiver/Cede & Co. Assignment stamp, or any combination of these stamps to facilitate making negotiable a participant's securities for transfer or sale in accordance with the participant's instructions.

[6] The language DTC is proposing to eliminate from the Custody Service Guide continues to be included in the Deposits Service Guide.

[7] 15 U.S.C. 78s(b)(3)(A)(iii).

[8] 17 CFR 240.19b–4(f)(4).

you wish to make available publicly. All submissions should refer to File Number SR–DTC–2011–11 and should be submitted on or before January 12, 2012.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32755 Filed 12–21–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65987; File No. SR–BX–2011–084]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Proposed Rule Change Relating to Amending the BOX Trading Rules To Reduce the PIP From One Second to 100 Milliseconds

December 16, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 7, 2011, NASDAQ OMX BX, Inc. (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter V, Section 18 (The Price Improvement Period (''PIP'')) of the Rules of the Boston Options Exchange Group, LLC (''BOX'') to reduce the PIP from one second to 100 milliseconds. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Chapter V, Section 18(e)(i) (The Price Improvement Period (''PIP'')) of the BOX Rules to reduce the time period of the PIP from one second to 100 milliseconds (1/10 of one second). The PIP allows BOX Options Participants to designate certain customer orders for price improvement and submit such orders to the PIP (''PIP Order'') with a matching contra order (''Primary Improvement Order''). Once such an order is submitted, BOX commences a PIP by broadcasting a message to Options Participants that (1) states that a Primary Improvement Order has been processed; (2) contains information concerning series, size, PIP Start Price and side of the market of the order; and (3) states when the PIP will conclude (''PIP Broadcast''). Further, responses within a PIP (i.e., Improvement Orders), are also broadcast to BOX Options Participants. This proposed rule change would reduce the duration of the PIP from one second to 100 milliseconds. When approving previous reductions in BOX exposure periods (e.g., crossing orders and the PIP) the Commission concluded that reducing these time periods to one second was fully consistent with the BOX electronic market.[3]

BOX is not proposing any change to the requirement in Chapter V, Section 17 of the BOX Rules that requires an Order Flow Provider (''OFP'') to expose its customer's order on the BOX Book for at least one second before executing its own principal order against such customer order. An exception to this requirement to expose a customer order for one second is provided in Chapter V, Section 18(c) of the BOX Rules, permitting an OFP to execute its principal order against an order it represents as agent if the OFP submits the agency order to the PIP. BOX believes this exception for PIP orders is appropriate because the customer order is guaranteed an execution at the National Best Bid/Offer (''NBBO'') or a better price through the PIP. Additionally, BOX Options Participants are informed about the two-sided order starting the PIP through receipt of the PIP Broadcast. BOX Participants have the opportunity to compete for participation in the execution of the customer order by responding to the PIP Broadcast with their best-priced Improvement Order.

BOX believes the proposed rule change could provide more customer orders an opportunity for price improvement because it will reduce the market risk for all Participants executing trades in the PIP. BOX Participants that initiate a PIP (''Initiating Participants'') are required to guarantee an execution at the NBBO or at a better price, and are subject to market risk while their PIP Order is exposed to other BOX Participants. While other PIP Participants are also subject to market risk, those providing responses in the PIP through Improvement Orders are not permitted to cancel their orders, but can only modify their Improvement Order, including reducing their order quantity, by providing a better price. When a PIP Participant submits more than one Improvement Order during a PIP, doing so decreases the time that each Improvement Order is exposed to market risk. BOX believes that the Initiating Participant acts in a critical role in the PIP. Their willingness to guarantee the customer order an execution at NBBO or a better price is the keystone to the customer order gaining the opportunity for price improvement. As such, BOX believes that reducing the PIP from one second to 100 milliseconds, and the Participants' corresponding market risk, particularly the risk for the Initiating Participant, will benefit customers because it is more likely that additional PIP transactions will be initiated.

BOX believes that its Options Participants operate electronic systems that enable them to react and respond to orders in a meaningful way in fractions of a second. BOX anticipates that its Participants will continue to compete within the proposed PIP duration of 100 milliseconds. In particular, BOX believes that 100 milliseconds will continue to provide market participants with sufficient time to respond to,

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 53854 (May 24, 2006), 71 FR 30975 (May 31, 2006) (SR–BSE–2006–23) and 59638 (March 27, 2009), 74 FR 15020 (April 2, 2009) (BX–2009–015).

compete for, and provide price improvement for orders, and will provide investors and other market participants with more timely executions, and reduce their market risk.

BOX believes that further reducing the PIP from one second to 100 milliseconds will benefit Participants trading in the PIP. BOX believes it is in these Participants' best interests to minimize the PIP while continuing to allow Participants adequate time to electronically respond. Both the order being exposed and Participants' Improvement Orders are subject to market risk during the PIP. While a limited number of Participants wait to respond until later in the PIP, presumably to minimize their market risk, in more than eighty percent (80%) of PIP executions BOX Participants respond within the first 100 milliseconds.[4] BOX believes that 100 milliseconds will continue to provide all market participants with sufficient time to respond, compete, and provide price improvement for orders and will provide investors and other market participants with more timely executions, thereby reducing their market risk.

In consideration of this proposed rule change, BOX recently distributed a survey to all BOX Participants that have participated in the PIP in 2011. To substantiate that BOX Participants can receive, process, and communicate a response to a BOX PIP Broadcast within 100 milliseconds, the survey asked Participants to identify (i) how many milliseconds it takes for a PIP Broadcast to reach Participant systems; (ii) how many milliseconds it takes their systems to generate a PIP Broadcast response; (iii) how many milliseconds it takes their PIP Broadcast response to reach BOX; and (iv) whether or not a reduction of the PIP to 100 milliseconds would impair Options Participants' ability to compete for orders in the BOX PIP. All of the Participants that responded to the specific timing questions in this survey indicated that they can receive, process, and communicate multiple PIP Broadcast responses back to BOX within substantially less than 100 milliseconds.[5] Also in consideration of this proposed rule change, BOX reviewed all PIP executions by its Participants for the three month period of May through July 2011. This review of PIP transaction executions indicates that approximately eighty-five percent (85%) of Improvement Orders that are executed at the conclusion of a PIP were submitted within 100 milliseconds of the initial PIP Order. Additionally, approximately seventy-eight percent (78%) of Improvement Orders executed at the end of the PIP were submitted in less than 10 milliseconds, and seventy percent (70%) were submitted in less than 5 milliseconds. Through the survey BOX conducted, BOX confirmed that those Participants whose PIP Broadcast responses currently average greater than 100 milliseconds do operate sufficiently automated electronic systems to enable them to react and respond to multiple PIP Broadcasts within 100 milliseconds. Based on the responses received, BOX confirmed that it typically takes a message less than ten milliseconds to travel each way between BOX and its Participants.[6] Participants confirm that it typically takes not more than five milliseconds for Participant systems to process PIP Broadcast information and generate a response.[7] If it takes less than 10 milliseconds for a PIP Broadcast to reach a Participant's system, less than 5 milliseconds for the Participant system to process the message and generate a response, and then less than 10 milliseconds for that response to travel back to BOX, it is generally less than 25 milliseconds from the time BOX sends a PIP Broadcast to the time BOX receives a Participant's response (in the form of an Improvement Order) to that Broadcast. If it takes less than 25 milliseconds for a Participant to receive and respond to a PIP Broadcast, then a single Participant could receive and respond to four iterations of PIP messages within 100 milliseconds. Accordingly, BOX believes that 100 milliseconds will continue to provide all market participants with sufficient time to respond, compete, and provide price improvement for orders and will provide investors and other market participants with more timely executions, thereby reducing their market risk. The 85% of Improvement Orders executed at the end of the PIP that were received within 100 milliseconds of the PIP Order also demonstrates the speed of Participant systems. BOX's review of PIP transactions and the BOX survey results indicate that Participants can receive, process, and respond to a PIP Broadcast and multiple Improvement Orders while trading within a BOX PIP of 100 milliseconds.

Moreover, Supplementary Material .02 to Chapter V, Section 18 provides that a PIP will not run simultaneously with or overlap another PIP in any manner. Because the PIP currently lasts for one second, Options Participants are unable to initiate another PIP during the one second that the PIP occurs, and BOX rejects PIP Orders during this one second. By reducing the PIP to 100 milliseconds and thereby decreasing the likelihood that a PIP is underway, and the resulting PIP Order rejection, BOX believes that it is likely that the number of PIP transactions will increase.[8] The PIP has saved investors more than $350 million versus the prevailing NBBO since 2004, a monthly average of more than $3.5 million. BOX believes that reducing the PIP duration will result in additional PIP transactions, and thus, in customers having a greater opportunity to benefit from price improvement.

Based on current PIP related market data and the BOX Participant survey, BOX believes that reducing the PIP from one second to 100 milliseconds would not impair Participants' ability to compete in the PIP.[9] More than sixty-five percent of PIP auctions include competition for execution (i.e., at least one other Options Participant competes with the Initiating Participant for execution of a customer order).[10] Additionally, almost fifty percent of all PIP auctions include three or more Participants competing for PIP execution.[11] BOX notes, however, that its market makers are the Participants most likely to compete with Initiating Participants for execution against customer orders. BOX believes the PIP provides an incentive for them to do so by quoting their best and most aggressive prices, inuring the benefit of price improvement directly to customer orders.

BOX believes that the information outlined above regarding PIP

[4] Based on a BOX review of all PIP executions from May through July 2011 and a sample of PIP transactions from September through November 2010.

[5] Fourteen of sixteen firms responded to the survey. Nine firms responded to the specific timing questions.

[6] All Participants responding to the specific timing questions confirm that it typically takes a message less than ten milliseconds to travel each way between BOX and their system.

[7] Six of nine Participants responding to the specific timing questions confirm that it typically takes not more than five milliseconds for them to process PIP Broadcast information and generate a response.

[8] Less than one in every one thousand PIP orders was rejected for the period from January through September 2011.

[9] All fourteen Participants responding to the survey indicated that reducing the PIP to 100 milliseconds would not impair their ability to participate in the BOX PIP.

[10] Based on a sample of PIP transactions for the first and third Wednesday of each month, a total of more than 40 trading days, for the period from January 2010 through September 2011.

[11] Based on a sample of PIP transactions for the first and third Wednesday of each month, a total of more than 40 trading days, for the period from January 2010 through September 2011.

transactions and the feedback provided by BOX Participants provides substantial support for its assertion that reducing the PIP duration from one second to 100 milliseconds will continue to provide Participants with sufficient time to ensure competition for PIP Orders, and could provide customer orders with additional opportunities for price improvement.

With regard to the impact of this proposal on system capacity, BOX has analyzed its capacity and represents that it and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle the potential additional traffic associated with the additional transactions that may occur with the implementation of the proposed reduction in the PIP duration to 100 milliseconds. Additionally, the Exchange represents that its systems will be able to sufficiently maintain an audit trail for order and trade information with the reduction in the PIP duration.

Upon Commission approval of the proposal, and at least one week prior to implementation of the proposed rule change, BOX will issue an Informational Circular to Participants, informing them of the implementation date of the reduction of the PIP from one second to 100 milliseconds. This will give Participants an opportunity to make any necessary modifications to coincide with the implementation date. Finally, BOX notes that the proposed rule change will have no impact on provisions related to Auto Auction Orders in Chapter V, Section 14 of the BOX Trading Rules, nor how such orders function within the PIP.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[12] in general, and Section 6(b)(5) of the Act,[13] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest. BOX notes that exposure and allocation timers for the Chicago Board Options Exchange's Hybrid Agency Liaison (''HAL'') and Simple Auction Liaison (''SAL'') mechanisms, are both currently set at 150 milliseconds.[14] In particular, the proposed rule change will provide investors with more timely execution of their options orders, while ensuring that there is an adequate exposure of orders in the BOX PIP. Additionally, the proposed change will allow additional investors the opportunity to receive price improvement through the BOX PIP, and will reduce market risk for BOX Participants using the PIP. As such, BOX believes the proposed rule change would help perfect the mechanism for a free and open national market system, and generally help protect investors' and the public interest.

The Exchange believes the proposed rule change is not unfairly discriminatory because the PIP duration would be the same for all Participants. All Participants in the PIP have today, and will continue to have, an equal opportunity to receive the PIP Broadcast and respond with their best prices during the PIP. As noted above, based on the feedback BOX has received from its Participants, they will have, within 100 milliseconds, the opportunity to receive and respond to at least four iterations of PIP messages and compete for the customer order. Additionally, BOX believes the reduction in the PIP duration reduces the market risk for all PIP Participants. The reduction in time period reduces the market risk for the Initiating Participant as well as any Participant providing orders in response to a PIP Broadcast. Moreover, based on the responses BOX received to its survey of PIP Participants, BOX believes that a reduction in the PIP auction period to 100 milliseconds would not impair Participants' ability to compete in PIP transactions. BOX believes these results support the assertion that a reduction in the PIP duration would not be unfairly discriminatory and would benefit investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. By order approve or disapprove such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2011–084 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2011–084. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m., located at 100 F Street NE.,

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] *See* CBOE Regulatory Circular RG08–100, September 3, 2008.

Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2011–084 and should be submitted on or before January 12, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32750 Filed 12–21–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65989; File No. SR–BX–2011–085]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the BOX Fee Schedule With Respect to the Delisting of the Russell 2000 Index Options (RUT)

December 16, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 7, 2011, NASDAQ OMX BX, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ OMX BX, Inc. proposes to amend the Fee Schedule of the Boston Options Exchange Group, LLC (''BOX'') to remove references to the Russell® 2000 Index (RUT). The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Because the Exchange is delisting the Russell® 2000 Index (RUT), the Exchange proposes to remove references to RUT from the BOX fee schedule. Currently, Section 3 of the BOX fee schedule provides for a surcharge to be applied to options on any index traded on BOX; $0.15 per contract for options on RUT. The Exchange is delisting options on RUT and they will no longer be traded on BOX. As such, no related surcharge will apply, and the Exchange is proposing to remove references to such from the BOX fee schedule.

2. Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[5] in general, and Section 6(b)(4) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. In particular, this proposed change removes from the BOX fee schedule references to a fee that will no longer be applicable after options on RUT are delisted and no longer traded on BOX.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and paragraph (f) of Rule 19b–4 thereunder.[8] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2011–85 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2011–85. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f).

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2011–85 and should be submitted on or before January 12, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32752 Filed 12–21–11; 8:45 am]

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[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65992, File No. SR–MSRB–2011–19]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Consisting of Amendments to Rule G–16, on Periodic Compliance Examination, and Rule G–9, on Preservation of Records

December 16, 2011.

I. Introduction

On October 13, 2011, the Municipal Securities Rulemaking Board (''MSRB'' or ''Board''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change consisting of amendments to Rule G–16, on periodic compliance examination, and Rule G–9, on preservation of records. The proposed rule change was published for comment in the **Federal Register** on November 1, 2011.[3] The Commission received two comment letters regarding the proposed rule change and the MSRB's response to those comment letters.[4] On December 12, 2011, the MSRB filed with the Commission, pursuant to Section 19(b)(1) of the Exchange Act[5] and Rule 19b–4 thereunder,[6] Partial Amendment No. 1 (''Amendment No. 1'') to the proposed rule change.[7] The Commission is publishing this notice and order to solicit comment on Amendment No. 1 and to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Description of the Proposed Rule Change, As Modified by Amendment No. 1 to the Proposed Rule Change

Pursuant to Section 15B(b)(2)(E) of the Exchange Act,[8] MSRB rules must provide for the periodic examination of municipal securities brokers, municipal securities dealers, or municipal advisors (''regulated entities'') to determine compliance with Section 15B of the Exchange Act, the rules and regulations thereunder, and MSRB rules. The same provision requires that the MSRB specify the minimum scope and frequency of the examinations and that the examination rules be designed to avoid unnecessary regulatory duplication or undue regulatory burden for any regulated entity.

Section 15B(c)(7) of the Exchange Act[9] provides that the periodic examination of regulated entities shall be conducted by (a) A registered securities association in the case of dealers that are members of the registered securities association, (b) the appropriate regulatory agency (''bank regulators'') in the case of dealers that are not members of a registered securities association, and (c) the SEC, or its designee, in the case of municipal advisors. There is one securities association registered with the SEC—FINRA. Approximately 1,800 MSRB registered dealers are members of and examined by FINRA, with the remaining dealers registered with the SEC as municipal securities dealers and examined primarily by the various Federal bank regulators.

Rule G–16 currently provides that, at least once every two calendar years, dealers must be examined in accordance with Section 15B of the Exchange Act in order to determine whether the dealers are in compliance with all MSRB rules and applicable provisions of the Exchange Act. Separately, FINRA examines its members pursuant to a risk-based approach at least every four calendar years. In order to comply with Rule G–16, FINRA and the MSRB agreed to a protocol allowing for a questionnaire to be completed by certain firms every two calendar years. These dealers are typically less active in the municipal securities market and, therefore, pose less overall risk to market participants. The questionnaire, entitled the Alternative Municipal Examination (''AME'') module, was implemented in 1998, after review by SEC and MSRB staff. The AME is used as an off-site examination for low-risk dealers that: (a) Conduct a limited municipal securities business; (b) do not conduct a public finance business; and (c) are not otherwise identified as high risk firms for regulatory purposes. The AME is necessarily general and not tailored to the specific business of any one firm. It relies on each responding dealer to self report rule violations and to certify that the information provided is truthful and accurate.

After many years of experience with the AME, the MSRB and FINRA believe that a more risk-based examination protocol should be implemented and that Rule G–16 should be amended to allow for up to a four year examination cycle for FINRA-member firms, consistent with FINRA's requirement for cycle examinations of all other FINRA members. This would also allow FINRA to integrate the municipal securities cycle examination program more closely with its overall cycle examination program, and redeploying staff resources from administering the AME to participating in the risk-based examination program would foster more meaningful oversight. Moreover, over the last few years, there have been significant advances in information technology, particularly with the development of the MSRB's Real-time

[3] *See* Securities Exchange Act Release No. 65631 (October 26, 2011), 76 FR 67503 (November 1, 2011) (the ''Commission's Notice'').

[4] *See* letter from David L. Cohen, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (''SIFMA''), dated November 21, 2011 (''SIFMA Letter''); letter from Tamara K. Salmon, Associate General Counsel, Investment Company Institute (''ICI''), dated November 22, 2011 (''ICI Letter''); and letter from Lawrence P. Sandor, Senior Associate General Counsel, Municipal Securities Rulemaking Board (''MSRB''), dated December 12, 2011 (''MSRB Letter'').

[5] 15 U.S.C. 78s(b)(1).

[6] 17 CFR 240.19b–4.

[7] Amendment No. 1 to the proposed rule change requested that the Commission approve the amendment to Rule G–9 with an effective date that is six months from the date of the approval order. The text of Amendment No. 1 and the MSRB Letter are available on the MSRB's Web site at *http://www.msrb.org,* at the principal office of the MSRB, and at the Commission's Public Reference Room.

[8] 15 U.S.C. 78o(b)(2)(E).

[9] 15 U.S.C. 78o(c)(7).

Transaction Reporting System and Electronic Municipal Market Access system. These advancements in information technology and transparency have enabled FINRA to develop robust automated surveillance reviews of municipal securities transactions. FINRA is now able to review municipal securities transactions and other activity remotely in order to identify potential MSRB rule violations by dealers. These tools permit FINRA staff to conduct near real-time surveillance of certain municipal securities activities.

The municipal securities business has also changed dramatically over the last few years. The industry has consolidated and a small number of large firms account for the majority of public finance business. The top five underwriters accounted for over 50 percent, by par amount, of primary offerings in 2010 and 2011.[10] The top 10 underwriters accounted for over 70 percent of the underwritings, by par amount, in 2010 and 2011, and the top 200 accounted for almost 100 percent of the underwritings, by par amount, in 2010 and 2011. According to data gathered by the MSRB, the top 10 dealers executed approximately 55 percent of all municipal securities transactions reported to the MSRB in 2010 and 2011. The top 50 dealers executed approximately 80 percent of all such transactions in 2010 and 2011, and the top 200 dealers executed approximately 96 percent of all such transactions. By par amount, the top 200 dealers executed approximately 98 percent of all municipal securities transactions reported to the MSRB in 2010 and 2011. The remaining approximately 1,600 firms are less active in the municipal securities market, engage solely in the sale of interests in 529 College Savings Plans, or effect municipal securities transactions primarily as an accommodation to their customers. Generally, these firms are not engaged in financial advisory activities or municipal securities underwriting, research, or trading. They, therefore, do not pose systemic risk to the market in these areas.

With input from the MSRB, consistent with Section 15B(b)(4) of the Exchange Act,[11] FINRA is enhancing its risk assessment approach to rank dealers by certain risk factors, as well as by size and scope of business, to determine their examination cycle frequencies, which under the proposed rule change would range from one to four years, rather than every two years as currently prescribed by Rule G–16. It is anticipated that, based on the analysis of the various identified risks and related factors, those firms that represent higher risks, as well as firms that pose a systemic threat based on the scope and scale of their underlying municipal securities activities, would be examined on an annual basis. Other firms would be examined less frequently, every two to four years, depending on the risk ranking and size of their municipal securities business and the firm's overall business model. At a minimum, all firms would be examined at least once every four calendar years. Cycle examination frequencies for dealers would be re-assessed at least on an annual basis. FINRA would continue to conduct off-site surveillance of municipal securities activity and ''cause'' examinations as needed. ''Cause'' examinations are event-driven and typically initiated as a result of customer complaints, regulatory tips, and other information sources identified by FINRA via its regulatory oversight process.

The MSRB believes that using quantitative and qualitative criteria to rank dealers by appropriately identified risk measures and size no less frequently than on an annual basis provides better protection for investors, municipal entities, and other market participants, since FINRA's resources will be focused on those firms that pose the greatest risk to investors, municipal entities and the market. Such firms will be subject to in-depth examinations tailored to the specific municipal securities activities they conduct.

Finally, the MSRB is also proposing to change MSRB Rule G–9 to require dealers that are FINRA members to retain certain records for four years, rather than for three years, in order to ensure that the records are available at those firms that are examined every four calendar years.

III. Discussion of Comments and MSRB's Response

As previously noted, the Commission received two comment letters on the original proposed rule change.[12] Both commenters expressed support for the proposed amendments to Rule G–16, which would allow FINRA and the MSRB to establish a risk-based compliance program consistent with FINRA's requirement for cycle examinations of all other FINRA members. One commenter, however, did not support the proposed amendments to Rule G–9, which would extend certain recordkeeping requirements from three to four years, stating that such change is not warranted to support the proposed changes to the frequency of the cycle examinations.[13]

ICI stated that it supported the proposed revisions because they should result in a more efficient examination process without diminishing the effectiveness of the MSRB's oversight. ICI further stated that changes in technology and in the municipal securities business provide the MSRB greater access to information on registrants, thereby reducing the need for frequent examinations of registrants. Finally, ICI stated that in instances where there is cause for the MSRB to conduct more frequent examinations of a particular registrant, its ability to do so is not impeded by the revisions.

Although SIFMA believes that the current examination cycle appears to be working adequately, SIFMA supports the proposed rule change. SIFMA stated that the proposed rule change would facilitate the modernization of the examination process for dealers and permit greater flexibility in the administration of periodic compliance examinations in order to focus more closely on those dealers that, by virtue of various identified factors, pose the greatest risk to investors, other market participants, and the municipal securities market. SIFMA further stated, however, that it believes that such identified factors should be specifically enumerated by FINRA and the MSRB after further discussions with interested market participants. SIFMA concluded that changes to a dealer's examination cycle frequency should not be implemented until this process is complete. Additionally, SIFMA stated that since the voluminous real-time transaction data received by the MSRB on a daily basis has allowed FINRA to develop robust automated surveillance reviews of municipal securities transactions, it is critical that such data be leveraged to maximize the efficiency of on-site visits.

The MSRB noted that FINRA is the designated examination and enforcement authority for its members that are MSRB registered dealers. The MSRB further noted that although the MSRB provides advice and consultation on examination and enforcement matters, the authority for such examinations rests solely with FINRA for its member firms. While the MSRB has generally described the considerations in determining the

[10] All 2011 figures are through September 2011. Underwriting statistics are provided by Thomson Reuters.

[11] 15 U.S.C. 78o(b)(4).

[12] *See supra* note 4.

[13] *See* SIFMA Letter.

frequency of a dealer's examinations, such as the size and scope of its business, the MSRB believes it important to maintain confidentiality of the specific risk factors and not make them a matter of negotiation. Moreover, the MSRB stated that the risk factors are dynamic, and additional risk factors may be utilized as new risks emerge and existing risks are mitigated by market conditions or business practices. The MSRB believes that it would not be in the public interest to refrain from changing a dealer's examination cycle until there is disclosure and consultation with market participants. The MSRB stated that it agrees that transaction reporting by dealers provides an important source of information regarding dealer activity in the municipal securities market, and that the information is, and will continue to be, of value in surveillance and examinations of dealers.

With respect to the proposed changes to MSRB Rule G–9, SIFMA stated that the current three year/six year/and lifetime record-keeping categories as set forth in Rule G–9 are sufficient and have long been an industry standard. SIFMA believes that the proposed four-year record-keeping requirement is unnecessarily burdensome for member firms, and that the MSRB's only stated reasoning for increasing the retention period for certain records is to mirror the proposed four-year examination cycle. SIFMA further stated that, in order to function efficiently, dealers should be subject to consistent record-keeping requirements across product lines. SIFMA also stated that satisfying these regulations requires dealers to implement procedures, technology and training and that a well-established standard such as the current one should not be changed without a more comprehensive discussion of all related issues, including cost estimates compared to anticipated benefits.

In addition, SIFMA stated that real-time transaction data is available for review on a daily basis. SIFMA noted that when a periodic examination is conducted, FINRA reviews a sampling of transactions occurring during the period of review. SIFMA stated that the substantial costs of requiring additional record-keeping for all dealers (especially those dealers that are examined on an annual or semi-annual basis) so that certain records would be available to review at those dealers that are examined in year four of the proposed four-year review cycle (*i.e.,* dealers with the smallest footprint or risk profile) should be weighed against the nominal benefit of allowing FINRA to review a few records from ''year one'' for that subset of dealers.

The MSRB stated that the proposed rule change is not a significant departure from current record-keeping standards and will not impose an unnecessary burden on dealers that are already subject to a variety of different record retention requirements. Rule G–9 provides that, for dealers that are FINRA members, certain records must be retained for three years, while other records must be retained for six years or for the life of the enterprise. The proposal would extend the record retention obligation for certain records by one year. The MSRB stated that the retention of these records for one additional year is necessary to accommodate the four-year examination cycle for certain FINRA-member dealers and serves a clear regulatory purpose.

SIFMA also noted that, to their knowledge, the MSRB has not conducted a cost-benefit analysis regarding the impact of the proposed changes to Rule G–9. SIFMA requested that such cost-benefit analysis be conducted prior to implementing the proposal. In response, the MSRB stated that it does not believe that the proposal to retain certain records for an additional year will impose an undue burden on dealers or require substantial changes to their systems or procedures, since the rule would merely require that the records be retained for one additional year. Additionally, given the limited nature of the change proposed, a cost-benefit analysis is unwarranted, since the records are already being retained by dealers and any incremental storage cost and one-time transitional burden of modifying policies and systems should be relatively minimal for firms already in compliance with the existing MSRB and FINRA record-keeping rules, with such costs clearly outweighed by the necessity to accommodate the four-year examination cycle for a significant number of FINRA members.

SIFMA requested that, if the changes to Rule G–9 are approved, the effective date be at least one year from the date of the Commission's approval, in order to provide dealers with an opportunity to modify their policies and systems to comply with the new retention schedule. The MSRB believes that an extended effective date for Rule G–9 is appropriate but does not believe that a full year is necessary to comply with a new record retention period. Amendment No. 1 would partially amend the original proposed rule change by requesting that the Commission approve the amendments to Rule G–9 with an effective date that is six months from the date of the Commission's approval order. The MSRB believes that six months is an appropriate period to permit dealers to modify their policies and systems to comply with the rule change.

IV. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, the comment letters received, and the MSRB's response to the comment letters and finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB.[14] The Commission believes that the proposed rule change is consistent with the provisions of Section 15B(b)(2)(E) of the Exchange Act,[15] which authorizes the MSRB to provide for the periodic examination, in accordance with Section 15B(c)(7) of the Exchange Act,[16] of municipal securities brokers, municipal securities dealers, and municipal advisors to determine compliance with the applicable provisions of the Act, the rules and regulations thereunder, and the rules of the MSRB. Section 15B(b)(2)(E) of the Exchange Act[17] also provides that the rules of the Board shall specify the minimum scope and frequency of such examinations and shall be designed to avoid unnecessary regulatory duplication or undue regulatory burdens for any such municipal securities broker, municipal securities dealer, or municipal advisor.

The Commission also believes that the proposed rule change is consistent with the provisions of Section 15B(b)(2)(G) of the Exchange Act[18] which authorizes the MSRB to prescribe records to be made and kept by municipal securities brokers, municipal securities dealers, and municipal advisors and the periods for which such records shall be preserved.

The proposed rule change will more closely align the records required to be made and kept by municipal securities brokers, municipal securities dealers and municipal advisors pursuant to Rule G–9 with the records already required to be made and kept by FINRA, thereby reducing the administrative burden on such municipal securities

[14] In approving the proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78o(b)(2)(E).

[16] 15 U.S.C. 78o(c)(7).

[17] 15 U.S.C. 78o(b)(2)(E).

[18] 15 U.S.C. 78o(b)(2)(G).

brokers, municipal securities dealers and municipal advisors.

The Commission believes that the MSRB has adequately responded to the concerns expressed in the comment letters. The Commission agrees with the MSRB that the requirement to retain certain records for an additional year will not impose an undue burden on municipal securities brokers, municipal securities dealers and municipal advisors or require substantial changes to their systems or procedures because the records are already being retained. Further, the Commission agrees with the MSRB that any incremental cost and burden of modifying policies and procedures should be minimal, with such cost and burden outweighed by the necessity to accommodate the four-year examination cycle for a significant number of FINRA members.

V. Order Granting Accelerated Approval of Proposed Rule Change

Pursuant to Section 19(b)(2) of the Exchange Act,[19] the Commission may not approve any proposed rule change, or amendment thereto, prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding. The Commission hereby finds good cause for approving the proposed rule change, as modified by Amendment No. 1, before the 30th day after the date of publication of notice of filing thereof in the **Federal Register.** Amendment No. 1 would partially amend the original proposed rule change by requesting that the Commission approve the amendments to Rule G–9 with an effective date that is six months from the date of the Commission approval order. Originally, the proposed rule change to Rule G–9 would have become effective as of the date of the Commission approval order. While the MSRB does believe it appropriate to provide dealers with time to revise their policies and procedures, systems and controls to accommodate the longer retention period, the MSRB believes that such changes can be accomplished in a shorter timeframe. The MSRB stated that the modest extension of the retention period for certain records does not warrant such a delayed effective date as requested by SIFMA. Rather, the MSRB believes that in light of the clear importance of preserving records for the entire period between FINRA examination cycles, and the modest increase in the current retention period, six months is an appropriate period to permit dealers to modify their policies and systems to comply with the rule change. The Commission does not believe that Amendment No. 1 significantly alters the proposal and that the six-month extension in the effective date of the amendments to Rule G–9 is reasonable. The Commission believes that Amendment No. 1 is consistent with the proposal's purpose and raises no new significant issues. Accordingly, pursuant to Section 19(b)(2) of the Exchange Act,[20] the Commission finds good cause to approve the proposed rule change, as amended, on an accelerated basis.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MSRB–2011–19 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MSRB–2011–19. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MSRB–2011–19 and should be submitted on or before January 12, 2012.

VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[21] that the proposed rule change (SR–MSRB–2011–19), as modified by Amendment No. 1, be, and it hereby is, approved. The proposed amendment to Rule G–16 will become effective as of the date of this approval order and the proposed amendment to Rule G–9 will become effective six months after the date of this approval order.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32754 Filed 12–21–11; 8:45 am]

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[19] 15 U.S.C. 78s(b)(2).

[20] 15 U.S.C. 78s(b)(2).

[21] 15 U.S.C. 78s(b)(2).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65988; File No. SR–NYSEARCA–2011–95]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to Listing and Trading of the PIMCO Total Return Exchange Traded Fund Under NYSE Arca Equities Rule 8.600

December 16, 2011.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 13, 2011, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the following under NYSE Arca Equities Rule 8.600 (''Managed Fund Shares''): PIMCO Total Return Exchange Traded Fund.

The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the following Managed Fund Shares [4] (''Shares'') under NYSE Arca Equities Rule 8.600: PIMCO Total Return Exchange Traded Fund (the ''Fund'').[5] The Shares will be offered by PIMCO ETF Trust (the ''Trust''), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.[6]

The investment manager to the Fund is Pacific Investment Management Company LLC (''PIMCO'' or the ''Adviser''). PIMCO Investments LLC serves as the distributor for the Fund (''Distributor''). State Street Bank & Trust Co. serves as the custodian and transfer agent for the Fund (''Transfer Agent'').

Commentary .06 to Rule 8.600 provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio.[7] In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio. The Adviser is affiliated with a broker-dealer and has implemented a ''fire wall'' with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the Fund's portfolio. If PIMCO elects to hire a sub-adviser for the Fund that is also affiliated with a broker-dealer, such sub-adviser will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio. In the event (a) the Adviser or any sub-adviser becomes newly affiliated with a broker-dealer, or (b) any new manager, adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

According to the Registration Statement, the Fund will seek maximum total return, consistent with preservation of capital and prudent investment management. The Fund will invest under normal market circumstances at least 65% of its total assets in a diversified portfolio of Fixed Income Instruments of varying maturities.[8] ''Fixed Income Instruments'' include bonds, debt securities and other similar instruments issued by various U.S. and non-U.S. public- or private-sector entities.[9] The

[4] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) (''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[5] The Commission has previously approved the listing and trading on the Exchange of other actively managed funds under Rule 8.600. *See, e.g.,* Securities Exchange Act Release Nos. 60981 (November 10, 2009), 74 FR 59594 (November 18, 2009) (SR–NYSEArca–2009–79) (order approving Exchange listing and trading of five fixed income funds of the PIMCO ETF Trust); 61365 (January 15, 2010), 75 FR 4124 (January 26, 2010) (SR–NYSEArca–2009–114) (order approving Exchange listing and trading of Grail McDonnell Fixed Income ETFs).

[6] The Trust is registered under the 1940 Act. On July 7, 2011, the Trust filed with the Commission Post-Effective Amendment No. 30 to Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a) (''1933 Act'') relating to the Fund (File Nos. 333–155395 and 811–22250) (the ''Registration Statement''). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 28993 (November 10, 2009) (File No. 812–13571) (''Exemptive Order'').

[7] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the ''Advisers Act''). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) Adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[8] The term ''under normal market circumstances'' includes, but is not limited to, the absence of extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

[9] Described below are ''Fixed Income Instruments,'' as such term is used generally in the Registration Statement, in which the Fund will focus: Debt securities issued or guaranteed by the U.S. Government, its agencies or government-sponsored enterprises (''U.S. Government Securities''); corporate debt securities of U.S. and non-U.S. issuers, including convertible securities and corporate commercial paper; mortgage-backed and other asset-backed securities; inflation-indexed bonds issued both by governments and corporations; structured notes, including hybrid or ''indexed'' securities and event-linked bonds; bank capital and trust preferred securities; loan participations and assignments; delayed funding loans and revolving credit facilities; bank certificates of deposit, fixed time deposits and bankers' acceptances; repurchase agreements on Fixed Income Instruments and reverse repurchase agreements on Fixed Income Instruments; debt securities issued by states or local governments and their agencies, authorities and other government-sponsored enterprises; obligations of non-U.S. governments or their subdivisions, agencies and government-sponsored enterprises; and obligations of international agencies or supranational entities.

average portfolio duration of the Fund normally will vary within two years (plus or minus) of the duration of the Barclays Capital U.S. Aggregate Index, which as of May 31, 2011 was 5.19 years.[10]

According to the Registration Statement, the Fund will invest primarily (under normal market circumstances, at least 65% of its total assets) in investment-grade Fixed Income Instruments, but may invest up to 10% of its total assets in high yield Fixed Income Instruments (''junk bonds'') rated B3 through Ba1 by Moody's Investors Service, Inc. (''Moody's''), or equivalently rated by Standard & Poor's Ratings Services (''S&P'') or Fitch, Inc. (''Fitch''), or, if unrated, determined by PIMCO to be of comparable quality.[11]

The Fund may invest in variable and floating rate debt securities, which are securities that pay interest at rates that adjust whenever a specified interest rate changes and/or that reset on predetermined dates (such as the last day of a month or calendar quarter). The Fund may invest in floating rate debt instruments (''floaters'') and engage in credit spread trades. Variable and floating rate debt securities generally are less sensitive to interest rate changes but may decline in value if their interest rates do not rise as much, or as quickly, as interest rates in general. Conversely, floating rate debt securities will not generally increase in value if interest rates decline.

The Fund may invest in debt securities and instruments that are economically tied to foreign (non-U.S.) countries. PIMCO generally considers an instrument to be economically tied to a non-U.S. country if the issuer is a foreign government (or any political subdivision, agency, authority or instrumentality of such government), or if the issuer is organized under the laws of a non-U.S. country. In the case of certain money market instruments, such instruments will be considered economically tied to a non-U.S. country if either the issuer or the guarantor of such money market instrument is organized under the laws of a non-U.S. country.

The Fund may invest up to 15% of its total assets in securities and instruments that are economically tied to emerging market countries. PIMCO generally considers an instrument to be economically tied to an emerging market country if the issuer or guarantor is a government of an emerging market country (or any political subdivision, agency, authority or instrumentality of such government), if the issuer or guarantor is organized under the laws of an emerging market country, or if the currency of settlement of the security is a currency of an emerging market country.[12]

The Fund may invest, without limitation, in mortgage- or asset-backed securities.[13] The Fund may purchase or sell debt and equity securities on a when-issued, delayed delivery or forward commitment basis and may engage in short sales.

While corporate debt securities and debt securities economically tied to an emerging market country generally must have $200 million or more par amount outstanding and significant par value traded to be considered as an eligible investment for the Fund, at least 80% of issues of such securities held by the Fund must have $200 million or more par amount outstanding.

According to the Registration Statement, the Fund may, without limitation, seek to obtain market exposure to the securities in which it primarily invests by entering into a series of purchase and sale contracts or by using other investment techniques (such as buy backs or dollar rolls). The ''total return'' sought by the Fund will consist of income earned on the Fund's investments, plus capital appreciation, if any, which generally arises from decreases in interest rates, foreign currency appreciation, or improving credit fundamentals for a particular sector or security.

The Fund may also invest in Brady Bonds, which are debt securities created through the exchange of existing commercial bank loans to sovereign entities for new obligations in connection with a debt restructuring.

The Fund may invest up to 30% of its total assets in securities denominated in foreign currencies, and may invest beyond this limit in U.S. dollar-denominated securities of foreign issuers, subject to the Fund's 10% of total assets limit on investments in preferred stock, convertible securities and other equity related securities.[14] The Fund will normally limit its foreign currency exposure (from non-U.S. dollar-denominated securities or currencies) to 20% of its total assets.

The Fund may invest in municipal bonds. The types of municipal bonds in which the Fund may invest include municipal lease obligations, municipal general obligation bonds, municipal cash equivalents, and pre-refunded and escrowed to maturity municipal bonds. The Fund may also invest in industrial development bonds, which are municipal bonds issued by a government agency on behalf of a private sector company and, in most cases, are not backed by the credit of the issuing municipality and may therefore involve more risk. The Fund may also invest in securities issued by entities whose underlying assets are municipal bonds.

The Fund may invest in pre-refunded municipal bonds, which are tax-exempt bonds that have been refunded to a call date on or before the final maturity of principal and remain outstanding in the municipal market.[15]

Securities issued by U.S. Government agencies or government-sponsored enterprises may not be guaranteed by the U.S. Treasury.

[10] Duration is a measure used to determine the sensitivity of a security's price to changes in interest rates. The longer a security's duration, the more sensitive it will be to changes in interest rates.

[11] To the extent the Fund invests in unrated securities that PIMCO determines to be of comparable quality to rated securities that the Fund may purchase, the Fund's ability to achieve its objective may depend more heavily on PIMCO's creditworthiness analysis than if the Fund invested exclusively in rated securities.

[12] According to the Registration Statement, PIMCO has broad discretion to identify countries that it considers to qualify as emerging markets. In making investments in emerging market securities, the Fund emphasizes those countries with relatively low gross national product per capita and with the potential for rapid economic growth. Emerging market countries are generally located in Asia, Africa, the Middle East, Latin America and Eastern Europe. PIMCO will select the country based on its evaluation of relative interest rates, inflation rates, exchange rates, monetary and fiscal policies, trade and current account balances, legal and political developments and any other specific factors it believes to be relevant.

[13] According to the Registration Statement, the value of some mortgage-or asset-backed securities may be particularly sensitive to changes in prevailing interest rates. Early repayment of principal on some mortgage-related securities may expose the Fund to a lower rate of return upon reinvestment of principal. When interest rates rise, the value of a mortgage-related security generally will decline; however, when interest rates are declining, the value of mortgage-related securities with prepayment features may not increase as much as other fixed income securities. The rate of prepayments on underlying mortgages will affect the price and volatility of a mortgage-related security, and may shorten or extend the effective maturity of the security beyond what was anticipated at the time of purchase. If unanticipated rates of prepayment on underlying mortgages increase the effective maturity of a mortgage-related security, the volatility of the security can be expected to increase. The value of these securities may fluctuate in response to the market's perception of the creditworthiness of the issuers. Additionally, although mortgages and mortgage-related securities are generally supported by some form of government or private guarantee and/or insurance, there is no assurance that private guarantors or insurers will meet their obligations.

[14] The Fund will not invest in any non-U.S registered equity securities, except if such securities are traded on exchanges that are members of the Intermarket Surveillance Group (''ISG'').

[15] The payment of principal and interest of the pre-refunded municipal bonds held by the Fund is funded from securities in a designated escrow

Continued

The Fund may make short sales as part of its overall portfolio management strategies or to offset a potential decline in value of a security.

The Fund may invest in bank capital securities. Bank capital securities are issued by banks to help fulfill their regulatory capital requirements. There are three common types of bank capital: Lower Tier II, Upper Tier II and Tier I. Bank capital is generally, but not always, of investment grade quality. Upper Tier II securities are commonly thought of as hybrids of debt and preferred stock. Upper Tier II securities are often perpetual (with no maturity date), callable and have a cumulative interest deferral feature. This means that under certain conditions, the issuer bank can withhold payment of interest until a later date. However, such deferred interest payments generally earn interest. Tier I securities often take the form of trust preferred securities.

In selecting Fixed Income Instruments for the Fund, PIMCO will develop an outlook for interest rates, currency exchange rates and the economy, analyze credit and call risks, and use other security selection techniques. The proportion of the Fund's assets committed to investments in Fixed Income Instruments with particular characteristics (such as quality, sector, interest rate or maturity) will vary based on PIMCO's outlook for the U.S. economy and the economies of other countries in the world, the financial markets and other factors.

PIMCO will attempt to identify areas of the bond market that are undervalued relative to the rest of the market. PIMCO will identify these areas by grouping Fixed Income Instruments into sectors such as: money markets, governments, corporates, mortgages, asset-backed and international. Sophisticated proprietary software then will assist in evaluating sectors and pricing specific securities. Once investment opportunities are identified, PIMCO will shift assets among sectors depending upon changes in relative valuations and credit spreads.

Other Portfolio Holdings

This describes additional securities and investment techniques that may be used by the Fund from time to time. Most of the securities and investment techniques described herein are discretionary, which means that PIMCO can decide whether to use them or not.

The Fund may engage in foreign currency transactions on a spot (cash) basis and enter into forward foreign currency exchange contracts. A forward foreign currency exchange contract, which involves an obligation to purchase or sell a specific currency at a future date at a price set at the time of the contract, reduces the Fund's exposure to changes in the value of the currency it will deliver and increases its exposure to changes in the value of the currency it will receive for the duration of the contract. Certain foreign currency transactions may also be settled in cash rather than the actual delivery of the relevant currency. The Fund may enter into these contracts to hedge against foreign exchange risk, to increase exposure to a foreign currency or to shift exposure to foreign currency fluctuations from one currency to another. The Fund may use one currency (or a basket of currencies) to hedge against adverse changes in the value of another currency (or a basket of currencies) when exchange rates between the two currencies are positively correlated. The Fund will segregate or ''earmark'' assets determined to be liquid by PIMCO in accordance with the procedures established by the Fund's Board of Trustees (or, as permitted by applicable law, enter into certain offsetting positions) to cover its obligations under forward foreign currency exchange contracts entered into for non-hedging purposes.

As disclosed in the Registration Statement, if PIMCO believes that economic or market conditions are unfavorable to investors, PIMCO may temporarily invest up to 100% of the Fund's assets in certain defensive strategies, including holding a substantial portion of the Fund's assets in cash, cash equivalents or other highly rated short-term debt securities, including debt securities issued or guaranteed by the U.S. government, its agencies or instrumentalities and affiliated money market and/or short-term bond funds.

The Fund may invest in, to the extent permitted by Section 12(d)(1)(A) of the 1940 Act, other affiliated and unaffiliated funds, such as open-end or closed-end management investment companies, including other exchange traded funds, provided that the Fund's investment in units or shares of investment companies and other open-end collective investment vehicles will not exceed 10% of the Fund's net assets. The Fund may invest securities lending collateral in one or more money market funds to the extent permitted by Rule 12d1–1 under the 1940 Act, including series of PIMCO Funds, an affiliated open-end management investment company managed by PIMCO.

The Fund may invest up to 10% of its total assets in preferred stock, convertible securities and other equity related securities.

Consistent with the Exemptive Order, the Fund will not invest in options contracts, futures contracts or swap agreements.

The Fund may not concentrate its investments in a particular industry, as that term is used in the 1940 Act, and as interpreted, modified, or otherwise permitted by regulatory authority having jurisdiction from time to time.[16]

The Fund may not, with respect to 75% of the Fund's total assets, purchase the securities of any issuer, except securities issued or guaranteed by the U.S. government or any of its agencies or instrumentalities, if, as a result (i) more than 5% of the Fund's total assets would be invested in the securities of that issuer, or (ii) the Fund would hold more than 10% of the outstanding voting securities of that issuer.[17] For the purpose of this restriction, each state and each separate political subdivision, agency, authority or instrumentality of such state, each multi-state agency or authority, and each guarantor, if any, are treated as separate issuers of municipal bonds.

The Fund may hold up to 15% of its net assets in illiquid securities.[18]

account that holds U.S. Treasury securities or other obligations of the U.S. Government (including its agencies and instrumentalities (''Agency Securities'')). As the payment of principal and interest is generated from securities held in a designated escrow account, the pledge of the municipality has been fulfilled and the original pledge of revenue by the municipality is no longer in place. The escrow account securities pledged to pay the principal and interest of the pre-refunded municipal bond do not guarantee the price movement of the bond before maturity. Investment in pre-refunded municipal bonds held by the Fund may subject the Fund to interest rate risk, market risk and credit risk. In addition, while a secondary market exists for pre-refunded municipal bonds, if the Fund sells pre-refunded municipal bonds prior to maturity, the price received may be more or less than the original cost, depending on market conditions at the time of sale.

[16] *See* Form N–1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. *See, e.g.,* Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

[17] The diversification standard is set forth in Section 5(b)(1) of the 1940 Act (15 U.S.C. 80e).

[18] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), footnote 34. *See also,* Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding ''Restricted Securities''); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the ETF. *See* Investment Company Act Release No. 14983

Certain illiquid securities may require pricing at fair value as determined in good faith under the supervision of the Fund's Board of Trustees. The term ''illiquid securities'' for this purpose means securities that cannot be disposed of within seven days in the ordinary course of business at approximately the amount at which the Fund has valued the securities. Certain financial instruments, including, but not limited to, Rule 144A securities, loan participations and assignments, delayed funding loans, revolving credit facilities, and fixed- and floating-rate loans will be included in the 15% limitation on illiquid securities.[19]

The Fund intends to qualify annually and elect to be treated as a regulated investment company under Subchapter M of the Internal Revenue Code.[20]

The Fund will not invest in any non-U.S registered equity securities, except if such securities are traded on exchanges that are ISG members. The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. That is, while the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.,* 2Xs and 3Xs) of the Fund's broad-based securities market index (as defined in Form N–1A).

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600. Consistent with NYSE Arca Equities Rule 8.600(d)(2)(B)(ii), the Adviser will implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the Fund's portfolio. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 [21] under the Exchange Act, as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the net asset value (''NAV'') per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

Creations and Redemptions of Shares

According to the Registration Statement, Shares of the Fund that trade in the secondary market will be ''created'' at NAV [22] by Authorized Participants only in block-size Creation Units of 100,000 Shares or multiples thereof. The Fund will offer and issue Shares at their NAV per Share generally in exchange for a basket of debt securities held by the Fund (the ''Deposit Securities'') together with a deposit of a specified cash payment (the ''Cash Component''). Alternatively, the Fund may issue Creation Units in exchange for a specified all-cash payment (''Cash Deposit''). Similarly, Shares can be redeemed only in Creation Units, generally in-kind for a portfolio of debt securities held by the Fund and/or for a specified amount of cash.

Except when aggregated in Creation Units, Shares are not redeemable by the Fund. The prices at which creations and redemptions will occur will be based on the next calculation of NAV after an order is received. PIMCO will make available on each business day via the National Securities Clearing Corporation (''NSCC''), prior to the opening of business (subject to amendments) on the Exchange (currently 9:30 a.m., E.T.), the identity and the required amount of each Deposit Security and the amount of the Cash Component (or Cash Deposit) to be included in the current Fund Deposit [23] (based on information at the end of the previous business day). Creations and redemptions must be made by an Authorized Participant or through a firm that is either a participant in the Continuous Net Settlement System of the NSCC or a Depository Trust Company participant, and in each case, must have executed an agreement with the Distributor and Transfer Agent with respect to creations and redemptions of Creation Unit aggregations.

Additional information regarding the Trust, the Fund and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings, disclosure policies, distributions and taxes is included in the Registration Statement. All terms relating to the Fund that are referred to but not defined in this proposed rule change are defined in the Registration Statement.

Availability of Information

The Trust's Web site (*www.pimcoetfs.com*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Trust's Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (the

(March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the 1933 Act).

[19] The Fund may invest in fixed- and floating-rate loans, which investments generally will be in the form of loan participations and assignments of portions of such loans. Participations and assignments involve special types of risk, including credit risk, interest rate risk, liquidity risk, and the risks of being a lender. The Fund may also enter into, or acquire participations in, delayed funding loans and revolving credit facilities, in which a lender agrees to make loans up to a maximum amount upon demand by the borrower during a specified term. These commitments may have the effect of requiring the Fund to increase its investments in a company at a time when it might not otherwise decide to do so (including at a time when the company's financial condition makes it unlikely that such amounts will be repaid). To the extent that the Fund is committed to advance additional funds it will segregate or ''earmark'' assets determined to be liquid by PIMCO in accordance with procedures established by the Fund's Board of Trustees in an amount sufficient to meet such commitments.

[20] 26 U.S.C. 851. According to the Registration Statement, to qualify as a regulated investment company, the Fund generally must, among other things, (a) Derive in each taxable year at least 90% of its gross income from dividends, interest, payments with respect to securities loans, and gains from the sale or other disposition of stock, securities or foreign currencies, net income from certain ''qualified publicly traded partnerships,'' or other income derived with respect to its business of investing in such stock, securities or currencies (''Qualifying Income Test''); (b) diversify its holdings so that, at the end of each quarter of the taxable year, (i) at least 50% of the market value of the Fund's assets is represented by cash, U.S. Government securities, the securities of other regulated investment companies and other securities, with such other securities of any one issuer limited for the purposes of this calculation to an amount not greater than 5% of the value of the Fund's total assets and 10% of the outstanding voting securities of such issuer, and (ii) not more than 25% of the value of its total assets is invested in the securities of any one issuer (other than U.S. Government securities or the securities of other regulated investment companies), the securities of certain controlled issuers in the same or similar trades or businesses, or the securities of one or more ''qualified publicly traded partnerships''; and (c) distribute each taxable year the sum of (i) at least 90% of its investment company taxable income (which includes dividends, interest and net short-term capital gains in excess of any net long-term capital losses) and (ii) 90% of its tax exempt interest, net of expenses allocable thereto.

[21] 17 CFR 240.10A–3.

[22] The NAV of the Fund's Shares generally is calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange (''NYSE''), generally 4 p.m. Eastern time (''E.T.'') (the ''NAV Calculation Time'') on any business day. NAV per Share is calculated by dividing the Fund's net assets by the number of Fund Shares outstanding. For more information regarding the valuation of Fund investments in calculating the Fund's NAV, see the Registration Statement.

[23] The Deposit Securities and Cash Component or, alternatively, the Cash Deposit, constitute the ''Fund Deposit,'' which represents the investment amount for a Creation Unit of the Fund.

''Bid/Ask Price''),[24] and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session (9:30 a.m. E.T. to 4 p.m. E.T.) on the Exchange, the Fund will disclose on the Trust's Web site the Disclosed Portfolio as defined in NYSE Arca Equities Rule 8.600(c)(2) that will form the basis for the Fund's calculation of NAV at the end of the business day.[25]

On a daily basis, the Adviser will disclose for each portfolio security or other financial instrument of the Fund the following information: Ticker symbol (if applicable), name of security or financial instrument, number of shares or dollar value of financial instruments held in the portfolio, and percentage weighting of the security or financial instrument in the portfolio. The Web site information will be publicly available at no charge. In addition, price information for the debt securities held by the Fund will be available through major market data vendors.

In addition, a basket composition file, which includes the security names and share quantities, if applicable, required to be delivered in exchange for Fund Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the NYSE via the NSCC. The basket represents one Creation Unit of the Fund. The NAV of the Fund will normally be determined as of the close of the regular trading session on the NYSE (ordinarily 4 p.m. E.T.) on each business day.

Investors can also obtain the Trust's Statement of Additional Information (''SAI''), the Fund's Shareholder Reports, and its Form N–CSR and Form N–SAR, filed twice a year. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *www.sec.gov.* Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line. In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session. [26] The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and to provide a close estimate of that value throughout the trading day.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[27] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. E.T. in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, Commentary .03, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which include Managed Fund Shares) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable Federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the ISG from other exchanges that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[28]

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit (''ETP'') Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to

[24] The Bid/Ask Price of the Fund is determined using the midpoint of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[25] Under accounting procedures followed by the Fund, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[26] Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available Portfolio Indicative Values published on CTA or other data feeds.

[27] *See* NYSE Arca Equities Rule 7.12, Commentary .04.

[28] For a list of the current members of ISG, see *http://www.isgportal.org.* The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. *See* note 15, *supra.*

trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Exchange Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4 p.m. E.T. each trading day.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5) [29] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable Federal securities laws. The Exchange may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. According to the Registration Statement, the Fund will invest under normal market circumstances at least 65% of its total assets in a diversified portfolio of Fixed Income Instruments of varying maturities. The Fund will invest primarily (under normal market circumstances, at least 65% of its total assets) in investment-grade Fixed Income Instruments, but may invest up to 10% of its total assets in high yield Fixed Income Instruments rated B3 through Ba1 by Moody's or equivalently rated by S&P or Fitch, or, if unrated, determined by PIMCO to be of comparable quality. At least 80% of issues of corporate debt securities and debt securities economically tied to an emerging market country held by the Fund must have $200 million or more par amount outstanding. The Fund will not invest in options contracts, futures contracts or swap agreements. The Fund will not invest in any non-U.S registered equity securities, except if such securities are traded on exchanges that are ISG members. The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage; that is, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.,* 2Xs and 3Xs) of the Fund's broad-based securities market index (as defined in Form N–1A).

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information will be publicly available regarding the Fund and the Shares, thereby promoting market transparency. The Fund's portfolio holdings will be disclosed on its Web site daily after the close of trading on the Exchange and prior to the opening of trading on the Exchange the following day. Moreover, the Portfolio Indicative Value will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and quotation and last sale information will be available via the CTA high-speed line. The Web site for the Fund will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. Moreover, prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. The Adviser is affiliated with a broker-dealer and has implemented a ''fire wall'' with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the Fund's portfolio. In addition, the Fund's Reporting Authority will implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the Fund's portfolio.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

[29] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2011–95 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2011–95. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2011–95 and should be submitted on or before January 12, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32751 Filed 12–21–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65986; File No. SR–Phlx–2011–175]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing of Proposed Rule Change Regarding Strike Price Intervals for SLV and USO Options

December 16, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 7, 2011, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to amend Commentary .05 of Rule 1012 (Series of Options Open for Trading) to allow trading of options on iShares® Silver Trust[3] and United States Oil Fund at $0.50 strike price intervals where the strike price is less than $75.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/,* at the principal office of the Exchange, at the Commission's Web site at *www.sec.gov,* and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend Commentary .05 of Rule 1012 to allow trading of options on iShares® Silver Trust (''SLV'' or ''SLV Trust'') and United States Oil Fund (''USO'' or ''USO Fund'') at $0.50 strike price intervals where the strike price is less than $75.

The Underlying ETFs

Two popular exchange traded funds (''ETFs''), which are known on the Exchange as Exchange-Traded Fund Shares, underlie SLV and USO options.[4] SLV and USO options are currently traded on several exchanges.[5]

The iShares® Silver Trust is a grantor trust that is designed to provide a vehicle for investors to own interests in silver. The purpose of the SLV Trust is to own silver transferred to the trust in exchange for shares that are issued by the trust. Each of such shares represents a fractional undivided beneficial interest in the net assets of the SLV Trust. The objective of the SLV Trust is

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[30] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] See email from Jurij Trypupenko, Associate General Counsel, the NASDAQ OMX Group, Inc., to Drew J. Zimmerman, confirming that ''iShares®'' is a registered trademark of BlackRock Institutional Trust Company, N.A.

[4] As of July 31, 2011, the average daily volume (''ADV'') over the previous three calendar months was 60,087,539 for SLV and 13,881,380 for USO.

[5] These exchanges include, in addition to Phlx: NYSEAmex (''Amex''), NYSEArca (''Arca''), BATS Global Markets (''BATS''), Boston Options Exchange (''BOX''), Chicago Board Options Exchange (''CBOE''), C2 Options Exchange (''C2''), International Securities Exchange (''ISE''), and NASDAQ Options Exchange (''NOM'').

for the value of the iShares® to reflect, at any given time, the price of silver owned by the trust at that time.

The United States Oil Fund is a domestic exchange traded security designed to track the movements of light, sweet crude oil that is known as West Texas Intermediate. The investment objective of the USO Fund is for the changes in percentage terms of its units' net asset value to reflect the changes in percentage terms of the spot price of light, sweet crude oil delivered to Cushing, Oklahoma, as measured by the changes in the price of the futures contract for light, sweet crude oil traded on the New York Mercantile Exchange (the ''NYMEX''), less USO's expenses.

The ETFs underlying SLV and USO options, which are listed on NYSE Arca, are not affected or changed by this filing.

The Proposal

Commentary .05(a)(iv) of Rule 1012 currently states that the interval of strike prices of series of options on Exchange-Traded Fund Shares will be $1 or greater where the strike price is $200 or less and $5 or greater where the strike price is more than $200. This is similar to the applicable ETF option interval standards of other options markets.[6]

The Commission has recently approved a CBOE proposal to allow $0.50 strike price intervals for options on certain ETFs and individual equity securities on which CBOE would calculate volatility (known as ''volatility options'').[7] The Exchange is, in this filing, proposing $0.50 strike price intervals for options on ETFs similarly to what CBOE proposed in respect of volatility options. The Exchange notes that its $0.50 strike price interval proposal is, however, limited in several respects. First, the proposed $0.50 intervals are limited to only one type of underlying instrument, namely Exchange-Traded Fund Shares. Second, the $0.50 intervals are proposed for two option products, namely iShares® Silver Trust and United States Oil Fund. And third, the intervals are limited to strike prices that are less than $75.

Other than options in $0.50 strike price intervals approved for CBOE as noted, options on ETFs or Exchange Trades Fund Shares trade at $1 intervals where the strike price is below $200. As demonstrated in this filing, however, this $1 strike price interval is no longer always appropriate, and in fact may be counter-productive and more costly, for ETF option traders and investors that are trying to achieve optimum trading, hedging, and investing objectives.

Traders have expressed their belief that the strike price intervals for SLV and USO options are too coarse, and have asked for the ability to trade and hedge such options in smaller intervals. The Exchange believes that reducing these strike price intervals would make excellent economic sense, would allow better tailored investing and hedging opportunities, and would potentially enable traders and investors to save money.

The number of low-priced strike interval options have [sic] increased significantly over the last decade, such that now there are approximately 935 equity options and 225 ETF options listed at $1 strike price intervals.[8]

There are also, in addition to the newly enabled CBOE $0.50 strike price options, approximately 19 options listed at $0.50 strike price intervals pursuant to the $0.50 Strike Program.[9] Clearly, however, this is no longer sufficient in the current volatile and economically challenging environment. Traders and investors are requesting more low-priced interval ETF options so that they may better tailor investing and hedging strategies and opportunities.[10]

By way of example, if an investor wants to gain exposure to the silver market or hedge his position, he may invest in options on the iShares® Silver Trust (SLV). Today an investor must choose a strike price that might lack the precision he is looking for in order to gain or reduce exposure to the silver market. Thus, an investor executing a covered call strategy may be looking to sell calls on SLV. Assume the investor's SLV cost basis is $38.35. The nearest out-of-the-money strike call is the 39.00 strike, which is 1.69% out of the money. If the 38.50 strike were available, however, the investor could sell calls in a strike price only .39% out-of-the-money, thus offering 1.29% additional risk protection. To an investor writing covered calls on an equity position, this extra protection could be significant on an annual basis.

With United States Oil Fund (USO), a similar lack of precision exists at the current strike prices. For an investor looking to purchase out-of-the-money put protection against a USO purchase of $31.65, the investor must choose the 31.00 strike, which is 2.05% out-of-the-money. If the 31.50 strike were available, the investor could avail himself of a superior strike price that is only .47% out of the money, thus offering 1.58% additional protection. The smaller strike price offers an increased amount of downside protection to the investor at a more precisely factored cost for the hedging opportunity.

Moreover, an investor may want to execute an investment or hedging strategy whereby the investor would close one position and open another through use of a complex order. Implementing $0.50 strike intervals would, again, offer more precision and an opportunity to improve returns and/or risk protection. Thus, using the previous SLV example, the investor who purchased SLV at $38.35 and sold the $38.50 call might later wish to purchase a call to close the original position and roll into a new position as the stock moves away from the original strike price. By offering $0.50 strike prices, the investor may be able to again avail himself of a better return or hedging opportunity.

The Exchange also believes that with the increase in inter-market trading and hedging,[11] the ability to offer potentially similarly-situated products at more similar strike intervals gains importance. Thus, options on futures underlying USO and SLV are traded at $0.50 and lower strike price intervals. Options on USO futures listed for trading on the NYMEX have $0.50 strike price intervals.[12] And options on silver futures listed on NYMEX have strike

[6] *See, for example,* CBOE Rule 5.5 Interpretation and Policy .08; and NOM Chapter IV Section 6, Supplementary Material .01 to Section 6.

[7] *See* Securities Exchange Act Release No. 64189 (April 5, 2011), 76 FR 20066 (April 11, 2011)(SR–CBOE–008)(order granting approval of $0.50 and $1 strike price intervals for certain volatility options where the strike prices are less than $75 and between $75 and $150, respectively). Other Exchanges have submitted similar immediately effective proposals. *See* Securities Exchange Act Release Nos. 64325 (April 22, 2011), 76 FR 23632 (April 27, 2011) (SR–NYSEAmex–2011–26); 64324 (April 22, 2011), 76 FR 23849 (April 28, 2011) (SR–NYSEArca–2011–19); 64359 (April 28, 2011), 76 FR 25390 (May 4, 2011) (SR–ISE–2011–27); and 64589 (June 2, 2011), 76 FR 33387 (June 8, 2011)(SR–Phlx–2011–74).

[8] Figures were based on July 2011 data using symbols with a 2011 expiration date.

[9] The noted $0.50 intervals were established per the $0.50 Program found in Commentary .05(a)(ii) of Rule 1012. The $0.50 Program has inherent price limitations that make it unsuitable for SLV and USO options.

[10] The Exchange is not aware of any material market surveillance issues arising because of the $0.50 or $1.00 the strike price intervals.

[11] Particularly between options markets and futures markets that also trade options on futures.

[12] Per the NYMEX Web site, *http://www.cmegroup.com/product-codes-listing/nymex-market.html,* options on crude oil futures are listed nine years forward whereby consecutive months are listed for the current year and the next five years, and in addition, the June and December contract months are listed beyond the sixth year. Additional months will be added on an annual basis after the December contract expires, so that an additional June and December contract would be added nine years forward, and the consecutive months in the sixth calendar year will be filled in.

price intervals as low as $0.05.[13] The Exchange is not, in this filing, proposing to go to sub-$0.50 strike price intervals but is proposing reasonable, requested, and needed $0.50 intervals only where the strike price of the underlying is less than $75.

By establishing $0.50 strike intervals for SLV and USO options, investors would have greater flexibility for trading and hedging the underlying ETFs or hedging market exposure[14] through establishing appropriate options positions tailored to meet their investment, trading and risk profiles.

Finally, in terms of housekeeping the Exchange is making non-substantive changes to Commentary .06 of Rule 1009 to improve its readability. The Exchange proposes language indicating that Exchange Trade Fund Shares may represent interests in several listed optionable trusts, in lieu of current language that shares may be issued by such trusts.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[15] in general, and furthers the objectives of Section 6(b)(5) of the Act[16] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. This would be achieved by establishing $0.50 strike intervals for SLV and USO options so that traders, market participants, and investors in general may have greater flexibility for trading and hedging the underlying ETFs or hedging market exposure through establishing appropriate options positions tailored to meet their investment, trading and risk profiles.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2011–175 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2011–175. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2011–175 and should be submitted on or before January 12, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32749 Filed 12–21–11; 8:45 am]

BILLING CODE 8011–01–P

[13] Per the NYMEX Web site, *http://www.cmegroup.com/product-codes-listing/nymex-market.html,* options on silver futures are listed for the first three months at strike price intervals of $.05. An additional ten strike prices will be listed at $.25 increments above and below the highest and lowest five-cent increment, respectively, beginning with the strike price evenly divisible by $.25. For all other trading months, strike prices are at an interval of $.05, $.10, and $.25 per specified parameters.

[14] A trader or investor may, for example, use a commodity-oriented ETF such as the SLV Trust or USO Fund to counter-balance (hedge) an equity or ETF position that tends to move inversely to the price movement of SLV or USO.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12740 and #12741]

Texas Disaster Number TX–00380

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 4.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Texas (FEMA–1999–DR), dated 08/15/2011.

Incident: Wildfires.

Incident Period: 04/06/2011 Through 08/29/2011.

Effective Date: 12/13/2011.

Physical Loan Application Deadline Date: 10/14/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 05/14/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster

declaration for Private Non-Profit organizations in the State of Texas, dated 08/15/2011, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Childress, Deaf Smith.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–32784 Filed 12–21–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12963 and #12964]

California Disaster #CA–00181

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of California dated 12/14/2011.

Incident: Sequoia Apartment Complex Fire.

Incident Period: 11/18/2011.

Effective Date: 12/14/2011.

Physical Loan Application Deadline Date: 02/13/2012.

Economic Injury (EIDL) Loan Application Deadline Date: 09/14/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Alameda.

Contiguous Counties: California:

Contra Costa, San Joaquin, San Mateo, Santa Clara, Stanislaus.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	4.125
Homeowners Without Credit Available Elsewhere	2.063
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	3.125
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 12963 5 and for economic injury is 12964 0.

The State which received an EIDL Declaration # is California.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: December 14, 2011.

Karen G. Mills,

Administrator.

[FR Doc. 2011–32785 Filed 12–21–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12740 and #12741]

Texas Disaster Number TX–00380

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 3.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Texas (FEMA–1999–DR), dated 08/15/2011.

Incident: Wildfires.

Incident Period: 04/06/2011 through 08/29/2011.

Effective Date: 12/13/2011.

Physical Loan Application Deadline Date: 10/14/2011.

Economic Injury (EIDL) Loan Application Deadline Date: 05/14/2012.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Texas, dated 08/15/2011, is hereby amended to re-establish the incident period for this disaster as beginning 04/06/2011 and continuing through 08/29/2011.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2011–32789 Filed 12–21–11; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 7738]

Determination Under the Foreign Assistance Act of 1961, as Amended, Relating to Assistance to St. Kitts and Nevis

Pursuant to the authority vested in me by Section 620(q) of the Foreign Assistance Act of 1961, as amended (FAA); Executive Order 12163, as amended by Executive Order 13346; and Delegation of Authority 245–1, I hereby determine that continued assistance to St. Kitts and Nevis from the date upon which the restriction took effect is in the national interest of the United States and thereby waive the application of section 620(q) of the FAA for such assistance.

This Determination shall be reported to Congress and published in the **Federal Register**.

Dated: December 8, 2011.

Thomas R. Nides,

Deputy Secretary of State for Management and Resources.

[FR Doc. 2011–32810 Filed 12–21–11; 8:45 am]

BILLING CODE 4710–29–P

DEPARTMENT OF STATE

[Public Notice 7543]

Industry Advisory Panel: Notice of Charter Renewal

The Under Secretary for Management has approved the renewal of the charter for the U.S. Department of State Bureau of Overseas Buildings Operations' (OBO) Industry Advisory Panel for an additional two-year period. The panel meets semi-annually in the Harry S Truman Building at the U.S. Department

of State, located at 2201 C Street NW., Washington, DC. The majority of each meeting is devoted to an exchange of ideas between OBO's senior management and the panel members on acquisitions, design, operations, security, and building maintenance. The meetings are open to the public and are subject to advance registration and provision of required security information. Procedures for registration are included with each meeting announcement, no later than fifteen business days before each meeting.

OBO's mission is to provide safe, secure, and functional facilities for the conduct of U.S. diplomacy and the promotion of U.S. interests worldwide. These facilities represent American values and the best in American architecture, engineering, technology, sustainability, art, culture, and construction execution. For further information, please contact Christine Foushee at *FousheeCT@state.gov* or (703) 875–4131.

Dated: December 14, 2011.

Lydia Muniz,

Acting Director, Overseas Buildings Operations, U.S. Department of State.

[FR Doc. 2011–32813 Filed 12–21–11; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending December 10, 2011

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (see 14 CFR 301.201 *et. seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2011–0227.

Date Filed: December 7, 2011.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 28, 2011.

Description: Application of Aviation Safety & Security Consultants, Ltd., d/b/a Butler's Aviation requesting issuance of a foreign air carrier permit to the extent necessary to permit it to engage in charter foreign air transportation of persons, property, and mail between a point or points in the Bahamas and a point or points in Florida, and other charters using small aircraft.

Docket Number: DOT–OST–2010–0264.

Date Filed: December 6, 2011.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 27, 2011.

Description: Application of Whitejets Transportes Aéreos Ltda. (''Whitejets'') requesting amendment of its foreign air carrier permit to remove the prior approval requirement imposed by Order 2011–3–15 consistent with the Department's decisions in other recent cases involving Brazilian carriers. Whitejets also requests an exemption to the extent necessary to allow Whitejets to operate charters between Brazil and the United States without needing to obtain prior approval from the Department in the form of a statement of authorization.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 2011–32770 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending December 3, 2011

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et. seq.*). The due date for Answers, Conforming Applications, or Motions to ModifyScope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or inappropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2001–11158.

Date Filed: December 2, 2011.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 23, 2011.

Description: Application of WestJet requesting renewal of its exemption authority to engagein: (i) Scheduled foreign air transportation of persons, property and mail from points behind Canada via Canada and intermediate points to a point or points in theUnited States and beyond; (ii) charter foreign air transportation between any point or points in Canada and any point or points in the United States and beyond, provided that, except with respect to cargo charters, such service constitutes part of a continuous operation, with or without a change of aircraft, that includes service to Canada for the purpose of carrying local traffic between Canada and the United States; and (iii) other charters.WestJet further requests issuance of a foreign air carrier permit to enableWestJet to engage in the same foreign air transportation described above.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 2011–32772 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Notice of Proposed Construction or Alteration, Notice of Actual Construction or Alteration, Project Status Report

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The FAA uses the information collected on form 7460–1 to determine the effect a proposed construction or alteration would have on air navigation and the National Airspace System (NAS), and the information collected on form 7460–2 to measure the progress of actual construction.

DATES: Written comments should be submitted by February 21, 2012.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.A.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0001.

Title: Notice of Proposed Construction or Alteration, Notice of Actual Construction or Alteration, Project Status Report.

Form Numbers: FAA Forms 7460–1 and 7460–2.

Type of Review: Renewal of an information collection.

Background: 49 U.S.C. Section 44718 states that the Secretary of Transportation shall require notice of structures that may affect navigable airspace, air commerce, or air capacity. These notice requirements are contained in 14 CFR Part 77. The information is collected via FAA forms 7460–1 and 7460–2.

Respondents: Approximately 110,325 airports.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: Approximately 15 minutes.

Estimated Total Annual Burden: 22,425 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on December 15, 2011.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2011–32807 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Reinstated Approval of Information Collection: Survey of Airman Satisfaction With Aeromedical Certification Services

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to reinstate a previously discontinued information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 4, 2011, vol. 76, no. 150, page 47287. This survey assesses airman opinion of key dimensions of service quality.

DATES: Written comments should be submitted by January 23, 2012.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.A.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0707.

Title: Survey of Airman Satisfaction with Aeromedical Certification Services.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Reinstatement of an information collection.

Background: The FAA, through the Office of Aerospace Medicine (OAM), is responsible for the medical certification of pilots and certain other personnel under 14 CFR part 67 to ensure they are medically qualified to operate aircraft and perform their duties safely. In the accomplishment of this responsibility, OAM provides a number of services to pilots, and has established goals for the performance of those services. This survey is designed to meet the requirement to survey stakeholder satisfaction under Executive Order No. 12862, ''Setting Customer Service Standards,'' and the Government Performance and Results Act of 1993 (GPRA).

Respondents: Approximately 2,333 pilots and certain other personnel who have applied for medical certification.

Frequency: Information is collected biennially.

Estimated Average Burden per Response: 15 minutes.

Estimated Total Annual Burden: 583.25 hours.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov*, or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on December 15, 2011.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2011–32856 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Certification: Airmen Other Than Flight Crewmembers, Subpart C, Aircraft Dispatchers and App. A Aircraft Dispatcher Courses

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The respondents to this information collection are FAR Part 135 and Part 121 operators seeking airman certification and approval of aircraft

dispatcher courses. The FAA uses the information to ensure compliance and adherence to the regulations.

DATES: Written comments should be submitted by February 21, 2012.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.A.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0648.

Title: Certification: Airmen Other Than Flight Crewmembers, Subpart C, Aircraft Dispatchers and App. A Aircraft Dispatcher Courses.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: Each applicant for an aircraft dispatcher certificate or FAA approval of an aircraft dispatcher course must comply with 14 CFR part 65, subpart C and appendix A. Any paperwork is provided to the local Flight Standards District Office of the FAA which oversees the certificates and FAA approvals.

Respondents: Approximately 36 applicants.

Frequency: Information is collected as needed.

Estimated Average Burden per Response: 1 hour.

Estimated Total Annual Burden: 4,679 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on December 15, 2011.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2011–32859 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Recording of Aircraft Conveyances and Security Documents

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. Approval is needed for security reasons such as mortgages submitted by the public for recording against aircraft, engines, propellers, and spare parts locations.

DATES: Written comments should be submitted by February 21, 2012.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.A.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 2120–0043.

Title: Recording of Aircraft Conveyances and Security Documents.

Form Numbers: FAA Form 8050–41.

Type of Review: Renewal of an information collection.

Background: Title 49, U.S.C. Section 44108 provides for establishing and maintaining a system for the recording of security conveyances affecting title to, or interest in U.S. civil aircraft, as well as certain specifically identified engines, propellers, or spare parts locations, and for recording of releases relating to those conveyances. The original security conveyance is examined by the Civil Aviation Registry to insure that it meets recording requirements as set forth in FAR Part 49. If it does, it is given a recording number and made a permanent part of the aircraft record.

Respondents: Approximately 45,469 lienholders.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 1 hour.

Estimated Total Annual Burden: 45,469 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on December 15, 2011.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2011–32858 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Twelfth Meeting: RTCA Special Committee 220, Automatic Flight Guidance and Control

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Notice of RTCA Special Committee 220, Automatic Flight Guidance and Control.

SUMMARY: The FAA is issuing this notice to advise the public of the twelfth meeting of RTCA Special Committee 220, Automatic Flight Guidance and Control.

DATES: The meeting will be held January 10–12, 2012, from 9 a.m.–5 p.m.

ADDRESSES: The meeting will be held at Hilton Clearwater Beach Resort, 400 Mandalay Avenue, Clearwater Beach, FL 33767.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a Special Committee 220, Automatic Flight Guidance and Control. The agenda will include the following:

January 10, 2012

- Introductions
- Review of Meeting Agenda

- Introduction and administrative items
- Review and approval of summary from the first plenary meeting RTCA Paper No. 111–11/SC220–024
- Presentation of FRAC comments WG#2
- Presentation of FRAC comments WG#3
- Break-out sessions for WG#2 and WG#3 to work on disposition of comments

January 11, 2012

- Continue Break-out sessions for WG#2 and WG#3
- Continue disposition of comments

January 12, 2012

- Return to general plenary meeting
- Review of WG#2 status—progress, issues and plan
- Review of WG#3 status—progress, issues and plans
- Review action items
- Agree on date to send out to PMC
- Discuss on extension of charter to cover advanced and NextGen technologies
- Administrative items (meeting schedule, location, and next meeting agenda)
- Any other business
- Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 15, 2011.

Robert L. Bostiga,

Manager, Business Operations Branch, Federal Aviation Administration.

[FR Doc. 2011–32864 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

First Meeting: RTCA Special Committee 226 Audio Systems and Equipment

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Notice of RTCA Special Committee 226, Audio Systems and Equipment.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 226, Audio Systems and Equipment, for the first meeting.

DATES: The meeting will be held January 10–12, 2012, from 9 a.m.–5 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1150 18th Street NW., Suite 910, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a Special Committee 226, Audio Systems and Equipment. The agenda will include the following:

January 10–12, 2012

- Welcome and Administrative Remarks
- Introductions
- RTCA Overview
- Audio Systems and Equipment—Background and History
- Agenda Overview
- Committee Scope, Terms of Reference Overview
- Organization of Work, Assign Tasks and Work Groups, Discussion, Recommendations and Assignment of Responsibilities
- Other Business
- Establish Agenda for Next Meeting
- Date and Place of Next Meeting
- Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 15, 2011.

Robert L. Bostiga,

Manager, Business Operations Branch, Federal Aviation Administration.

[FR Doc. 2011–32863 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on the Interstate 95 High Occupancy Toll Lanes Project in Virginia

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by FHWA.

SUMMARY: This notice announces actions taken by the FHWA that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to the Interstate 95 High Occupancy Toll Lanes project in Spotsylvania, Stafford, Prince William, and Fairfax Counties and City of Fredericksburg, Virginia, and those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the project will be barred unless the claim is filed on or before June 19, 2012. Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for a highway or public transportation capital project shall be barred unless it is filed within 180 days after publication of a notice in the **Federal Register** announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Sundra, Director of Program Development, Federal Highway Administration, 400 North 8th Street, Richmond, Virginia, 23219; telephone: (804) 775–3357; email: *Ed.Sundra@dot.gov.* The FHWA Virginia Division Office's normal business hours are 8 a.m. to 5 p.m. (eastern time). For the Virginia Department of Transportation: Mr. John D. Lynch, P.E., Regional Transportation Program Director, Virginia Department of Transportation, 6363 Walker Lane, Suite 500, Alexandria, Virginia, 22310; telephone: (703) 383–2274; email: *John.Lynch@VDOT.Virginia.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA has taken final agency actions subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the following project

in the State of Virginia: Interstate 95 High Occupancy Toll (HOT) Lanes. Generally, the Interstate 95 HOT Lanes project will expand the existing two High Occupancy Vehicle (HOV) lanes to three lanes from just north of the I–95/I–395/I–495 interchange in Fairfax County (in the vicinity of the I–395/Edsall Road interchange) to the Prince William Parkway in Prince William County (Exit 158) and convert them to HOT Lanes. The existing two HOV lanes will be maintained from the Prince William Parkway to south of the Town of Dumfries in Prince William County but be converted to HOT Lanes. Two new HOV/HOT Lanes will be constructed for approximately 26 miles through Stafford County, the City of Fredericksburg and Spotsylvania County to approximately one mile south of Route 17 in Spotsylvania County. The project will also include flyover ramps and at-grade slip ramps to facilitate movement between the HOV/HOT lanes and the general purpose lanes. Pull-off areas will also be provided for enforcement and breakdown purposes. The project would accommodate travel demand more efficiently, provide higher reliability of travel times, and expand travel choices. The actions taken by FHWA, and the laws under which such actions were taken, are described in the Environmental Assessment, the letter finalizing the Environmental Assessment process and requesting a Finding of No Significant Impact (FONSI), the FONSI that was issued on December 5, 2011, and in other documents in the FHWA project records. The Environmental Assessment, the Air Quality and Noise Analyses, and the Design Public Hearings Comments and Response Report can be viewed on the project's Web site at *http://www.vamegaprojects.com/about-megaprojects/i-95-hov-hot-lanes/.* These documents and other project records are also available by contacting FHWA or the VDOT at the contact information provided above.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act (FAHA) [23 U.S.C. 109 and 23 U.S.C. 128].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*].

6. *Social and Economic:* Farmland Protection Policy Act [7 U.S.C. 4201–4209].

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C 139(l)(1) .

Issued On: December 7, 2011.

Edward Sundra,

Director of Program Development.

[FR Doc. 2011–32827 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2011–0326]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption from the diabetes mellitus requirement; request for comments.

SUMMARY: FMCSA announces receipt of applications from 15 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before January 23, 2012.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2011–0326 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1 (202) 493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 15 individuals listed in this

notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

Howard A. Betz

Mr. Betz, age 63, has had ITDM since 2011. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Betz understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a Commercial Motor Vehicle (CMV) safely. Mr. Betz meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A Commercial Driver's License (CDL) from Ohio.

Keith R. Boyington

Mr. Boyington, 50, has had ITDM since 2009. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Boyington understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Boyington meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Idaho.

Adam C. Cochran

Mr. Cochran, 22, has had ITDM since 1991. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Cochran understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Cochran meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Georgia.

Kevin J. Coppens

Mr. Coppens, 53, has had ITDM since 2010. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Coppens understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Coppens meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable diabetic proliferative retinopathy in the right eye and stable diabetic nonproliferative retinopathy in the left eye. He holds an operator's license from Maine.

Frank H. Ford, Jr.

Mr. Ford, 39, has had ITDM since 2010. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ford understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ford meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Daniel R. Harris

Mr. Harris, 42, has had ITDM since 2011. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Harris understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Harris meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Texas.

Alva L. Keifer

Mr. Keifer, 56, has had ITDM since 2010. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Keifer understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Keifer meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Ohio.

Edwin J. Lundquist

Mr. Lundquist, 21, has had ITDM since 2003. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Lundquist understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Lundquist meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined

him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Minnesota.

John B. Marriott

Mr. Marriott, 39, has had ITDM since 2001. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Marriott understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Marriott meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Utah.

Joseph L. Owings

Mr. Owings, 71, has had ITDM since 2011. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Owings understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Owings meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Alabama.

Richard L. Pinkard

Mr. Pinkard, 47, has had ITDM since 2010. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Pinkard understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Pinkard meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Alabama.

Samuel E. Sanders

Mr. Sanders, 42, has had ITDM since 2011. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Sanders understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Sanders meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from New York.

Jerry H. Small

Mr. Small, 56, has had ITDM since 1984. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Small understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Small meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from North Carolina.

Michael L. Tyler

Mr. Tyler, 58, has had ITDM since 1983. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Tyler understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Tyler meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His optometrist examined him in 2011 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Michigan.

Richard D. Wollman

Mr. Wollman, 56, has had ITDM since 2011. His endocrinologist examined him in 2011 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Wollman understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Wollman meets the requirements of the vision requirement at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2011 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from South Dakota.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

[1] Section 4129(a) refers to the 2003 notice as a ''final rule.'' However, the 2003 notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 U.S.C. 31136(e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: December 14, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–32714 Filed 12–21–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2011–0278]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt eighteen individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective December 22, 2011. The exemptions expire on December 22, 2013.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov, FMCSA,* Room W64–224, Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

Background

On October 25, 2011, FMCSA published a notice of receipt of Federal diabetes exemption applications from eighteen individuals and requested comments from the public (76 FR 66120). The public comment period closed on November 25, 2011, and no comments were received.

FMCSA has evaluated the eligibility of the eighteen applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current requirement for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that ''A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control'' (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled ''A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century.'' The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible.

The September 3, 2003 (68 FR 52441), **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777), **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These eighteen applicants have had ITDM over a range of 1 to 33 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision requirement at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the October 25, 2011, **Federal Register** notice and they will not be repeated in this notice.

Discussion of Comment

FMCSA did not receive any comments in this proceeding.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes requirement in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants

from the diabetes requirement in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Conclusion

Based upon its evaluation of the eighteen exemption applications, FMCSA exempts, Lennie D. Cook (OH), David R. Cornelius (IL), John R. Crowder (OR), Scott E. Edwards (PA), Marcus M. Gagne (ME), Ronald J. Ezell (MO), David P. Govero (MS), Dale R. Herren (MS), Tony C. Johnson (AR), Christopher A. Jones (WY), Imre Kasza (PA), Donald R. McClure, Jr. (PA), Jeffrey C. Minehart (PA), Helen M. O'Malley (NJ), Nathan J. Postema (ID), Clyde G. Rishel (PA), Kurt Schneider (VT) and Douglas O. Sundby (MN) from the ITDM requirement in 49 CFR 391.41(b)(3), subject to the conditions listed under ''Conditions and Requirements'' above.

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: December 14, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–32717 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–1999–6156; FMCSA–1999–5748; FMCSA–2005–22194]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 10 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective January 3, 2012. Comments must be received on or before January 23, 2012.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: FMCSA–1999–6156; FMCSA–1999–5748; FMCSA–2005–22194, using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1 (202) 493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Divison, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 10 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 10 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period.

They are:

Woodrow E. Bohley (MO)
Kenneth E. Bross (MO)
Russell W. Foster (OH)
Kevin Jacoby (NJ)
Richard L. Loeffelholz (WI)
Herman C. Mash (NC)
Frank T. Miller (OH)
Robert G. Rascicot (FL)
Jon H. Wurtele (NE)
Walter M. Yohn, Jr. (AL)

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 10 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (64 FR 40404; 64 FR 54948; 64 FR 66962; 65 FR 159; 66 FR 66969; 68 FR 69432; 70 FR 57353; 70 FR 72689; 71 FR 644; 72 FR 71995; 74 FR 65847). Each of these 10 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by January 23, 2012.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 10 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: December 14, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–32710 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2011–0276]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt four individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs). The exemptions will enable these individuals to operate commercial motor vehicles (CMVs) in interstate commerce without meeting the prescribed vision requirement. The Agency has concluded that granting these exemptions will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these CMV drivers.

DATES: The exemptions are effective December 22, 2011. The exemptions expire on December 22, 2013.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov*.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m.

and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgment page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

Background

On October 31, 2011, FMCSA published a notice of receipt of exemption applications from certain individuals, and requested comments from the public (76 FR 67248). That notice listed four applicants' case histories. The four individuals applied for exemptions from the vision requirement in 49 CFR 391.41(b)(10), for drivers who operate CMVs in interstate commerce.

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. Accordingly, FMCSA has evaluated the four applications on their merits and made a determination to grant exemptions to each of them.

Vision and Driving Experience of the Applicants

The vision requirement in the FMCSRs provides:

A person is physically qualified to drive a commercial motor vehicle if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing requirement red, green, and amber (49 CFR 391.41(b)(10)).

FMCSA recognizes that some drivers do not meet the vision requirement but have adapted their driving to accommodate their vision limitation and demonstrated their ability to drive safely. The four exemption applicants listed in this notice are in this category. They are unable to meet the vision requirement in one eye for various reasons, including central scotoma, amblyopia, and prosthesis. In most cases, their eye conditions were not recently developed. Three of the applicants were either born with their vision impairments or have had them since childhood. The one individual who sustained his vision condition as an adult has had it for a period of twenty years.

Although each applicant has one eye that does not meet the vision requirement in 49 CFR 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and, in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV. Doctors' opinions are supported by the applicants' possession of valid commercial driver's licenses (CDLs) or non-CDLs to operate CMVs. Before issuing CDLs, States subject drivers to knowledge and skills tests designed to evaluate their qualifications to operate a CMV.

All of these applicants satisfied the testing requirements for their State of residence. By meeting State licensing requirements, the applicants demonstrated their ability to operate a CMV, with their limited vision, to the satisfaction of the State.

While possessing a valid CDL or non-CDL, these four drivers have been authorized to drive a CMV in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. They have driven CMVs with their limited vision for careers ranging from 2 to 13 years. In the past 3 years, none of the drivers were involved in crashes or convicted of moving violations in a CMV.

The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in the October 31, 2011 notice (76 FR 67248).

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the vision requirement in 49 CFR 391.41(b)(10) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. Without the exemption, applicants will continue to be restricted to intrastate driving. With the exemption, applicants can drive in interstate commerce. Thus, our analysis focuses on whether an equal or greater level of safety is likely to be achieved by permitting each of these drivers to drive in interstate commerce as opposed to restricting him or her to driving in intrastate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered the medical reports about the applicants' vision as well as their driving records and experience with the vision deficiency.

To qualify for an exemption from the vision requirement, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely with the vision deficiency for the past 3 years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at Docket Number FMCSA–1998–3637.

We believe we can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's (FHWA) former waiver study program clearly demonstrate the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively (See 61 FR 13338, 13345, March 26, 1996). The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time periods vary only slightly (See Bates and Neyman, University of California Publications in Statistics, April 1952). Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex, geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes (See Weber,

Donald C., ''Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process,'' Journal of American Statistical Association, June 1971). A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used 3 consecutive years of data, comparing the experiences of drivers in the first 2 years with their experiences in the final year.

Applying principles from these studies to the past 3-year record of the four applicants, none of the applicants were involved in crashes or convicted of moving violations in a CMV. All the applicants achieved a record of safety while driving with their vision impairment, demonstrating the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

We believe that the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions. The veteran drivers in this proceeding have operated CMVs safely under those conditions for at least 3 years, most for much longer. Their experience and driving records lead us to believe that each applicant is capable of operating in interstate commerce as safely as he/she has been performing in intrastate commerce. Consequently, FMCSA finds that exempting these applicants from the vision requirement in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption. For this reason, the Agency is granting the exemptions for the 2-year period allowed by 49 U.S.C. 31136(e) and 31315 to the four applicants listed in the notice of October 31, 2011 (76 FR 67248).

We recognize that the vision of an applicant may change and affect his/her ability to operate a CMV as safely as in the past. As a condition of the exemption, therefore, FMCSA will impose requirements on the four individuals consistent with the grandfathering provisions applied to drivers who participated in the Agency's vision waiver program.

Those requirements are found at 49 CFR 391.64(b) and include the following: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirement in 49 CFR 391.41(b)(10) and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Discussion of Comments

FMCSA received one comment in this proceeding. The comment was considered and discussed below.

Mr. Calvin Liburd is in favor of granting vision exemptions to all the potential applicants; he believes that effective research and monitoring is in place already. He emphasizes that many applicants have sufficient driving experience and commercial driver's licenses.

Conclusion

Based upon its evaluation of the four exemption applications, FMCSA exempts Tracey L. Butcher (VA), Keith M. Calvert (AL), Terry G. Howard (KY), and David M. Taylor (MS) from the vision requirement in 49 CFR 391.41(b)(10), subject to the requirements cited above (49 CFR 391.64(b)).

In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: December 14, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–32716 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2011–0158]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel TANGO; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 23, 2012.

ADDRESSES: Comments should refer to docket number MARAD–2011–0158. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W21–203, Washington, DC 20590. Telephone (202) 366–5979, Email *Joann.Spittle@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel TANGO is:

INTENDED COMMERCIAL USE OF VESSEL: ''Sightseeing, sportfishing, scuba diving.''

GEOGRAPHIC REGION: ''California.''

The complete application is given in DOT docket MARAD–2011–0158 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: December 15, 2011.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2011–32814 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2011–0156]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel DREAM CATCHER; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before January 23, 2012.

ADDRESSES: Comments should refer to docket number MARAD–2011–0156. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W21–203, Washington, DC 20590. Telephone (202) 366–5979, Email *Joann.Spittle@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel DREAM CATCHER is:

INTENDED COMMERCIAL USE OF VESSEL: ''Passenger charter.''

GEOGRAPHIC REGION: ''Georgia, Florida, California, Minnesota, Wisconsin.''

The complete application is given in DOT docket MARAD–2011–0156 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: December 15, 2011.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2011–32812 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD–2011–0163]

Use of Foreign-Flag Anchor Handling Vessels in the Beaufort Sea or Chukchi Sea Adjacent to Alaska

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice and request for comments.

SUMMARY: As authorized by Public Law 111–281, the Secretary of Transportation, as represented by the Maritime Administration, is authorized to make determinations permitting the use of foreign-flag anchor handling vessels in certain cases (and for a limited period of time) if no U.S.-flag vessels are found to be suitable and reasonably available.

A request for such a determination regarding anchor handling vessels with a minimum ice class A3 has been received by the Maritime Administration. If the Maritime Administration determines that U.S.-flag vessels are not suitable and reasonably available for the proposed service, a determination will be granted allowing for the conditional use of these vessels, within a set timeframe. Those interested in providing the names of suitable and available vessels for the proposed service should refer to the docket number, and identify the U.S.-flag vessels available.

DATES: Submit U.S.-flag anchor handling ice class A3 or above vessel nominations on or before January 23, 2012.

ADDRESSES: U.S.-flag vessel nominations should refer to docket number MARAD–2011–0163. Written nominations may be

submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30 West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. You may also send documents electronically via the Internet at *http://www.regulations.gov.* All submissions will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document, and all documents entered into this docket, is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Hokana, U.S. Department of Transportation, Maritime Administration, MAR–730 Room W21–304, 1200 New Jersey Avenue SE., Washington, DC 20590. Telephone (202) 366–0760.

SUPPLEMENTARY INFORMATION: The Maritime Administration has received a request from an attorney on behalf of a client seeking permission to charter a foreign-flag ice-classed A3 anchor handling vessel adjacent to the coast of Alaska. The foreign-flag anchor handling vessel (TOR VIKING II 9199622) would operate in the Beaufort Sea or Chukchi Sea adjacent to Alaska, under certain conditions, and for a limited period of time. Section 306 of Public Law 111–281 allows the use of foreign-flag vessels in this regard if the Maritime Administration determines that U.S.-flag vessels are not suitable or reasonably available.

The Maritime Administration is posting this notice in the **Federal Register** providing the public 30 days notice of our intention to provide a determination allowing for the use of a foreign-flag vessel in this regard, if suitable and available U.S.-flag vessels are not otherwise identified. Our determination will be for a period of one year from April 30, 2012 through April 30, 2013, but may be extended based on the demonstration of a binding commitment to acquire U.S.-flag replacement vessels. Foreign-flag anchor handling vessels may not be employed for the setting, relocation or recovery of anchors or other mooring equipment of a mobile offshore drilling unit after December 31, 2017.

Dated: December 15, 2011.

By order of the Maritime Administrator.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2011–32809 Filed 12–21–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Supplemental Identification Information for Two Individuals Designated Pursuant to Executive Order 13224

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing supplemental information for the names of two individuals whose property and interests in property are blocked pursuant to Executive Order 13224 of September 23, 2001, ''Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism.''

DATES: The publishing of updated identification information by the Director of OFAC of the two individuals in this notice, pursuant to Executive Order 13224, is effective on December 15, 2011.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, tel.: (202) 622–0077.

Background

On September 23, 2001, the President issued Executive Order 13224 (the ''Order'') pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701–1706, and the United Nations Participation Act of 1945, 22 U.S.C. 287c. In the Order, the President declared a national emergency to address grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the September 11, 2001 terrorist attacks in New York, Pennsylvania, and at the Pentagon. The Order imposes economic sanctions on persons who have committed, pose a significant risk of committing, or support acts of terrorism. The President identified in the Annex to the Order, as amended by Executive Order 13268 of July 2, 2002, 13 individuals and 16 entities as subject to the economic sanctions. The Order was further amended by Executive Order 13284 of January 23, 2003, to reflect the creation of the Department of Homeland Security.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in or hereafter come within the United States or the possession or control of United States persons, of: (1) Foreign persons listed in the Annex to the Order; (2) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States; (3) persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order; and (4) except as provided in section 5 of the Order and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to the Order or determined to be subject to the Order or to be otherwise associated with those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order.

On December 15, 2011 the Director of OFAC, in consultation with the Departments of State, Homeland Security, Justice and other relevant agencies, supplemented the identification information for two individuals whose property and interests in property are blocked pursuant to Executive Order 13224.

The supplementation identification information for the individuals is as follows:

Individuals

ABU GHAZALA, Muhammad Hisham Muhammad Isma'il (a.k.a. ABU

LAYTH, Mansur; a.k.a. ABU SUWAYWIN, 'Ali 'Abd Al-Rahman; a.k.a. ABU-GHAZALAH, Muhammad Hisham Isma'il; a.k.a. ABU-GHAZALAH, Muhammad Hisham Muhammad; a.k.a. AL-FILISTINI, Abu Layth; a.k.a. ISMA'IL, 'Ali 'Abd Al-Rahman; a.k.a. ''ABU GHAZALA''; a.k.a. ''ABU GHAZALEH''); DOB 26 Dec 1962; POB Al-Zarqa, Jordan; nationality Jordan; National ID No. 9621014947 (Jordan) (individual) [SDGT]

PATEK, Umar (a.k.a. ARSALAN, Mike; a.k.a. BIN ZEIN, Hisyam; a.k.a. JAFAR, Anis Alawi; a.k.a. KECIL, Umar; a.k.a. PATEK, Omar; a.k.a. ''AL ABU SYEKH AL ZACKY''; a.k.a. ''PAK TAEK''; a.k.a. ''PA'TEK''; a.k.a.''UMANGIS MIKE''); DOB 20 Jul 1966; POB Central Java, Indonesia; nationality Indonesia (individual) [SDGT]

Dated: December 15, 2011.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2011–32725 Filed 12–21–11; 8:45 am]

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FEDERAL REGISTER

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Part II

Bureau of Consumer Financial Protection

12 CFR Part 1026

Truth in Lending (Regulation Z); Interim Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB–2011–0031]

RIN 3170–AA06

Truth in Lending (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Interim final rule with request for public comment.

SUMMARY: Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) transferred rulemaking authority for a number of consumer financial protection laws from seven Federal agencies to the Bureau of Consumer Financial Protection (Bureau) as of July 21, 2011. The Bureau is in the process of republishing the regulations implementing those laws with technical and conforming changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act. In light of the transfer of the Board of Governors of the Federal Reserve System's (Board's) rulemaking authority for the Truth in Lending Act (TILA) to the Bureau, the Bureau is publishing for public comment an interim final rule establishing a new Regulation Z (Truth in Lending). This interim final rule does not impose any new substantive obligations on persons subject to the existing Regulation Z, previously published by the Board.

DATES: This interim final rule is effective December 30, 2011. Comments must be received on or before February 21, 2012.

ADDRESSES: You may submit comments, identified by *Docket No. CFPB–2011–0031* or *RIN 3170–AA06,* by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1500 Pennsylvania Avenue NW., (Attn: 1801 L Street), Washington, DC 20220.
- *Hand Delivery/Courier in Lieu of Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006.

All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20006, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. You should not include sensitive personal information, such as account numbers or social security numbers. The Bureau will not edit comments to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Catherine Henderson or Paul Mondor, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Background

Congress enacted the Truth in Lending Act (TILA) based on findings that the informed use of credit resulting from consumers' awareness of the cost of credit would enhance economic stability and would strengthen competition among consumer credit providers. One of the purposes of TILA is to provide meaningful disclosure of credit terms to enable consumers to compare credit terms available in the marketplace more readily and avoid the uninformed use of credit. TILA's disclosures differ depending on whether credit is an open-end (revolving) plan or a closed-end (installment) loan. TILA also contains procedural and substantive protections for consumers.

Historically, Regulation Z of the Board of Governors of the Federal Reserve System (Board), 12 CFR part 226, has implemented TILA. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [1] amended a number of consumer financial protection laws, including TILA. In addition to various substantive amendments, the Dodd-Frank Act transferred rulemaking authority for TILA to the Bureau of Consumer Financial Protection (Bureau), effective July 21, 2011.[2] *See* sections 1061 and 1100A of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act and TILA, as amended, the Bureau is publishing for public comment an interim final rule establishing a new Regulation Z (Truth in Lending), 12 CFR Part 1026, implementing TILA (except with respect to persons excluded from the Bureau's rulemaking authority by section 1029 of the Dodd-Frank Act).

II. Summary of the Interim Final Rule

A. General

The interim final rule substantially duplicates the Board's Regulation Z as the Bureau's new Regulation Z, 12 CFR part 1026, making only certain non-substantive, technical, formatting, and stylistic changes. To minimize any potential confusion, the Bureau is preserving the numbering system of the Board's Regulation Z, other than the new part number. While this interim final rule generally incorporates the Board's existing regulatory text, appendices (including model forms and clauses), and supplements, the rule has been edited as necessary to reflect nomenclature and other technical amendments required by the Dodd-Frank Act. Notably, this interim final rule does not impose any new substantive obligations on regulated entities.

B. Specific Changes

References to the Board and its administrative structure have been replaced with references to the Bureau. In particular, certain model and sample forms in Appendix G (Open-End Model Forms and Clauses) have been revised to change references to the Board (and its Web site) to the Bureau (and its Web site). The revised forms are the Applications and Solicitations model and samples for credit cards, G–10(A) through G–10(C), and the Account-Opening model and samples for credit cards, G–17(A) through G–17(C). Similarly, references to other agencies that no longer exist (*e.g.,* the Office of Thrift Supervision and the Federal Home Loan Bank Board) have been updated as appropriate.

Conforming edits have been made to internal cross-references and addresses for filing applications and notices. Certain comments reflecting the Board's past state law preemption and exemption determinations have been amended to clarify that these determinations continue in effect pending Bureau action to the contrary. Appendix I, entitled ''Federal Enforcement Agencies,'' is being removed and reserved because it was designed to be informational only and is unnecessary for purposes of implementing the TILA, as amended. Conforming edits have also been made to reflect the scope of the Bureau's authority pursuant to TILA, as amended by the Dodd-Frank Act. Historical references that are no longer applicable,

[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] Section 1029 of the Dodd-Frank Act excludes from this transfer of authority, subject to certain exceptions, any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.

and references to effective dates that have passed, have been removed as appropriate.

In addition, certain changes have been made to the text of the Board's Regulation Z to conform to current codification standards of the Code of Federal Regulations. For example, previously undesignated paragraphs in the regulation and the official commentary have been enumerated, and footnotes have been eliminated and their substance moved to the body of the regulation as appropriate. Other provisions have been redesignated as necessary to accommodate these changes.

Most significantly, the Board's §§ 226.5a and 226.5b have been renumbered as §§ 1026.60 and 1026.40, respectively. These two sections, as numbered in the Board's existing Regulation Z, do not meet the current requirements for section numbering for publication in the Code of Federal Regulations. *See* 1 CFR 21.11(g). Because existing § 226.5a relates to credit card disclosures, the Bureau is codifying it as § 1026.60 so that it will appear in subpart G, Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students. Because existing § 226.5b relates to home-equity plans, the Bureau is codifying it as § 1026.40 so that it will appear in subpart E, Special Rules for Certain Home Mortgage Transactions. All existing cross-references to these two sections are changed accordingly throughout the Bureau's new Regulation Z.

In addition, existing §§ 226.5a(b)(15) and 226.6(b)(2)(xiv) require card issuers to include in their applications and solicitations disclosures and their account opening disclosures, respectively, a reference to the Web site established by the Board and a statement that consumers may obtain on the Web site information about shopping for and using credit cards. This interim final rule revises those provisions to require a reference to the Bureau in §§ 1026.60(b)(15) and 1026.6(b)(2)(xiv). As noted above, the affected model forms in Appendix G are revised accordingly. The Bureau recognizes that this change to the disclosure requirements will require card issuers that maintain standardized disclosure forms in their systems to make modifications to those systems. To afford adequate time to make such modifications, the Bureau is also adding to §§ 1026.60(b)(15) and 1026.6(b)(2)(xiv) a provision that, until January 1, 2013, issuers may substitute for the required reference a reference to the Web site established by the Board of Governors of the Federal Reserve System. Similarly, the Bureau is adding to comment app. G–5 a new paragraph viii to clarify that, until January 1, 2013, issuers using model forms G–10(A) and G–17(A) may substitute references to the Board and its Web site for the references to the Bureau and its Web site contained in those models. This provision preserves the safe harbor for card issuers using the old version of these models until they have modified their systems as necessary, provided they do so by January 1, 2013.

Finally, the Bureau is correcting two typographical errors in the Board's existing Regulation Z in conjunction with its republication as the Bureau's Regulation Z. Following is a discussion of each correction, in order by section of the regulation.

Section 1026.36 Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling

36(a) Loan Originator and Mortgage Broker Defined

The Board's existing comment 36(a)–4 contains a typographical error that inadvertently misstates the test for whether a person is a loan originator subject to the rules governing compensation paid to loan originators. Under existing § 226.36(a)(1), a loan originator is defined as a person who, for compensation or other monetary gain, or in expectation of compensation or other monetary gain, arranges, negotiates, or otherwise obtains an extension of consumer credit for another person. Thus, the test essentially has two components, both of which must be present for a person to be a loan originator: (i) compensation or monetary gain; and (ii) the arranging, negotiating, or otherwise obtaining of consumer credit.

The comment discusses this test in the context of managers and administrative staff, who generally are not loan originators under the definition, but it frames the discussion in the negative. The comment provides that such persons are not loan originators if they do not arrange, negotiate, or otherwise obtain an extension of credit for a consumer, *and* their compensation is not based on whether any particular loan is originated. Thus, as written, the comment could be read to require that, to be excluded from coverage as loan originators, managers and administrative staff must *both* not arrange extensions of consumer credit *and* not receive compensation that depends on a particular loan being originated. Such a reading would be contrary to the definition in the regulation, which covers a person only if both components are present. For this reason, the Bureau's comment 36(a)–4 reads ''or'' where the Board's existing comment reads ''and,'' thus ensuring that the comment is consistent with the regulatory provision.

Section 1026.46 Special Disclosure Requirements for Private Education Loans

46(b) Definitions

46(b)(5) Private Education Loan

46(b)(5)(iii)

The Board's existing § 226.46(b)(5)(iii) provides that the term ''private education loan'' does not include ''open-end credit any loan that is secured by real property or a dwelling.'' As adopted by the Board, this provision inadvertently omitted the word ''or'' between ''open-end credit'' and ''any loan that is secured by real property or a dwelling.'' Thus, as written, the provision is unclear but could be interpreted to exclude from ''private education loan'' only open-end credit that is secured by real property or a dwelling, whereas it was intended to exclude all open-end credit, regardless of whether secured, and all loans that are secured by real property or a dwelling, whether open- or closed-end. In the **SUPPLEMENTARY INFORMATION** to the final rule that adopted § 226.46(b)(5)(iii), the Board stated that the term ''private education loan'' was being adopted substantially as proposed and noted that under the proposal ''[a] private education loan excluded any credit otherwise made under an open-end credit plan. It also excluded any closed-end loan secured by real property or a dwelling.'' 74 FR 41194, 41203 (Aug. 14, 2009). To correct this error, the Bureau's § 1026.46(b)(5)(iii) inserts the word ''or'' in the appropriate place.

III. Legal Authority

A. Rulemaking Authority

The Bureau is issuing this interim final rule pursuant to its authority under TILA and the Dodd-Frank Act. Effective July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies. The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review

such rules, orders, and guidelines.'' [3] TILA is a Federal consumer financial law.[4] Accordingly, effective July 21, 2011, except with respect to persons excluded from the Bureau's rulemaking authority by section 1029 of the Dodd-Frank Act, the authority of the Board to issue regulations pursuant to TILA transferred to the Bureau.[5]

The TILA, as amended, authorizes the Bureau to ''prescribe regulations to carry out the purposes of [TILA].'' [6] These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, that in the Bureau's judgment are necessary or proper to effectuate the purpose of TILA, facilitate compliance with TILA, or prevent circumvention or evasion of TILA.[7] Numerous other provisions of TILA, as amended, also authorize the Bureau to issue regulations, including model forms and changes.[8] In its existing regulation, the Board used this TILA authority to establish extensive rules that promote the informed use of credit by mandating disclosures and to regulate substantively certain credit practices.[9]

B. Authority To Issue an Interim Final Rule Without Prior Notice and Comment

The Administrative Procedure Act (APA) [10] generally requires public notice and an opportunity to comment before promulgation of regulations.[11] The APA provides exceptions to notice-and-comment procedures, however, where an agency for good cause finds that such procedures are impracticable, unnecessary, or contrary to the public interest or when a rulemaking relates to agency organization, procedure, and practice.[12] The Bureau finds that there is good cause to conclude that providing notice and opportunity for comment would be unnecessary and contrary to the public interest under these circumstances. In addition, substantially all the changes made by this interim final rule, which were necessitated by the Dodd-Frank Act's transfer of TILA authority from the Board to the Bureau, relate to agency organization, procedure, and practice and are thus exempt from the APA's notice-and-comment requirements.

The Bureau's good cause findings are based on the following considerations. As an initial matter, the Board's existing regulation was a result of notice-and-comment rulemaking to the extent required. Moreover, the interim final rule published today does not impose any new, substantive obligations on regulated entities. Rather, the interim final rule makes only non-substantive, technical changes to the existing text of the regulation, such as renumbering, changing internal cross-references, replacing appropriate nomenclature to reflect the transfer of authority to the Bureau, and changing certain addresses. Given the technical nature of these changes, and the fact that the interim final rule does not impose any additional substantive requirements on covered entities, an opportunity for prior public comment is unnecessary. In addition, recodifying the Board's regulations to reflect the transfer of authority to the Bureau will help facilitate compliance with TILA and its implementing regulations, and the new regulations will help reduce uncertainty regarding the applicable regulatory framework. Using notice-and-comment procedures would delay this process and thus be contrary to the public interest.

The APA generally requires that rules be published not less than 30 days before their effective dates. *See* 5 U.S.C. 553(d). As with the notice and comment requirement, however, the APA allows an exception when ''otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d)(3). The Bureau finds that there is good cause for providing less than 30 days notice here. A delayed effective date would harm consumers and regulated entities by needlessly perpetuating discrepancies between the amended statutory text and the implementing regulation, thereby hindering compliance and prolonging uncertainty regarding the applicable regulatory framework.[13]

In addition, delaying the effective date of the interim final rule for 30 days would provide no practical benefit to regulated entities in this context and in fact could operate to their detriment. As discussed above, the interim final rule published today does not impose any new, substantive obligations on regulated entities. Instead, the rule makes only non-substantive, technical changes to the existing text of the regulation. Thus, regulated entities that are already in compliance with the existing rules will not need to modify business practices as a result of this rule. To the extent that one-time modifications to forms are required, the Bureau has provided an ample implementation period to allow appropriate advance notice and facilitate compliance without suspending the benefits of the interim final rule during the intervening period.

C. Section 1022(b)(2) of the Dodd-Frank Act

In developing the interim final rule, the Bureau has conducted an analysis of potential benefits, costs, and impacts.[14] The Bureau believes that the interim final rule will benefit consumers and covered persons by updating and recodifying Regulation Z to reflect the transfer of authority to the Bureau and certain other changes mandated by the Dodd-Frank Act. This will help facilitate compliance with TILA and its implementing regulations and help

[3] Public Law 111–203, section 1061(a)(1). Effective on the designated transfer date, the Bureau is also granted ''all powers and duties'' vested in each of the Federal agencies, relating to the consumer financial protection functions, on the day before the designated transfer date. Until this and other interim final rules take effect, existing regulations for which rulemaking authority transferred to the Bureau continue to govern persons covered by this rule. *See* 76 FR 43569 (July 21, 2011).

[4] Public Law 111–203, section 1002(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws''); *id.* Section 1002(12) (defining ''enumerated consumer laws'' to include TILA).

[5] Section 1066 of the Dodd-Frank Act grants the Secretary of the Treasury interim authority to perform certain functions of the Bureau. Pursuant to that authority, Treasury is publishing this interim final rule on behalf of the Bureau.

[6] Public Law 111–203, section 1100A(2); 15 U.S.C. 1604(a).

[7] *Id.*

[8] *See, generally,* 15 U.S.C. 1601 *et seq.*

[9] *See* the Board's Regulation Z, 12 CFR Part 226.

[10] 5 U.S.C. 551 *et seq.*

[11] 5 U.S.C. 553(b), (c).

[12] 5 U.S.C. 553(b)(3)(A), (B).

[13] This interim final rule is one of 14 companion rulemakings that together restate and recodify the implementing regulations under 14 existing consumer financial laws (part III.C, below, lists the 14 laws involved). In the interest of proper coordination of this overall regulatory framework, which includes numerous cross-references among some of the regulations, the Bureau is establishing the same effective date of December 30, 2011 for those rules published on or before that date and making those published thereafter (if any) effective immediately.

[14] Section 1022(b)(2)(A) of the Dodd-Frank Act addresses the consideration of the potential benefits and costs of regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas. Section 1022(b)(2)(B) requires that the Bureau ''consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies.'' The manner and extent to which these provisions apply to interim final rules and to costs, benefits, and impacts that are compelled by statutory changes rather than discretionary Bureau action is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations.

reduce any uncertainty regarding the applicable regulatory framework. Although the interim final rule will require certain creditors to modify certain credit and charge card disclosures to reflect the transfer of authority to the Bureau, as discussed below, the interim final rule will not impose any new substantive obligations on consumers or covered persons and is not expected to have any impact on consumers' access to consumer financial products and services.

As discussed above in part II of this **SUPPLEMENTARY INFORMATION**, consistent with the existing regulation, the Bureau's §§ 1026.6(b)(2)(xiv) and 1026.60(b)(15) require creditors to include in certain disclosures for credit and charge cards a reference to the Bureau and its Web site. The Bureau's new Model Forms G–10(A) and G–17(A) reflect that requirement. To afford creditors sufficient time to modify their existing forms, §§ 1026.6(b)(2)(xiv) and 1026.60(b)(15) provide that, until January 1, 2013, issuers may substitute for the required Bureau reference the existing reference to the Web site established by the Board of Governors of the Federal Reserve System. Similarly, comment app. G–5.viii provides that, until January 1, 2013, issuers using model forms G–10(A) and G–17(A) may use existing references to the Board and its Web site instead of the references to the Bureau and its Web site contained in those models.

Thus, by January 1, 2013, certain categories of creditors will need to make one-time revisions to certain credit and charge card disclosure forms. The Bureau estimates, assuming approximately four hours per creditor for the systems updates, that the roughly 102,410 affected creditors will incur costs of approximately $25,832,636. These costs may be overstated to the extent that multiple firms use the same software vendors, who are able to spread any costs over all of their affected clients. These estimates may also be overstated because the Bureau is giving creditors one year to effect the changes, thus allowing creditors to include the changes in routine, scheduled systems updates during the next year. These one-time changes to the affected disclosures ultimately will provide ongoing benefits to consumers by providing them with accurate information on where on the Internet to look for helpful information on credit card accounts.

Although not required by the interim final rule, creditors may incur some costs in updating compliance manuals and related materials to reflect the new numbering and other technical changes reflected in the new Regulation Z, including the renumbering of the Board's §§ 226.5a and 226.5b as new §§ 1026.60 and 1026.40, respectively. The Bureau has worked to reduce any such burden by preserving the existing numbering to the extent possible, and believes that such costs will likely be minimal. These changes could be handled in the short term by providing a short, standalone summary alerting users to the changes and in the long term could be combined with other updates at the firm's convenience. The Bureau intends to continue investigating the possible costs to affected firms of updating manuals and related materials to reflect these changes and solicits comments on this and other issues discussed in this section.

The interim final rule will have no unique impact on depository institutions or credit unions with $10 billion or less in assets as described in section 1026(a) of the Dodd-Frank Act. Also, the interim final rule will have no unique impact on rural consumers.

In undertaking the process of recodifying Regulation Z, as well as regulations implementing thirteen other existing consumer financial laws,[15] the Bureau consulted the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, the Board of Governors of the Federal Reserve System, the Federal Trade Commission, and the Department of Housing and Urban Development, including with respect to consistency with any prudential, market, or systemic objectives that may be administered by such agencies.[16] The Bureau also has consulted with the Office of Management and Budget for technical assistance. The Bureau expects to have further consultations with the appropriate Federal agencies during the comment period.

IV. Request for Comment

Although notice and comment rulemaking procedures are not required, the Bureau invites comments on this notice. Commenters are specifically encouraged to identify any technical issues raised by the rule. The Bureau is also seeking comment in response to a notice published at 76 FR 75825 (Dec. 5, 2011) concerning its efforts to identify priorities for streamlining regulations that it has inherited from other Federal agencies to address provisions that are outdated, unduly burdensome, or unnecessary.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[17] The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[18] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[19]

The IRFA and FRFA requirements described above apply only where a notice of proposed rulemaking is required,[20] and the panel requirement applies only when a rulemaking requires an IRFA.[21] As discussed above in part III, a notice of proposed rulemaking is not required for this rulemaking.

In addition, as discussed above, this interim final rule has only a minor impact on entities subject to Regulation Z. Accordingly, the undersigned certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities. The rule imposes no new, substantive obligations on covered entities and will require only minor, one-time adjustments to certain model

[15] The fourteen laws implemented by this and its companion rulemakings are: The Consumer Leasing Act, the Electronic Fund Transfer Act (except with respect to section 920 of that Act), the Equal Credit Opportunity Act, the Fair Credit Reporting Act (except with respect to sections 615(e) and 628 of that act), the Fair Debt Collection Practices Act, Subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act, sections 502 through 509 of the Gramm-Leach-Bliley Act (except for section 505 as it applies to section 501(b)), the Home Mortgage Disclosure Act, the Real Estate Settlement Procedures Act, the S.A.F.E. Mortgage Licensing Act, the Truth in Lending Act, the Truth in Savings Act, section 626 of the Omnibus Appropriations Act, 2009, and the Interstate Land Sales Full Disclosure Act.

[16] In light of the technical but voluminous nature of this recodification project, the Bureau focused the consultation process on a representative sample of the recodified regulations, while making information on the other regulations available. The Bureau expects to conduct differently its future consultations regarding substantive rulemakings.

[17] 5 U.S.C. 601 *et seq.*

[18] 5 U.S.C. 603, 604.

[19] 5 U.S.C. 609.

[20] 5 U.S.C. 603(a), 604(a); 5 U.S.C. 553(b)(B).

[21] 5 U.S.C. 609(b).

forms, as discussed in part III above. Moreover, as noted, the per-firm cost estimate discussed above may be overstated to the extent that multiple firms use the same software vendors, who are able to spread costs over all of their affected clients. Small entities, in particular, are especially likely to rely on outside vendors for disclosure compliance systems and therefore may have even less burden in complying with the one-time changes required by this interim final rule.

VI. Paperwork Reduction Act

The Bureau may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. This rule contains information collection requirements under the Paperwork Reduction Act (PRA), which have been previously approved by OMB, and the ongoing PRA burden for which is unchanged by this rule. There are no new information collection requirements in this interim final rule. The Bureau's OMB control number for this information collection is: 3170–0015.

List of Subjects in 12 CFR Part 1026

Advertising, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

Authority and Issuance

For the reasons set forth above, the Bureau of Consumer Financial Protection adds Part 1026 to Chapter X in Title 12 of the Code of Federal Regulations to read as follows:

PART 1026—TRUTH IN LENDING (REGULATION Z)

Subpart A—General

Sec.
1026.1 Authority, purpose, coverage, organization, enforcement, and liability.
1026.2 Definitions and rules of construction.
1026.3 Exempt transactions.
1026.4 Finance charge.

Subpart B—Open-End Credit

1026.5 General disclosure requirements.
1026.6 Account-opening disclosures.
1026.7 Periodic statement.
1026.8 Identifying transactions on periodic statements.
1026.9 Subsequent disclosure requirements.
1026.10 Payments.
1026.11 Treatment of credit balances; account termination.
1026.12 Special credit card provisions.
1026.13 Billing error resolution.
1026.14 Determination of annual percentage rate.
1026.15 Right of rescission.
1026.16 Advertising.

Subpart C—Closed-End Credit

1026.17 General disclosure requirements.
1026.18 Content of disclosures.
1026.19 Certain mortgage and variable-rate transactions.
1026.20 Subsequent disclosure requirements.
1026.21 Treatment of credit balances.
1026.22 Determination of annual percentage rate.
1026.23 Right of rescission.
1026.24 Advertising.

Subpart D—Miscellaneous

1026.25 Record retention.
1026.26 Use of annual percentage rate in oral disclosures.
1026.27 Language of disclosures.
1026.28 Effect on state laws.
1026.29 State exemptions.
1026.30 Limitation on rates.

Subpart E—Special Rules for Certain Home Mortgage Transactions

1026.31 General rules.
1026.32 Requirements for certain closed-end home mortgages.
1026.33 Requirements for reverse mortgages.
1026.34 Prohibited acts or practices in connection with high-cost mortgages.
1026.35 Prohibited acts or practices in connection with higher-priced mortgage loans.
1026.36 Prohibited acts or practices in connection with credit secured by a dwelling.
1026.37–1026.38 [Reserved]
1026.39 Mortgage transfer disclosures.
1026.40 Requirements for home equity plans.
1026.41 [Reserved]
1026.42 Valuation independence.
1026.43–1026.45 [Reserved]

Subpart F—Special Rules for Private Education Loans

1026.46 Special disclosure requirements for private education loans.
1026.47 Content of disclosures.
1026.48 Limitations on private education loans.

Subpart G—Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

1026.51 Ability to Pay.
1026.52 Limitations on fees.
1026.53 Allocation of payments.
1026.54 Limitations on the imposition of finance charges.
1026.55 Limitations on increasing annual percentage rates, fees, and charges.
1026.56 Requirements for over-the-limit transactions.
1026.57 Reporting and marketing rules for college student open-end credit.
1026.58 Internet posting of credit card agreements.
1026.59 Reevaluation of rate increases.
1026.60 Credit and charge card applications and solicitations.
Appendix A to Part 1026—Effect on State Laws
Appendix B to Part 1026—State Exemptions
Appendix C to Part 1026—Issuance of Official Interpretations
Appendix D to Part 1026—Multiple Advance Construction Loans
Appendix E to Part 1026—Rules for Card Issuers That Bill on a Transaction-by-Transaction Basis
Appendix F to Part 1026—Optional Annual Percentage Rate Computations for Creditors Offering Open-End Credit Plans Secured by a Consumer's Dwelling
Appendix G to Part 1026—Open-End Model Forms and Clauses
Appendix H to Part 1026— Closed-End Model Forms and Clauses
Appendix I to Part 1026—[Reserved]
Appendix J to Part 1026—Annual Percentage Rate Computations for Closed-End Credit Transactions
Appendix K to Part 1026—Total Annual Loan Cost Rate Computations for Reverse Mortgage Transactions
Appendix L to Part 1026—Assumed Loan Periods for Computations of Total Annual Loan Cost Rates
Appendix M1 to Part 1026—Repayment Disclosures
Appendix M2 to Part 1026—Sample Calculations of Repayment Disclosures
Supplement I to Part 1026—Official Interpretations

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1601 *et seq.*

Subpart A—General

§ 1026.1 Authority, purpose, coverage, organization, enforcement, and liability.

(a) *Authority.* This part, known as Regulation Z, is issued by the Bureau of Consumer Financial Protection to implement the Federal Truth in Lending Act, which is contained in Title I of the Consumer Credit Protection Act, as amended (15 U.S.C. 1601 *et seq.*). This part also implements Title XII, section 1204 of the Competitive Equality Banking Act of 1987 (Pub. L. 100–86, 101 Stat. 552). Information-collection requirements contained in this part have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501 *et seq.* and have been assigned OMB No. 3170–0015.

(b) *Purpose.* The purpose of this part is to promote the informed use of consumer credit by requiring disclosures about its terms and cost. The regulation also includes substantive protections. It gives consumers the right to cancel certain credit transactions that involve a lien on a consumer's principal dwelling, regulates certain credit card practices, and provides a means for fair and timely resolution of credit billing disputes. The regulation does not generally govern charges for consumer credit, except that several provisions in

Subpart G set forth special rules addressing certain charges applicable to credit card accounts under an open-end (not home-secured) consumer credit plan. The regulation requires a maximum interest rate to be stated in variable-rate contracts secured by the consumer's dwelling. It also imposes limitations on home-equity plans that are subject to the requirements of § 1026.40 and mortgages that are subject to the requirements of § 1026.32. The regulation prohibits certain acts or practices in connection with credit secured by a dwelling in § 1026.36, and credit secured by a consumer's principal dwelling in § 1026.35. The regulation also regulates certain practices of creditors who extend private education loans as defined in § 1026.46(b)(5).

(c) *Coverage.* (1) In general, this part applies to each individual or business that offers or extends credit, other than a person excluded from coverage of this part by section 1029 of the Consumer Financial Protection Act of 2010, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, when four conditions are met:

(i) The credit is offered or extended to consumers;

(ii) The offering or extension of credit is done regularly;

(iii) The credit is subject to a finance charge or is payable by a written agreement in more than four installments; and

(iv) The credit is primarily for personal, family, or household purposes.

(2) If a credit card is involved, however, certain provisions apply even if the credit is not subject to a finance charge, or is not payable by a written agreement in more than four installments, or if the credit card is to be used for business purposes.

(3) In addition, certain requirements of § 1026.40 apply to persons who are not creditors but who provide applications for home-equity plans to consumers.

(4) Furthermore, certain requirements of § 1026.57 apply to institutions of higher education.

(d) *Organization.* The regulation is divided into subparts and appendices as follows:

(1) Subpart A contains general information. It sets forth:

(i) The authority, purpose, coverage, and organization of the regulation;

(ii) The definitions of basic terms;

(iii) The transactions that are exempt from coverage; and

(iv) The method of determining the finance charge.

(2) Subpart B contains the rules for open-end credit. It requires that account-opening disclosures and periodic statements be provided, as well as additional disclosures for credit and charge card applications and solicitations and for home-equity plans subject to the requirements of § 1026.60 and § 1026.40, respectively. It also describes special rules that apply to credit card transactions, treatment of payments and credit balances, procedures for resolving credit billing errors, annual percentage rate calculations, rescission requirements, and advertising.

(3) Subpart C relates to closed-end credit. It contains rules on disclosures, treatment of credit balances, annual percentage rate calculations, rescission requirements, and advertising.

(4) Subpart D contains rules on oral disclosures, disclosures in languages other than English, record retention, effect on state laws, state exemptions, and rate limitations.

(5) Subpart E contains special rules for mortgage transactions. Section 1026.32 requires certain disclosures and provides limitations for closed-end loans that have rates or fees above specified amounts. Section 1026.33 requires special disclosures, including the total annual loan cost rate, for reverse mortgage transactions. Section 1026.34 prohibits specific acts and practices in connection with closed-end mortgage transactions that are subject to § 1026.32. Section 1026.35 prohibits specific acts and practices in connection with closed-end higher-priced mortgage loans, as defined in § 1026.35(a). Section 1026.36 prohibits specific acts and practices in connection with an extension of credit secured by a dwelling.

(6) Subpart F relates to private education loans. It contains rules on disclosures, limitations on changes in terms after approval, the right to cancel the loan, and limitations on co-branding in the marketing of private education loans.

(7) Subpart G relates to credit card accounts under an open-end (not home-secured) consumer credit plan (except for § 1026.57(c), which applies to all open-end credit plans). Section 1026.51 contains rules on evaluation of a consumer's ability to make the required payments under the terms of an account. Section 1026.52 limits the fees that a consumer can be required to pay with respect to an open-end (not home-secured) consumer credit plan during the first year after account opening. Section 1026.53 contains rules on allocation of payments in excess of the minimum payment. Section 1026.54 sets forth certain limitations on the imposition of finance charges as the result of a loss of a grace period. Section 1026.55 contains limitations on increases in annual percentage rates, fees, and charges for credit card accounts. Section 1026.56 prohibits the assessment of fees or charges for over-the-limit transactions unless the consumer affirmatively consents to the creditor's payment of over-the-limit transactions. Section 1026.57 sets forth rules for reporting and marketing of college student open-end credit. Section 1026.58 sets forth requirements for the Internet posting of credit card accounts under an open-end (not home-secured) consumer credit plan.

(8) Several appendices contain information such as the procedures for determinations about state laws, state exemptions and issuance of official interpretations, special rules for certain kinds of credit plans, and the rules for computing annual percentage rates in closed-end credit transactions and total-annual-loan-cost rates for reverse mortgage transactions.

(e) *Enforcement and liability.* Section 108 of the Act contains the administrative enforcement provisions. Sections 112, 113, 130, 131, and 134 contain provisions relating to liability for failure to comply with the requirements of the Act and the regulation. Section 1204(c) of Title XII of the Competitive Equality Banking Act of 1987, Public Law 100–86, 101 Stat. 552, incorporates by reference administrative enforcement and civil liability provisions of sections 108 and 130 of the Act.

§ 1026.2 Definitions and rules of construction.

(a) *Definitions.* For purposes of this part, the following definitions apply:

(1) *Act* means the Truth in Lending Act (15 U.S.C. 1601 *et seq.*).

(2) *Advertisement* means a commercial message in any medium that promotes, directly or indirectly, a credit transaction.

(3) [Reserved]

(4) *Billing cycle* or *cycle* means the interval between the days or dates of regular periodic statements. These intervals shall be equal and no longer than a quarter of a year. An interval will be considered equal if the number of days in the cycle does not vary more than four days from the regular day or date of the periodic statement.

(5) *Bureau* means the Bureau of Consumer Financial Protection.

(6) *Business day* means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. However,

for purposes of rescission under §§ 1026.15 and 1026.23, and for purposes of §§ 1026.19(a)(1)(ii), 1026.19(a)(2), 1026.31, and 1026.46(d)(4), the term means all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a), such as New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(7) *Card issuer* means a person that issues a credit card or that person's agent with respect to the card.

(8) *Cardholder* means a natural person to whom a credit card is issued for consumer credit purposes, or a natural person who has agreed with the card issuer to pay consumer credit obligations arising from the issuance of a credit card to another natural person. For purposes of § 1026.12(a) and (b), the term includes any person to whom a credit card is issued for any purpose, including business, commercial or agricultural use, or a person who has agreed with the card issuer to pay obligations arising from the issuance of such a credit card to another person.

(9) *Cash price* means the price at which a creditor, in the ordinary course of business, offers to sell for cash property or service that is the subject of the transaction. At the creditor's option, the term may include the price of accessories, services related to the sale, service contracts and taxes and fees for license, title, and registration. The term does not include any finance charge.

(10) *Closed-end credit* means consumer credit other than ''open-end credit'' as defined in this section.

(11) *Consumer* means a cardholder or natural person to whom consumer credit is offered or extended. However, for purposes of rescission under §§ 1026.15 and 1026.23, the term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest.

(12) *Consumer credit* means credit offered or extended to a consumer primarily for personal, family, or household purposes.

(13) *Consummation* means the time that a consumer becomes contractually obligated on a credit transaction.

(14) *Credit* means the right to defer payment of debt or to incur debt and defer its payment.

(15)(i) *Credit card* means any card, plate, or other single credit device that may be used from time to time to obtain credit.

(ii) *Credit card account under an open-end (not home-secured) consumer credit plan* means any open-end credit account that is accessed by a credit card, except:

(A) A home-equity plan subject to the requirements of § 1026.40 that is accessed by a credit card; or

(B) An overdraft line of credit that is accessed by a debit card or an account number.

(iii) *Charge card* means a credit card on an account for which no periodic rate is used to compute a finance charge.

(16) *Credit sale* means a sale in which the seller is a creditor. The term includes a bailment or lease (unless terminable without penalty at any time by the consumer) under which the consumer:

(i) Agrees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and service involved; and

(ii) Will become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement.

(17) *Creditor* means:

(i) A person who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment), and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.

(ii) For purposes of §§ 1026.4(c)(8) (Discounts), 1026.9(d) (Finance charge imposed at time of transaction), and 1026.12(e) (Prompt notification of returns and crediting of refunds), a person that honors a credit card.

(iii) For purposes of subpart B, any card issuer that extends either open-end credit or credit that is not subject to a finance charge and is not payable by written agreement in more than four installments.

(iv) For purposes of subpart B (except for the credit and charge card disclosures contained in §§ 1026.60 and 1026.9(e) and (f), the finance charge disclosures contained in § 1026.6(a)(1) and (b)(3)(i) and § 1026.7(a)(4) through (7) and (b)(4) through (6) and the right of rescission set forth in § 1026.15) and subpart C, any card issuer that extends closed-end credit that is subject to a finance charge or is payable by written agreement in more than four installments.

(v) A person regularly extends consumer credit only if it extended credit (other than credit subject to the requirements of § 1026.32) more than 25 times (or more than 5 times for transactions secured by a dwelling) in the preceding calendar year. If a person did not meet these numerical standards in the preceding calendar year, the numerical standards shall be applied to the current calendar year. A person regularly extends consumer credit if, in any 12-month period, the person originates more than one credit extension that is subject to the requirements of § 1026.32 or one or more such credit extensions through a mortgage broker.

(18) *Downpayment* means an amount, including the value of property used as a trade-in, paid to a seller to reduce the cash price of goods or services purchased in a credit sale transaction. A deferred portion of a downpayment may be treated as part of the downpayment if it is payable not later than the due date of the second otherwise regularly scheduled payment and is not subject to a finance charge.

(19) *Dwelling* means a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence.

(20) *Open-end credit* means consumer credit extended by a creditor under a plan in which:

(i) The creditor reasonably contemplates repeated transactions;

(ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and

(iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

(21) *Periodic rate* means a rate of finance charge that is or may be imposed by a creditor on a balance for a day, week, month, or other subdivision of a year.

(22) *Person* means a natural person or an organization, including a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit.

(23) *Prepaid finance charge* means any finance charge paid separately in cash or by check before or at consummation of a transaction, or withheld from the proceeds of the credit at any time.

(24) *Residential mortgage transaction* means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in the consumer's principal

dwelling to finance the acquisition or initial construction of that dwelling.

(25) *Security interest* means an interest in property that secures performance of a consumer credit obligation and that is recognized by state or Federal law. It does not include incidental interests such as interests in proceeds, accessions, additions, fixtures, insurance proceeds (whether or not the creditor is a loss payee or beneficiary), premium rebates, or interests in after-acquired property. For purposes of disclosures under §§ 1026.6 and 1026.18, the term does not include an interest that arises solely by operation of law. However, for purposes of the right of rescission under §§ 1026.15 and 1026.23, the term does include interests that arise solely by operation of law.

(26) *State* means any state, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(b) *Rules of construction.* For purposes of this part, the following rules of construction apply:

(1) Where appropriate, the singular form of a word includes the plural form and plural includes singular.

(2) Where the words *obligation* and *transaction* are used in the regulation, they refer to a consumer credit obligation or transaction, depending upon the context. Where the word *credit* is used in the regulation, it means *consumer credit* unless the context clearly indicates otherwise.

(3) Unless defined in this part, the words used have the meanings given to them by state law or contract.

(4) Where the word *amount* is used in this part to describe disclosure requirements, it refers to a numerical amount.

§ 1026.3 Exempt transactions.

This part does not apply to the following:

(a) *Business, commercial, agricultural, or organizational credit.* (1) An extension of credit primarily for a business, commercial or agricultural purpose.

(2) An extension of credit to other than a natural person, including credit to government agencies or instrumentalities.

(b) *Credit over applicable threshold amount.* (1) *Exemption.* (i) *Requirements.* An extension of credit in which the amount of credit extended exceeds the applicable threshold amount or in which there is an express written commitment to extend credit in excess of the applicable threshold amount, unless the extension of credit is:

(A) Secured by any real property, or by personal property used or expected to be used as the principal dwelling of the consumer; or

(B) A private education loan as defined in § 1026.46(b)(5).

(ii) *Annual adjustments.* The threshold amount in paragraph (b)(1)(i) of this section is adjusted annually to reflect increases in the Consumer Price Index for Urban Wage Earners and Clerical Workers, as applicable. See the official commentary to this paragraph (b) for the threshold amount applicable to a specific extension of credit or express written commitment to extend credit.

(2) *Transition rule for open-end accounts exempt prior to July 21, 2011.* An open-end account that is exempt on July 20, 2011 based on an express written commitment to extend credit in excess of $25,000 remains exempt until December 31, 2011 unless:

(i) The creditor takes a security interest in any real property, or in personal property used or expected to be used as the principal dwelling of the consumer; or

(ii) The creditor reduces the express written commitment to extend credit to $25,000 or less.

(c) *Public utility credit.* An extension of credit that involves public utility services provided through pipe, wire, other connected facilities, or radio or similar transmission (including extensions of such facilities), if the charges for service, delayed payment, or any discounts for prompt payment are filed with or regulated by any government unit. The financing of durable goods or home improvements by a public utility is not exempt.

(d) *Securities or commodities accounts.* Transactions in securities or commodities accounts in which credit is extended by a broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission.

(e) *Home fuel budget plans.* An installment agreement for the purchase of home fuels in which no finance charge is imposed.

(f) *Student loan programs.* Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*).

(g) *Employer-sponsored retirement plans.* An extension of credit to a participant in an employer-sponsored retirement plan qualified under section 401(a) of the Internal Revenue Code, a tax-sheltered annuity under section 403(b) of the Internal Revenue Code, or an eligible governmental deferred compensation plan under section 457(b) of the Internal Revenue Code (26 U.S.C. 401(a); 26 U.S.C. 403(b); 26 U.S.C. 457(b)), provided that the extension of credit is comprised of fully vested funds from such participant's account and is made in compliance with the Internal Revenue Code (26 U.S.C. 1 *et seq.*).

§ 1026.4 Finance charge.

(a) *Definition.* The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

(1) *Charges by third parties.* The finance charge includes fees and amounts charged by someone other than the creditor, unless otherwise excluded under this section, if the creditor:

(i) Requires the use of a third party as a condition of or an incident to the extension of credit, even if the consumer can choose the third party; or

(ii) Retains a portion of the third-party charge, to the extent of the portion retained.

(2) *Special rule; closing agent charges.* Fees charged by a third party that conducts the loan closing (such as a settlement agent, attorney, or escrow or title company) are finance charges only if the creditor:

(i) Requires the particular services for which the consumer is charged;

(ii) Requires the imposition of the charge; or

(iii) Retains a portion of the third-party charge, to the extent of the portion retained.

(3) *Special rule; mortgage broker fees.* Fees charged by a mortgage broker (including fees paid by the consumer directly to the broker or to the creditor for delivery to the broker) are finance charges even if the creditor does not require the consumer to use a mortgage broker and even if the creditor does not retain any portion of the charge.

(b) *Examples of finance charges.* The finance charge includes the following types of charges, except for charges specifically excluded by paragraphs (c) through (e) of this section:

(1) Interest, time price differential, and any amount payable under an add-on or discount system of additional charges.

(2) Service, transaction, activity, and carrying charges, including any charge imposed on a checking or other transaction account to the extent that the charge exceeds the charge for a similar account without a credit feature.

(3) Points, loan fees, assumption fees, finder's fees, and similar charges.

(4) Appraisal, investigation, and credit report fees.

(5) Premiums or other charges for any guarantee or insurance protecting the creditor against the consumer's default or other credit loss.

(6) Charges imposed on a creditor by another person for purchasing or accepting a consumer's obligation, if the consumer is required to pay the charges in cash, as an addition to the obligation, or as a deduction from the proceeds of the obligation.

(7) Premiums or other charges for credit life, accident, health, or loss-of-income insurance, written in connection with a credit transaction.

(8) Premiums or other charges for insurance against loss of or damage to property, or against liability arising out of the ownership or use of property, written in connection with a credit transaction.

(9) Discounts for the purpose of inducing payment by a means other than the use of credit.

(10) Charges or premiums paid for debt cancellation or debt suspension coverage written in connection with a credit transaction, whether or not the coverage is insurance under applicable law.

(c) *Charges excluded from the finance charge.* The following charges are not finance charges:

(1) Application fees charged to all applicants for credit, whether or not credit is actually extended.

(2) Charges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence.

(3) Charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing.

(4) Fees charged for participation in a credit plan, whether assessed on an annual or other periodic basis.

(5) Seller's points.

(6) Interest forfeited as a result of an interest reduction required by law on a time deposit used as security for an extension of credit.

(7) *Real-estate related fees.* The following fees in a transaction secured by real property or in a residential mortgage transaction, if the fees are bona fide and reasonable in amount:

(i) Fees for title examination, abstract of title, title insurance, property survey, and similar purposes.

(ii) Fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents.

(iii) Notary and credit-report fees.

(iv) Property appraisal fees or fees for inspections to assess the value or condition of the property if the service is performed prior to closing, including fees related to pest-infestation or flood-hazard determinations.

(v) Amounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge.

(8) Discounts offered to induce payment for a purchase by cash, check, or other means, as provided in section 167(b) of the Act.

(d) *Insurance and debt cancellation and debt suspension coverage.* (1) *Voluntary credit insurance premiums.* Premiums for credit life, accident, health, or loss-of-income insurance may be excluded from the finance charge if the following conditions are met:

(i) The insurance coverage is not required by the creditor, and this fact is disclosed in writing.

(ii) The premium for the initial term of insurance coverage is disclosed in writing. If the term of insurance is less than the term of the transaction, the term of insurance also shall be disclosed. The premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under § 1026.17(g), and certain closed-end credit transactions involving an insurance plan that limits the total amount of indebtedness subject to coverage.

(iii) The consumer signs or initials an affirmative written request for the insurance after receiving the disclosures specified in this paragraph, except as provided in paragraph (d)(4) of this section. Any consumer in the transaction may sign or initial the request.

(2) *Property insurance premiums.* Premiums for insurance against loss of or damage to property, or against liability arising out of the ownership or use of property, including single interest insurance if the insurer waives all right of subrogation against the consumer, may be excluded from the finance charge if the following conditions are met:

(i) The insurance coverage may be obtained from a person of the consumer's choice, and this fact is disclosed. (A creditor may reserve the right to refuse to accept, for reasonable cause, an insurer offered by the consumer.)

(ii) If the coverage is obtained from or through the creditor, the premium for the initial term of insurance coverage shall be disclosed. If the term of insurance is less than the term of the transaction, the term of insurance shall also be disclosed. The premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under § 1026.17(g), and certain closed-end credit transactions involving an insurance plan that limits the total amount of indebtedness subject to coverage.

(3) *Voluntary debt cancellation or debt suspension fees.* Charges or premiums paid for debt cancellation coverage for amounts exceeding the value of the collateral securing the obligation or for debt cancellation or debt suspension coverage in the event of the loss of life, health, or income or in case of accident may be excluded from the finance charge, whether or not the coverage is insurance, if the following conditions are met:

(i) The debt cancellation or debt suspension agreement or coverage is not required by the creditor, and this fact is disclosed in writing;

(ii) The fee or premium for the initial term of coverage is disclosed in writing. If the term of coverage is less than the term of the credit transaction, the term of coverage also shall be disclosed. The fee or premium may be disclosed on a unit-cost basis only in open-end credit transactions, closed-end credit transactions by mail or telephone under § 1026.17(g), and certain closed-end credit transactions involving a debt cancellation agreement that limits the total amount of indebtedness subject to coverage;

(iii) The following are disclosed, as applicable, for debt suspension coverage: That the obligation to pay loan principal and interest is only suspended, and that interest will continue to accrue during the period of suspension.

(iv) The consumer signs or initials an affirmative written request for coverage after receiving the disclosures specified in this paragraph, except as provided in paragraph (d)(4) of this section. Any consumer in the transaction may sign or initial the request.

(4) *Telephone purchases.* If a consumer purchases credit insurance or debt cancellation or debt suspension coverage for an open-end (not home-secured) plan by telephone, the creditor must make the disclosures under paragraphs (d)(1)(i) and (ii) or (d)(3)(i) through (iii) of this section, as applicable, orally. In such a case, the creditor shall:

(i) Maintain evidence that the consumer, after being provided the disclosures orally, affirmatively elected to purchase the insurance or coverage; and

(ii) Mail the disclosures under paragraphs (d)(1)(i) and (ii) or (d)(3)(i) through (iii) of this section, as applicable, within three business days after the telephone purchase.

(e) *Certain security interest charges.* If itemized and disclosed, the following charges may be excluded from the finance charge:

(1) Taxes and fees prescribed by law that actually are or will be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest.

(2) The premium for insurance in lieu of perfecting a security interest to the extent that the premium does not exceed the fees described in paragraph (e)(1) of this section that otherwise would be payable.

(3) *Taxes on security instruments.* Any tax levied on security instruments or on documents evidencing indebtedness if the payment of such taxes is a requirement for recording the instrument securing the evidence of indebtedness.

(f) *Prohibited offsets.* Interest, dividends, or other income received or to be received by the consumer on deposits or investments shall not be deducted in computing the finance charge.

Subpart B—Open-End Credit

§ 1026.5 General disclosure requirements.

(a) *Form of disclosures.* (1) *General.* (i) The creditor shall make the disclosures required by this subpart clearly and conspicuously.

(ii) The creditor shall make the disclosures required by this subpart in writing, in a form that the consumer may keep, except that:

(A) The following disclosures need not be written: Disclosures under § 1026.6(b)(3) of charges that are imposed as part of an open-end (not home-secured) plan that are not required to be disclosed under § 1026.6(b)(2) and related disclosures of charges under § 1026.9(c)(2)(iii)(B); disclosures under § 1026.9(c)(2)(vi); disclosures under § 1026.9(d) when a finance charge is imposed at the time of the transaction; and disclosures under § 1026.56(b)(1)(i).

(B) The following disclosures need not be in a retainable form: Disclosures that need not be written under paragraph (a)(1)(ii)(A) of this section; disclosures for credit and charge card applications and solicitations under § 1026.60; home-equity disclosures under § 1026.40(d); the alternative summary billing-rights statement under § 1026.9(a)(2); the credit and charge card renewal disclosures required under § 1026.9(e); and the payment requirements under § 1026.10(b), except as provided in § 1026.7(b)(13).

(iii) The disclosures required by this subpart may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). The disclosures required by §§ 1026.60, 1026.40, and 1026.16 may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the E-Sign Act in the circumstances set forth in those sections.

(2) *Terminology.* (i) Terminology used in providing the disclosures required by this subpart shall be consistent.

(ii) For home-equity plans subject to § 1026.40, the terms *finance charge* and *annual percentage rate,* when required to be disclosed with a corresponding amount or percentage rate, shall be more conspicuous than any other required disclosure. The terms need not be more conspicuous when used for periodic statement disclosures under § 1026.7(a)(4) and for advertisements under § 1026.16.

(iii) If disclosures are required to be presented in a tabular format pursuant to paragraph (a)(3) of this section, the term *penalty APR* shall be used, as applicable. The term *penalty APR* need not be used in reference to the annual percentage rate that applies with the loss of a promotional rate, assuming the annual percentage rate that applies is not greater than the annual percentage rate that would have applied at the end of the promotional period; or if the annual percentage rate that applies with the loss of a promotional rate is a variable rate, the annual percentage rate is calculated using the same index and margin as would have been used to calculate the annual percentage rate that would have applied at the end of the promotional period. If credit insurance or debt cancellation or debt suspension coverage is required as part of the plan, the term *required* shall be used and the program shall be identified by its name. If an annual percentage rate is required to be presented in a tabular format pursuant to paragraph (a)(3)(i) or (a)(3)(iii) of this section, the term *fixed,* or a similar term, may not be used to describe such rate unless the creditor also specifies a time period that the rate will be fixed and the rate will not increase during that period, or if no such time period is provided, the rate will not increase while the plan is open.

(3) *Specific formats.* (i) Certain disclosures for credit and charge card applications and solicitations must be provided in a tabular format in accordance with the requirements of § 1026.60(a)(2).

(ii) Certain disclosures for home-equity plans must precede other disclosures and must be given in accordance with the requirements of § 1026.40(a).

(iii) Certain account-opening disclosures must be provided in a tabular format in accordance with the requirements of § 1026.6(b)(1).

(iv) Certain disclosures provided on periodic statements must be grouped together in accordance with the requirements of § 1026.7(b)(6) and (b)(13).

(v) Certain disclosures provided on periodic statements must be given in accordance with the requirements of § 1026.7(b)(12).

(vi) Certain disclosures accompanying checks that access a credit card account must be provided in a tabular format in accordance with the requirements of § 1026.9(b)(3).

(vii) Certain disclosures provided in a change-in-terms notice must be provided in a tabular format in accordance with the requirements of § 1026.9(c)(2)(iv)(D).

(viii) Certain disclosures provided when a rate is increased due to delinquency, default or as a penalty must be provided in a tabular format in accordance with the requirements of § 1026.9(g)(3)(ii).

(b) *Time of disclosures.* (1) *Account-opening disclosures.* (i) *General rule.* The creditor shall furnish account-opening disclosures required by § 1026.6 before the first transaction is made under the plan.

(ii) *Charges imposed as part of an open-end (not home-secured) plan.* Charges that are imposed as part of an open-end (not home-secured) plan and are not required to be disclosed under § 1026.6(b)(2) may be disclosed after account opening but before the consumer agrees to pay or becomes obligated to pay for the charge, provided they are disclosed at a time and in a manner that a consumer would be likely to notice them. This provision does not apply to charges imposed as part of a home-equity plan subject to the requirements of § 1026.40.

(iii) *Telephone purchases.* Disclosures required by § 1026.6 may be provided as soon as reasonably practicable after the first transaction if:

(A) The first transaction occurs when a consumer contacts a merchant by telephone to purchase goods and at the same time the consumer accepts an offer to finance the purchase by establishing

an open-end plan with the merchant or third-party creditor;

(B) The merchant or third-party creditor permits consumers to return any goods financed under the plan and provides consumers with a sufficient time to reject the plan and return the goods free of cost after the merchant or third-party creditor has provided the written disclosures required by § 1026.6; and

(C) The consumer's right to reject the plan and return the goods is disclosed to the consumer as a part of the offer to finance the purchase.

(iv) *Membership fees.* (A) *General.* In general, a creditor may not collect any fee before account-opening disclosures are provided. A creditor may collect, or obtain the consumer's agreement to pay, membership fees, including application fees excludable from the finance charge under § 1026.4(c)(1), before providing account-opening disclosures if, after receiving the disclosures, the consumer may reject the plan and have no obligation to pay these fees (including application fees) or any other fee or charge. A membership fee for purposes of this paragraph has the same meaning as a fee for the issuance or availability of credit described in § 1026.60(b)(2). If the consumer rejects the plan, the creditor must promptly refund the membership fee if it has been paid, or take other action necessary to ensure the consumer is not obligated to pay that fee or any other fee or charge.

(B) *Home-equity plans.* Creditors offering home-equity plans subject to the requirements of § 1026.40 are not subject to the requirements of paragraph (b)(1)(iv)(A) of this section.

(v) *Application fees.* A creditor may collect an application fee excludable from the finance charge under § 1026.4(c)(1) before providing account-opening disclosures. However, if a consumer rejects the plan after receiving account-opening disclosures, the consumer must have no obligation to pay such an application fee, or if the fee was paid, it must be refunded. *See* § 1026.5(b)(1)(iv)(A).

(2) *Periodic statements.* (i) *Statement required.* The creditor shall mail or deliver a periodic statement as required by § 1026.7 for each billing cycle at the end of which an account has a debit or credit balance of more than $1 or on which a finance charge has been imposed. A periodic statement need not be sent for an account if the creditor deems it uncollectible, if delinquency collection proceedings have been instituted, if the creditor has charged off the account in accordance with loan-loss provisions and will not charge any additional fees or interest on the account, or if furnishing the statement would violate Federal law.

(ii) *Timing requirements.* (A) *Credit card accounts under an open-end (not home-secured) consumer credit plan.* For credit card accounts under an open-end (not home-secured) consumer credit plan, a card issuer must adopt reasonable procedures designed to ensure that:

(*1*) Periodic statements are mailed or delivered at least 21 days prior to the payment due date disclosed on the statement pursuant to § 1026.7(b)(11)(i)(A); and

(*2*) The card issuer does not treat as late for any purpose a required minimum periodic payment received by the card issuer within 21 days after mailing or delivery of the periodic statement disclosing the due date for that payment.

(B) *Open-end consumer credit plans.* For accounts under an open-end consumer credit plan, a creditor must adopt reasonable procedures designed to ensure that:

(*1*) If a grace period applies to the account:

(*i*) Periodic statements are mailed or delivered at least 21 days prior to the date on which the grace period expires; and

(*ii*) The creditor does not impose finance charges as a result of the loss of the grace period if a payment that satisfies the terms of the grace period is received by the creditor within 21 days after mailing or delivery of the periodic statement.

(*2*) Regardless of whether a grace period applies to the account:

(*i*) Periodic statements are mailed or delivered at least 14 days prior to the date on which the required minimum periodic payment must be received in order to avoid being treated as late for any purpose; and

(*ii*) The creditor does not treat as late for any purpose a required minimum periodic payment received by the creditor within 14 days after mailing or delivery of the periodic statement.

(*3*) For purposes of paragraph (b)(2)(ii)(B) of this section, ''grace period'' means a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate.

(3) *Credit and charge card application and solicitation disclosures.* The card issuer shall furnish the disclosures for credit and charge card applications and solicitations in accordance with the timing requirements of § 1026.60.

(4) *Home-equity plans.* Disclosures for home-equity plans shall be made in accordance with the timing requirements of § 1026.40(b).

(c) *Basis of disclosures and use of estimates.* Disclosures shall reflect the terms of the legal obligation between the parties. If any information necessary for accurate disclosure is unknown to the creditor, it shall make the disclosure based on the best information reasonably available and shall state clearly that the disclosure is an estimate.

(d) *Multiple creditors; multiple consumers.* If the credit plan involves more than one creditor, only one set of disclosures shall be given, and the creditors shall agree among themselves which creditor must comply with the requirements that this part imposes on any or all of them. If there is more than one consumer, the disclosures may be made to any consumer who is primarily liable on the account. If the right of rescission under § 1026.15 is applicable, however, the disclosures required by §§ 1026.6 and 1026.15(b) shall be made to each consumer having the right to rescind.

(e) *Effect of subsequent events.* If a disclosure becomes inaccurate because of an event that occurs after the creditor mails or delivers the disclosures, the resulting inaccuracy is not a violation of this part, although new disclosures may be required under § 1026.9(c).

§ 1026.6 Account-opening disclosures.

(a) *Rules affecting home-equity plans.* The requirements of this paragraph (a) apply only to home-equity plans subject to the requirements of § 1026.40. A creditor shall disclose the items in this section, to the extent applicable:

(1) *Finance charge.* The circumstances under which a finance charge will be imposed and an explanation of how it will be determined, as follows:

(i) A statement of when finance charges begin to accrue, including an explanation of whether or not any time period exists within which any credit extended may be repaid without incurring a finance charge. If such a time period is provided, a creditor may, at its option and without disclosure, impose no finance charge when payment is received after the time period's expiration.

(ii) A disclosure of each periodic rate that may be used to compute the finance charge, the range of balances to which it is applicable, and the corresponding annual percentage rate. If a creditor offers a variable-rate plan, the creditor shall also disclose: The circumstances under which the rate(s) may increase; any limitations on the increase; and the effect(s) of an increase. When different periodic rates apply to different types of transactions, the types of transactions to which the periodic rates shall apply

shall also be disclosed. A creditor is not required to adjust the range of balances disclosure to reflect the balance below which only a minimum charge applies.

(iii) An explanation of the method used to determine the balance on which the finance charge may be computed.

(iv) An explanation of how the amount of any finance charge will be determined, including a description of how any finance charge other than the periodic rate will be determined.

(2) *Other charges.* The amount of any charge other than a finance charge that may be imposed as part of the plan, or an explanation of how the charge will be determined.

(3) *Home-equity plan information.* The following disclosures described in § 1026.40(d), as applicable:

(i) A statement of the conditions under which the creditor may take certain action, as described in § 1026.40(d)(4)(i), such as terminating the plan or changing the terms.

(ii) The payment information described in § 1026.40(d)(5)(i) and (ii) for both the draw period and any repayment period.

(iii) A statement that negative amortization may occur as described in § 1026.40(d)(9).

(iv) A statement of any transaction requirements as described in § 1026.40(d)(10).

(v) A statement regarding the tax implications as described in § 1026.40(d)(11).

(vi) A statement that the annual percentage rate imposed under the plan does not include costs other than interest as described in § 1026.40(d)(6) and (d)(12)(ii).

(vii) The variable-rate disclosures described in § 1026.40(d)(12)(viii), (d)(12)(x), (d)(12)(xi), and (d)(12)(xii), as well as the disclosure described in § 1026.40(d)(5)(iii), unless the disclosures provided with the application were in a form the consumer could keep and included a representative payment example for the category of payment option chosen by the consumer.

(4) *Security interests.* The fact that the creditor has or will acquire a security interest in the property purchased under the plan, or in other property identified by item or type.

(5) *Statement of billing rights.* A statement that outlines the consumer's rights and the creditor's responsibilities under §§ 1026.12(c) and 1026.13 and that is substantially similar to the statement found in Model Form G–3 or, at the creditor's option, G–3(A), in Appendix G to this part.

(b) *Rules affecting open-end (not home-secured) plans.* The requirements of paragraph (b) of this section apply to plans other than home-equity plans subject to the requirements of § 1026.40.

(1) *Form of disclosures; tabular format for open-end (not home-secured) plans.* Creditors must provide the account-opening disclosures specified in paragraph (b)(2)(i) through (b)(2)(v) (except for (b)(2)(i)(D)(*2*)) and (b)(2)(vii) through (b)(2)(xiv) of this section in the form of a table with the headings, content, and format substantially similar to any of the applicable tables in G–17 in Appendix G.

(i) *Highlighting.* In the table, any annual percentage rate required to be disclosed pursuant to paragraph (b)(2)(i) of this section; any introductory rate permitted to be disclosed pursuant to paragraph (b)(2)(i)(B) or required to be disclosed under paragraph (b)(2)(i)(F) of this section, any rate that will apply after a premium initial rate expires permitted to be disclosed pursuant to paragraph (b)(2)(i)(C) or required to be disclosed pursuant to paragraph (b)(2)(i)(F), and any fee or percentage amounts or maximum limits on fee amounts disclosed pursuant to paragraphs (b)(2)(ii), (b)(2)(iv), (b)(2)(vii) through (b)(2)(xii) of this section must be disclosed in bold text. However, bold text shall not be used for: The amount of any periodic fee disclosed pursuant to paragraph (b)(2) of this section that is not an annualized amount; and other annual percentage rates or fee amounts disclosed in the table.

(ii) *Location.* Only the information required or permitted by paragraphs (b)(2)(i) through (v) (except for (b)(2)(i)(D)(*2*)) and (b)(2)(vii) through (xiv) of this section shall be in the table. Disclosures required by paragraphs (b)(2)(i)(D)(*2*), (b)(2)(i)(D)(*3*), (b)(2)(vi), and (b)(2)(xv) of this section shall be placed directly below the table. Disclosures required by paragraphs (b)(3) through (5) of this section that are not otherwise required to be in the table and other information may be presented with the account agreement or account-opening disclosure statement, provided such information appears outside the required table.

(iii) *Fees that vary by state.* Creditors that impose fees referred to in paragraphs (b)(2)(vii) through (b)(2)(xi) of this section that vary by state and that provide the disclosures required by paragraph (b) of this section in person at the time the open-end (not home-secured) plan is established in connection with financing the purchase of goods or services may, at the creditor's option, disclose in the account-opening table the specific fee applicable to the consumer's account, or the range of the fees, if the disclosure includes a statement that the amount of the fee varies by state and refers the consumer to the account agreement or other disclosure provided with the account-opening table where the amount of the fee applicable to the consumer's account is disclosed. A creditor may not list fees for multiple states in the account-opening summary table.

(iv) *Fees based on a percentage.* If the amount of any fee required to be disclosed under this section is determined on the basis of a percentage of another amount, the percentage used and the identification of the amount against which the percentage is applied may be disclosed instead of the amount of the fee.

(2) *Required disclosures for account-opening table for open-end (not home-secured) plans.* A creditor shall disclose the items in this section, to the extent applicable:

(i) *Annual percentage rate.* Each periodic rate that may be used to compute the finance charge on an outstanding balance for purchases, a cash advance, or a balance transfer, expressed as an annual percentage rate (as determined by § 1026.14(b)). When more than one rate applies for a category of transactions, the range of balances to which each rate is applicable shall also be disclosed. The annual percentage rate for purchases disclosed pursuant to this paragraph shall be in at least 16-point type, except for the following: A penalty rate that may apply upon the occurrence of one or more specific events.

(A) *Variable-rate information.* If a rate disclosed under paragraph (b)(2)(i) of this section is a variable rate, the creditor shall also disclose the fact that the rate may vary and how the rate is determined. In describing how the applicable rate will be determined, the creditor must identify the type of index or formula that is used in setting the rate. The value of the index and the amount of the margin that are used to calculate the variable rate shall not be disclosed in the table. A disclosure of any applicable limitations on rate increases or decreases shall not be included in the table.

(B) *Discounted initial rates.* If the initial rate is an introductory rate, as that term is defined in § 1026.16(g)(2)(ii), the creditor must disclose the rate that would otherwise apply to the account pursuant to paragraph (b)(2)(i) of this section. Where the rate is not tied to an index or formula, the creditor must disclose the rate that will apply after the introductory rate expires. In a variable-rate account, the creditor must disclose a rate based on the applicable index or

formula in accordance with the accuracy requirements of paragraph (b)(4)(ii)(G) of this section. Except as provided in paragraph (b)(2)(i)(F) of this section, the creditor is not required to, but may disclose in the table the introductory rate along with the rate that would otherwise apply to the account if the creditor also discloses the time period during which the introductory rate will remain in effect, and uses the term ''introductory'' or ''intro'' in immediate proximity to the introductory rate.

(C) *Premium initial rate.* If the initial rate is temporary and is higher than the rate that will apply after the temporary rate expires, the creditor must disclose the premium initial rate pursuant to paragraph (b)(2)(i) of this section. Consistent with paragraph (b)(2)(i) of this section, the premium initial rate for purchases must be in at least 16-point type. Except as provided in paragraph (b)(2)(i)(F) of this section, the creditor is not required to, but may disclose in the table the rate that will apply after the premium initial rate expires if the creditor also discloses the time period during which the premium initial rate will remain in effect. If the creditor also discloses in the table the rate that will apply after the premium initial rate for purchases expires, that rate also must be in at least 16-point type.

(D) *Penalty rates.* (*1*) *In general.* Except as provided in paragraph (b)(2)(i)(D)(*2*) and (b)(2)(i)(D)(*3*) of this section, if a rate may increase as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit, the creditor must disclose pursuant to paragraph (b)(2)(i) of this section the increased rate that may apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect. If more than one penalty rate may apply, the creditor at its option may disclose the highest rate that could apply, instead of disclosing the specific rates or the range of rates that could apply.

(*2*) *Introductory rates.* If the creditor discloses in the table an introductory rate, as that term is defined in § 1026.16(g)(2)(ii), creditors must briefly disclose directly beneath the table the circumstances under which the introductory rate may be revoked, and the rate that will apply after the introductory rate is revoked.

(*3*) *Employee preferential rates.* If a creditor discloses in the table a preferential annual percentage rate for which only employees of the creditor, employees of a third party, or other individuals with similar affiliations with the creditor or third party, such as executive officers, directors, or principal shareholders are eligible, the creditor must briefly disclose directly beneath the table the circumstances under which such preferential rate may be revoked, and the rate that will apply after such preferential rate is revoked.

(E) *Point of sale where APRs vary by state or based on creditworthiness.* Creditors imposing annual percentage rates that vary by state or based on the consumer's creditworthiness and providing the disclosures required by paragraph (b) of this section in person at the time the open-end (not home-secured) plan is established in connection with financing the purchase of goods or services may, at the creditor's option, disclose pursuant to paragraph (b)(2)(i) of this section in the account-opening table:

(*1*) The specific annual percentage rate applicable to the consumer's account; or

(*2*) The range of the annual percentage rates, if the disclosure includes a statement that the annual percentage rate varies by state or will be determined based on the consumer's creditworthiness and refers the consumer to the account agreement or other disclosure provided with the account-opening table where the annual percentage rate applicable to the consumer's account is disclosed. A creditor may not list annual percentage rates for multiple states in the account-opening table.

(F) *Credit card accounts under an open-end (not home-secured) consumer credit plan.* Notwithstanding paragraphs (b)(2)(i)(B) and (b)(2)(i)(C) of this section, for credit card accounts under an open-end (not home-secured) plan, issuers must disclose in the table:

(*1*) Any introductory rate as that term is defined in § 1026.16(g)(2)(ii) that would apply to the account, consistent with the requirements of paragraph (b)(2)(i)(B) of this section, and

(*2*) Any rate that would apply upon the expiration of a premium initial rate, consistent with the requirements of paragraph (b)(2)(i)(C) of this section.

(ii) *Fees for issuance or availability.* (A) Any annual or other periodic fee that may be imposed for the issuance or availability of an open-end plan, including any fee based on account activity or inactivity; how frequently it will be imposed; and the annualized amount of the fee.

(B) Any non-periodic fee that relates to opening the plan. A creditor must disclose that the fee is a one-time fee.

(iii) *Fixed finance charge; minimum interest charge.* Any fixed finance charge and a brief description of the charge. Any minimum interest charge if it exceeds $1.00 that could be imposed during a billing cycle, and a brief description of the charge. The $1.00 threshold amount shall be adjusted periodically by the Bureau to reflect changes in the Consumer Price Index. The Bureau shall calculate each year a price level adjusted minimum interest charge using the Consumer Price Index in effect on the June 1 of that year. When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current minimum interest charge threshold has risen by a whole dollar, the minimum interest charge will be increased by $1.00. The creditor may, at its option, disclose in the table minimum interest charges below this threshold.

(iv) *Transaction charges.* Any transaction charge imposed by the creditor for use of the open-end plan for purchases.

(v) *Grace period.* The date by which or the period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate and any conditions on the availability of the grace period. If no grace period is provided, that fact must be disclosed. If the length of the grace period varies, the creditor may disclose the range of days, the minimum number of days, or the average number of the days in the grace period, if the disclosure is identified as a range, minimum, or average. In disclosing in the tabular format a grace period that applies to all features on the account, the phrase ''How to Avoid Paying Interest'' shall be used as the heading for the row describing the grace period. If a grace period is not offered on all features of the account, in disclosing this fact in the tabular format, the phrase ''Paying Interest'' shall be used as the heading for the row describing this fact.

(vi) *Balance computation method.* The name of the balance computation method listed in § 1026.60(g) that is used to determine the balance on which the finance charge is computed for each feature, or an explanation of the method used if it is not listed, along with a statement that an explanation of the method(s) required by paragraph (b)(4)(i)(D) of this section is provided with the account-opening disclosures. In determining which balance computation method to disclose, the creditor shall assume that credit extended will not be repaid within any grace period, if any.

(vii) *Cash advance fee.* Any fee imposed for an extension of credit in the form of cash or its equivalent.

(viii) *Late payment fee.* Any fee imposed for a late payment.

(ix) *Over-the-limit fee.* Any fee imposed for exceeding a credit limit.

(x) *Balance transfer fee.* Any fee imposed to transfer an outstanding balance.

(xi) *Returned-payment fee.* Any fee imposed by the creditor for a returned payment.

(xii) *Required insurance, debt cancellation or debt suspension coverage.* (A) A fee for insurance described in § 1026.4(b)(7) or debt cancellation or suspension coverage described in § 1026.4(b)(10), if the insurance, or debt cancellation or suspension coverage is required as part of the plan; and

(B) A cross reference to any additional information provided about the insurance or coverage, as applicable.

(xiii) *Available credit.* If a creditor requires fees for the issuance or availability of credit described in paragraph (b)(2)(ii) of this section, or requires a security deposit for such credit, and the total amount of those required fees and/or security deposit that will be imposed and charged to the account when the account is opened is 15 percent or more of the minimum credit limit for the plan, a creditor must disclose the available credit remaining after these fees or security deposit are debited to the account. The determination whether the 15 percent threshold is met must be based on the minimum credit limit for the plan. However, the disclosure provided under this paragraph must be based on the actual initial credit limit provided on the account. In determining whether the 15 percent threshold test is met, the creditor must only consider fees for issuance or availability of credit, or a security deposit, that are required. If fees for issuance or availability are optional, these fees should not be considered in determining whether the disclosure must be given. Nonetheless, if the 15 percent threshold test is met, the creditor in providing the disclosure must disclose the amount of available credit calculated by excluding those optional fees, and the available credit including those optional fees. The creditor shall also disclose that the consumer has the right to reject the plan and not be obligated to pay those fees or any other fee or charges until the consumer has used the account or made a payment on the account after receiving a periodic statement. This paragraph does not apply with respect to fees or security deposits that are not debited to the account.

(xiv) *Web site reference.* For issuers of credit cards that are not charge cards, a reference to the Web site established by the Bureau and a statement that consumers may obtain on the Web site information about shopping for and using credit cards. Until January 1, 2013, issuers may substitute for this reference a reference to the Web site established by the Board of Governors of the Federal Reserve System.

(xv) *Billing error rights reference.* A statement that information about consumers' right to dispute transactions is included in the account-opening disclosures.

(3) *Disclosure of charges imposed as part of open-end (not home-secured) plans.* A creditor shall disclose, to the extent applicable:

(i) For charges imposed as part of an open-end (not home-secured) plan, the circumstances under which the charge may be imposed, including the amount of the charge or an explanation of how the charge is determined. For finance charges, a statement of when the charge begins to accrue and an explanation of whether or not any time period exists within which any credit that has been extended may be repaid without incurring the charge. If such a time period is provided, a creditor may, at its option and without disclosure, elect not to impose a finance charge when payment is received after the time period expires.

(ii) Charges imposed as part of the plan are:

(A) Finance charges identified under § 1026.4(a) and § 1026.4(b).

(B) Charges resulting from the consumer's failure to use the plan as agreed, except amounts payable for collection activity after default, attorney's fees whether or not automatically imposed, and post-judgment interest rates permitted by law.

(C) Taxes imposed on the credit transaction by a state or other governmental body, such as documentary stamp taxes on cash advances.

(D) Charges for which the payment, or nonpayment, affect the consumer's access to the plan, the duration of the plan, the amount of credit extended, the period for which credit is extended, or the timing or method of billing or payment.

(E) Charges imposed for terminating a plan.

(F) Charges for voluntary credit insurance, debt cancellation or debt suspension.

(iii) Charges that are not imposed as part of the plan include:

(A) Charges imposed on a cardholder by an institution other than the card issuer for the use of the other institution's ATM in a shared or interchange system.

(B) A charge for a package of services that includes an open-end credit feature, if the fee is required whether or not the open-end credit feature is included and the non-credit services are not merely incidental to the credit feature.

(C) Charges under § 1026.4(e) disclosed as specified.

(4) *Disclosure of rates for open-end (not home-secured) plans.* A creditor shall disclose, to the extent applicable:

(i) For each periodic rate that may be used to calculate interest:

(A) *Rates.* The rate, expressed as a periodic rate and a corresponding annual percentage rate.

(B) *Range of balances.* The range of balances to which the rate is applicable; however, a creditor is not required to adjust the range of balances disclosure to reflect the balance below which only a minimum charge applies.

(C) *Type of transaction.* The type of transaction to which the rate applies, if different rates apply to different types of transactions.

(D) *Balance computation method.* An explanation of the method used to determine the balance to which the rate is applied.

(ii) *Variable-rate accounts.* For interest rate changes that are tied to increases in an index or formula (variable-rate accounts) specifically set forth in the account agreement:

(A) The fact that the annual percentage rate may increase.

(B) How the rate is determined, including the margin.

(C) The circumstances under which the rate may increase.

(D) The frequency with which the rate may increase.

(E) Any limitation on the amount the rate may change.

(F) The effect(s) of an increase.

(G) Except as specified in paragraph (b)(4)(ii)(H) of this section, a rate is accurate if it is a rate as of a specified date and this rate was in effect within the last 30 days before the disclosures are provided.

(H) Creditors imposing annual percentage rates that vary according to an index that is not under the creditor's control that provide the disclosures required by paragraph (b) of this section in person at the time the open-end (not home-secured) plan is established in connection with financing the purchase of goods or services may disclose in the table a rate, or range of rates to the

extent permitted by § 1026.6(b)(2)(i)(E), that was in effect within the last 90 days before the disclosures are provided, along with a reference directing the consumer to the account agreement or other disclosure provided with the account-opening table where an annual percentage rate applicable to the consumer's account in effect within the last 30 days before the disclosures are provided is disclosed.

(iii) *Rate changes not due to index or formula.* For interest rate changes that are specifically set forth in the account agreement and not tied to increases in an index or formula:

(A) The initial rate (expressed as a periodic rate and a corresponding annual percentage rate) required under paragraph (b)(4)(i)(A) of this section.

(B) How long the initial rate will remain in effect and the specific events that cause the initial rate to change.

(C) The rate (expressed as a periodic rate and a corresponding annual percentage rate) that will apply when the initial rate is no longer in effect and any limitation on the time period the new rate will remain in effect.

(D) The balances to which the new rate will apply.

(E) The balances to which the current rate at the time of the change will apply.

(5) *Additional disclosures for open-end (not home-secured) plans.* A creditor shall disclose, to the extent applicable:

(i) *Voluntary credit insurance, debt cancellation or debt suspension.* The disclosures in §§ 1026.4(d)(1)(i) and (d)(1)(ii) and (d)(3)(i) through (d)(3)(iii) if the creditor offers optional credit insurance or debt cancellation or debt suspension coverage that is identified in § 1026.4(b)(7) or (b)(10).

(ii) *Security interests.* The fact that the creditor has or will acquire a security interest in the property purchased under the plan, or in other property identified by item or type.

(iii) *Statement of billing rights.* A statement that outlines the consumer's rights and the creditor's responsibilities under §§ 1026.12(c) and 1026.13 and that is substantially similar to the statement found in Model Form G–3(A) in Appendix G to this part.

§ 1026.7 Periodic statement.

The creditor shall furnish the consumer with a periodic statement that discloses the following items, to the extent applicable:

(a) *Rules affecting home-equity plans.* The requirements of paragraph (a) of this section apply only to home-equity plans subject to the requirements of § 1026.40. Alternatively, a creditor subject to this paragraph may, at its option, comply with any of the requirements of paragraph (b) of this section; however, any creditor that chooses not to provide a disclosure under paragraph (a)(7) of this section must comply with paragraph (b)(6) of this section.

(1) *Previous balance.* The account balance outstanding at the beginning of the billing cycle.

(2) *Identification of transactions.* An identification of each credit transaction in accordance with § 1026.8.

(3) *Credits.* Any credit to the account during the billing cycle, including the amount and the date of crediting. The date need not be provided if a delay in accounting does not result in any finance or other charge.

(4) *Periodic rates.* (i) Except as provided in paragraph (a)(4)(ii) of this section, each periodic rate that may be used to compute the finance charge, the range of balances to which it is applicable, and the corresponding annual percentage rate. If no finance charge is imposed when the outstanding balance is less than a certain amount, the creditor is not required to disclose that fact, or the balance below which no finance charge will be imposed. If different periodic rates apply to different types of transactions, the types of transactions to which the periodic rates apply shall also be disclosed. For variable-rate plans, the fact that the periodic rate(s) may vary.

(ii) *Exception.* An annual percentage rate that differs from the rate that would otherwise apply and is offered only for a promotional period need not be disclosed except in periods in which the offered rate is actually applied.

(5) *Balance on which finance charge computed.* The amount of the balance to which a periodic rate was applied and an explanation of how that balance was determined. When a balance is determined without first deducting all credits and payments made during the billing cycle, the fact and the amount of the credits and payments shall be disclosed.

(6) *Amount of finance charge and other charges.* Creditors may comply with paragraphs (a)(6) of this section, or with paragraph (b)(6) of this section, at their option.

(i) *Finance charges.* The amount of any finance charge debited or added to the account during the billing cycle, using the term *finance charge.* The components of the finance charge shall be individually itemized and identified to show the amount(s) due to the application of any periodic rates and the amounts(s) of any other type of finance charge. If there is more than one periodic rate, the amount of the finance charge attributable to each rate need not be separately itemized and identified.

(ii) *Other charges.* The amounts, itemized and identified by type, of any charges other than finance charges debited to the account during the billing cycle.

(7) *Annual percentage rate.* At a creditor's option, when a finance charge is imposed during the billing cycle, the annual percentage rate(s) determined under § 1026.14(c) using the term *annual percentage rate.*

(8) *Grace period.* The date by which or the time period within which the new balance or any portion of the new balance must be paid to avoid additional finance charges. If such a time period is provided, a creditor may, at its option and without disclosure, impose no finance charge if payment is received after the time period's expiration.

(9) *Address for notice of billing errors.* The address to be used for notice of billing errors. Alternatively, the address may be provided on the billing rights statement permitted by § 1026.9(a)(2).

(10) *Closing date of billing cycle; new balance.* The closing date of the billing cycle and the account balance outstanding on that date.

(b) *Rules affecting open-end (not home-secured) plans.* The requirements of paragraph (b) of this section apply only to plans other than home-equity plans subject to the requirements of § 1026.40.

(1) *Previous balance.* The account balance outstanding at the beginning of the billing cycle.

(2) *Identification of transactions.* An identification of each credit transaction in accordance with § 1026.8.

(3) *Credits.* Any credit to the account during the billing cycle, including the amount and the date of crediting. The date need not be provided if a delay in crediting does not result in any finance or other charge.

(4) *Periodic rates.* (i) Except as provided in paragraph (b)(4)(ii) of this section, each periodic rate that may be used to compute the interest charge expressed as an annual percentage rate and using the term *Annual Percentage Rate,* along with the range of balances to which it is applicable. If no interest charge is imposed when the outstanding balance is less than a certain amount, the creditor is not required to disclose that fact, or the balance below which no interest charge will be imposed. The types of transactions to which the periodic rates apply shall also be disclosed. For variable-rate plans, the fact that the annual percentage rate may vary.

(ii) *Exception.* A promotional rate, as that term is defined in § 1026.16(g)(2)(i), is required to be disclosed only in periods in which the offered rate is actually applied.

(5) *Balance on which finance charge computed.* The amount of the balance to which a periodic rate was applied and an explanation of how that balance was determined, using the term *Balance Subject to Interest Rate.* When a balance is determined without first deducting all credits and payments made during the billing cycle, the fact and the amount of the credits and payments shall be disclosed. As an alternative to providing an explanation of how the balance was determined, a creditor that uses a balance computation method identified in § 1026.60(g) may, at the creditor's option, identify the name of the balance computation method and provide a toll-free telephone number where consumers may obtain from the creditor more information about the balance computation method and how resulting interest charges were determined. If the method used is not identified in § 1026.60(g), the creditor shall provide a brief explanation of the method used.

(6) *Charges imposed.* (i) The amounts of any charges imposed as part of a plan as stated in § 1026.6(b)(3), grouped together, in proximity to transactions identified under paragraph (b)(2) of this section, substantially similar to Sample G–18(A) in Appendix G to this part.

(ii) *Interest.* Finance charges attributable to periodic interest rates, using the term *Interest Charge,* must be grouped together under the heading *Interest Charged,* itemized and totaled by type of transaction, and a total of finance charges attributable to periodic interest rates, using the term *Total Interest,* must be disclosed for the statement period and calendar year to date, using a format substantially similar to Sample G–18(A) in Appendix G to this part.

(iii) *Fees.* Charges imposed as part of the plan other than charges attributable to periodic interest rates must be grouped together under the heading *Fees,* identified consistent with the feature or type, and itemized, and a total of charges, using the term *Fees,* must be disclosed for the statement period and calendar year to date, using a format substantially similar to Sample G–18(A) in Appendix G to this part.

(7) *Change-in-terms and increased penalty rate summary for open-end (not home-secured) plans.* Creditors that provide a change-in-terms notice required by § 1026.9(c), or a rate increase notice required by § 1026.9(g), on or with the periodic statement, must disclose the information in § 1026.9(c)(2)(iv)(A) and (c)(2)(iv)(B) (if applicable) or § 1026.9(g)(3)(i) on the periodic statement in accordance with the format requirements in § 1026.9(c)(2)(iv)(D), and § 1026.9(g)(3)(ii). See Forms G–18(F) and G–18(G) in Appendix G to this part.

(8) *Grace period.* The date by which or the time period within which the new balance or any portion of the new balance must be paid to avoid additional finance charges. If such a time period is provided, a creditor may, at its option and without disclosure, impose no finance charge if payment is received after the time period's expiration.

(9) *Address for notice of billing errors.* The address to be used for notice of billing errors. Alternatively, the address may be provided on the billing rights statement permitted by § 1026.9(a)(2).

(10) *Closing date of billing cycle; new balance.* The closing date of the billing cycle and the account balance outstanding on that date. The new balance must be disclosed in accordance with the format requirements of paragraph (b)(13) of this section.

(11) *Due date; late payment costs.* (i) Except as provided in paragraph (b)(11)(ii) of this section and in accordance with the format requirements in paragraph (b)(13) of this section, for a credit card account under an open-end (not home-secured) consumer credit plan, a card issuer must provide on each periodic statement:

(A) The due date for a payment. The due date disclosed pursuant to this paragraph shall be the same day of the month for each billing cycle.

(B) The amount of any late payment fee and any increased periodic rate(s) (expressed as an annual percentage rate(s)) that may be imposed on the account as a result of a late payment. If a range of late payment fees may be assessed, the card issuer may state the range of fees, or the highest fee and an indication that the fee imposed could be lower. If the rate may be increased for more than one feature or balance, the card issuer may state the range of rates or the highest rate that could apply and at the issuer's option an indication that the rate imposed could be lower.

(ii) *Exception.* The requirements of paragraph (b)(11)(i) of this section do not apply to the following:

(A) Periodic statements provided solely for charge card accounts; and

(B) Periodic statements provided for a charged-off account where payment of the entire account balance is due immediately.

(12) *Repayment disclosures.* (i) *In general.* Except as provided in paragraphs (b)(12)(ii) and (b)(12)(v) of this section, for a credit card account under an open-end (not home-secured) consumer credit plan, a card issuer must provide the following disclosures on each periodic statement:

(A) The following statement with a bold heading: ''Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance;''

(B) The minimum payment repayment estimate, as described in Appendix M1 to this part. If the minimum payment repayment estimate is less than 2 years, the card issuer must disclose the estimate in months. Otherwise, the estimate must be disclosed in years and rounded to the nearest whole year;

(C) The minimum payment total cost estimate, as described in Appendix M1 to this part. The minimum payment total cost estimate must be rounded either to the nearest whole dollar or to the nearest cent, at the card issuer's option;

(D) A statement that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the current outstanding balance shown on the periodic statement. A statement that the minimum payment repayment estimate and the minimum payment total cost estimate are based on the assumption that only minimum payments are made and no other amounts are added to the balance;

(E) A toll-free telephone number where the consumer may obtain from the card issuer information about credit counseling services consistent with paragraph (b)(12)(iv) of this section; and

(F)(*1*) Except as provided in paragraph (b)(12)(i)(F)(*2*) of this section, the following disclosures:

(*i*) The estimated monthly payment for repayment in 36 months, as described in Appendix M1 to this part. The estimated monthly payment for repayment in 36 months must be rounded either to the nearest whole dollar or to the nearest cent, at the card issuer's option;

(*ii*) A statement that the card issuer estimates that the consumer will repay the outstanding balance shown on the periodic statement in 3 years if the consumer pays the estimated monthly payment each month for 3 years;

(*iii*) The total cost estimate for repayment in 36 months, as described in Appendix M1 to this part. The total cost estimate for repayment in 36 months must be rounded either to the nearest whole dollar or to the nearest cent, at the card issuer's option; and

(*iv*) The savings estimate for repayment in 36 months, as described in

Appendix M1 to this part. The savings estimate for repayment in 36 months must be rounded either to the nearest whole dollar or to the nearest cent, at the card issuer's option.

(*2*) The requirements of paragraph (b)(12)(i)(F)(*1*) of this section do not apply to a periodic statement in any of the following circumstances:

(*i*) The minimum payment repayment estimate that is disclosed on the periodic statement pursuant to paragraph (b)(12)(i)(B) of this section after rounding is three years or less;

(*ii*) The estimated monthly payment for repayment in 36 months, as described in Appendix M1 to this part, after rounding as set forth in paragraph (b)(12)(i)(F)(*1*)(*i*) of this section that is calculated for a particular billing cycle is less than the minimum payment required for the plan for that billing cycle; and

(*iii*) A billing cycle where an account has both a balance in a revolving feature where the required minimum payments for this feature will not amortize that balance in a fixed amount of time specified in the account agreement and a balance in a fixed repayment feature where the required minimum payment for this fixed repayment feature will amortize that balance in a fixed amount of time specified in the account agreement which is less than 36 months.

(ii) *Negative or no amortization.* If negative or no amortization occurs when calculating the minimum payment repayment estimate as described in Appendix M1 of this part, a card issuer must provide the following disclosures on the periodic statement instead of the disclosures set forth in paragraph (b)(12)(i) of this section:

(A) The following statement: ''Minimum Payment Warning: Even if you make no more charges using this card, if you make only the minimum payment each month we estimate you will never pay off the balance shown on this statement because your payment will be less than the interest charged each month'';

(B) The following statement: ''If you make more than the minimum payment each period, you will pay less in interest and pay off your balance sooner'';

(C) The estimated monthly payment for repayment in 36 months, as described in Appendix M1 to this part. The estimated monthly payment for repayment in 36 months must be rounded either to the nearest whole dollar or to the nearest cent, at the issuer's option;

(D) A statement that the card issuer estimates that the consumer will repay the outstanding balance shown on the periodic statement in 3 years if the consumer pays the estimated monthly payment each month for 3 years; and

(E) A toll-free telephone number where the consumer may obtain from the card issuer information about credit counseling services consistent with paragraph (b)(12)(iv) of this section.

(iii) *Format requirements.* A card issuer must provide the disclosures required by paragraph (b)(12)(i) or (b)(12)(ii) of this section in accordance with the format requirements of paragraph (b)(13) of this section, and in a format substantially similar to Samples G–18(C)(1), G–18(C)(2) and G–18(C)(3) in Appendix G to this part, as applicable.

(iv) *Provision of information about credit counseling services.* (A) *Required information.* To the extent available from the United States Trustee or a bankruptcy administrator, a card issuer must provide through the toll-free telephone number disclosed pursuant to paragraphs (b)(12)(i) or (b)(12)(ii) of this section the name, street address, telephone number, and Web site address for at least three organizations that have been approved by the United States Trustee or a bankruptcy administrator pursuant to 11 U.S.C. 111(a)(1) to provide credit counseling services in, at the card issuer's option, either the state in which the billing address for the account is located or the state specified by the consumer.

(B) *Updating required information.* At least annually, a card issuer must update the information provided pursuant to paragraph (b)(12)(iv)(A) of this section for consistency with the information available from the United States Trustee or a bankruptcy administrator.

(v) *Exemptions.* Paragraph (b)(12) of this section does not apply to:

(A) Charge card accounts that require payment of outstanding balances in full at the end of each billing cycle;

(B) A billing cycle immediately following two consecutive billing cycles in which the consumer paid the entire balance in full, had a zero outstanding balance or had a credit balance; and

(C) A billing cycle where paying the minimum payment due for that billing cycle will pay the entire outstanding balance on the account for that billing cycle.

(13) *Format requirements.* The due date required by paragraph (b)(11) of this section shall be disclosed on the front of the first page of the periodic statement. The amount of the late payment fee and the annual percentage rate(s) required by paragraph (b)(11) of this section shall be stated in close proximity to the due date. The ending balance required by paragraph (b)(10) of this section and the disclosures required by paragraph (b)(12) of this section shall be disclosed closely proximate to the minimum payment due. The due date, late payment fee and annual percentage rate, ending balance, minimum payment due, and disclosures required by paragraph (b)(12) of this section shall be grouped together. Sample G–18(D) in Appendix G to this part sets forth an example of how these terms may be grouped.

(14) *Deferred interest or similar transactions.* For accounts with an outstanding balance subject to a deferred interest or similar program, the date by which that outstanding balance must be paid in full in order to avoid the obligation to pay finance charges on such balance must be disclosed on the front of any page of each periodic statement issued during the deferred interest period beginning with the first periodic statement issued during the deferred interest period that reflects the deferred interest or similar transaction. The disclosure provided pursuant to this paragraph must be substantially similar to Sample G–18(H) in Appendix G to this part.

§ 1026.8 Identifying transactions on periodic statements.

The creditor shall identify credit transactions on or with the first periodic statement that reflects the transaction by furnishing the following information, as applicable:

(a) *Sale credit.* (1) Except as provided in paragraph (a)(2) of this section, for each credit transaction involving the sale of property or services, the creditor must disclose the amount and date of the transaction, and either:

(i) A brief identification of the property or services purchased, for creditors and sellers that are the same or related; or

(ii) The seller's name; and the city and state or foreign country where the transaction took place. The creditor may omit the address or provide any suitable designation that helps the consumer to identify the transaction when the transaction took place at a location that is not fixed; took place in the consumer's home; or was a mail, Internet, or telephone order.

(2) Creditors need not comply with paragraph (a)(1) of this section if an actual copy of the receipt or other credit document is provided with the first periodic statement reflecting the transaction, and the amount of the transaction and either the date of the transaction to the consumer's account or the date of debiting the transaction are disclosed on the copy or on the periodic statement.

(b) *Nonsale credit.* For each credit transaction not involving the sale of property or services, the creditor must disclose a brief identification of the transaction; the amount of the transaction; and at least one of the following dates: The date of the transaction, the date the transaction was debited to the consumer's account, or, if the consumer signed the credit document, the date appearing on the document. If an actual copy of the receipt or other credit document is provided and that copy shows the amount and at least one of the specified dates, the brief identification may be omitted.

(c) *Alternative creditor procedures; consumer inquiries for clarification or documentation.* The following procedures apply to creditors that treat an inquiry for clarification or documentation as a notice of a billing error, including correcting the account in accordance with § 1026.13(e):

(1) Failure to disclose the information required by paragraphs (a) and (b) of this section is not a failure to comply with the regulation, provided that the creditor also maintains procedures reasonably designed to obtain and provide the information. This applies to transactions that take place outside a state, as defined in § 1026.2(a)(26), whether or not the creditor maintains procedures reasonably adapted to obtain the required information.

(2) As an alternative to the brief identification for sale or nonsale credit, the creditor may disclose a number or symbol that also appears on the receipt or other credit document given to the consumer, if the number or symbol reasonably identifies that transaction with that creditor.

§ 1026.9 Subsequent disclosure requirements.

(a) *Furnishing statement of billing rights.* (1) *Annual statement.* The creditor shall mail or deliver the billing rights statement required by § 1026.6(a)(5) and (b)(5)(iii) at least once per calendar year, at intervals of not less than 6 months nor more than 18 months, either to all consumers or to each consumer entitled to receive a periodic statement under § 1026.5(b)(2) for any one billing cycle.

(2) *Alternative summary statement.* As an alternative to paragraph (a)(1) of this section, the creditor may mail or deliver, on or with each periodic statement, a statement substantially similar to Model Form G–4 or Model Form G–4(A) in Appendix G to this part, as applicable. Creditors offering home-equity plans subject to the requirements of § 1026.40 may use either Model Form, at their option.

(b) *Disclosures for supplemental credit access devices and additional features.* (1) If a creditor, within 30 days after mailing or delivering the account-opening disclosures under § 1026.6(a)(1) or (b)(3)(ii)(A), as applicable, adds a credit feature to the consumer's account or mails or delivers to the consumer a credit access device, including but not limited to checks that access a credit card account, for which the finance charge terms are the same as those previously disclosed, no additional disclosures are necessary. Except as provided in paragraph (b)(3) of this section, after 30 days, if the creditor adds a credit feature or furnishes a credit access device (other than as a renewal, resupply, or the original issuance of a credit card) on the same finance charge terms, the creditor shall disclose, before the consumer uses the feature or device for the first time, that it is for use in obtaining credit under the terms previously disclosed.

(2) Except as provided in paragraph (b)(3) of this section, whenever a credit feature is added or a credit access device is mailed or delivered to the consumer, and the finance charge terms for the feature or device differ from disclosures previously given, the disclosures required by § 1026.6(a)(1) or (b)(3)(ii)(A), as applicable, that are applicable to the added feature or device shall be given before the consumer uses the feature or device for the first time.

(3) *Checks that access a credit card account.* (i) *Disclosures.* For open-end plans not subject to the requirements of § 1026.40, if checks that can be used to access a credit card account are provided more than 30 days after account-opening disclosures under § 1026.6(b) are mailed or delivered, or are provided within 30 days of the account-opening disclosures and the finance charge terms for the checks differ from the finance charge terms previously disclosed, the creditor shall disclose on the front of the page containing the checks the following terms in the form of a table with the headings, content, and form substantially similar to Sample G–19 in Appendix G to this part:

(A) If a promotional rate, as that term is defined in § 1026.16(g)(2)(i) applies to the checks:

(*1*) The promotional rate and the time period during which the promotional rate will remain in effect;

(*2*) The type of rate that will apply (such as whether the purchase or cash advance rate applies) after the promotional rate expires, and the annual percentage rate that will apply after the promotional rate expires. For a variable-rate account, a creditor must disclose an annual percentage rate based on the applicable index or formula in accordance with the accuracy requirements set forth in paragraph (b)(3)(ii) of this section; and

(*3*) The date, if any, by which the consumer must use the checks in order to qualify for the promotional rate. If the creditor will honor checks used after such date but will apply an annual percentage rate other than the promotional rate, the creditor must disclose this fact and the type of annual percentage rate that will apply if the consumer uses the checks after such date.

(B) If no promotional rate applies to the checks:

(*1*) The type of rate that will apply to the checks and the applicable annual percentage rate. For a variable-rate account, a creditor must disclose an annual percentage rate based on the applicable index or formula in accordance with the accuracy requirements set forth in paragraph (b)(3)(ii) of this section.

(*2*) [Reserved]

(C) Any transaction fees applicable to the checks disclosed under § 1026.6(b)(2)(iv); and

(D) Whether or not a grace period is given within which any credit extended by use of the checks may be repaid without incurring a finance charge due to a periodic interest rate. When disclosing whether there is a grace period, the phrase ''How to Avoid Paying Interest on Check Transactions'' shall be used as the row heading when a grace period applies to credit extended by the use of the checks. When disclosing the fact that no grace period exists for credit extended by use of the checks, the phrase ''Paying Interest'' shall be used as the row heading.

(ii) *Accuracy.* The disclosures in paragraph (b)(3)(i) of this section must be accurate as of the time the disclosures are mailed or delivered. A variable annual percentage rate is accurate if it was in effect within 60 days of when the disclosures are mailed or delivered.

(iii) *Variable rates.* If any annual percentage rate required to be disclosed pursuant to paragraph (b)(3)(i) of this section is a variable rate, the card issuer shall also disclose the fact that the rate may vary and how the rate is determined. In describing how the applicable rate will be determined, the card issuer must identify the type of index or formula that is used in setting the rate. The value of the index and the amount of the margin that are used to

calculate the variable rate shall not be disclosed in the table. A disclosure of any applicable limitations on rate increases shall not be included in the table.

(c) *Change in terms.* (1) *Rules affecting home-equity plans.* (i) *Written notice required.* For home-equity plans subject to the requirements of § 1026.40, whenever any term required to be disclosed under § 1026.6(a) is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected. The notice shall be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer; the notice shall be given, however, before the effective date of the change.

(ii) *Notice not required.* For home-equity plans subject to the requirements of § 1026.40, a creditor is not required to provide notice under this section when the change involves a reduction of any component of a finance or other charge or when the change results from an agreement involving a court proceeding.

(iii) *Notice to restrict credit.* For home-equity plans subject to the requirements of § 1026.40, if the creditor prohibits additional extensions of credit or reduces the credit limit pursuant to § 1026.40(f)(3)(i) or (f)(3)(vi), the creditor shall mail or deliver written notice of the action to each consumer who will be affected. The notice must be provided not later than three business days after the action is taken and shall contain specific reasons for the action. If the creditor requires the consumer to request reinstatement of credit privileges, the notice also shall state that fact.

(2) *Rules affecting open-end (not home-secured) plans.* (i) *Changes where written advance notice is required.* (A) *General.* For plans other than home-equity plans subject to the requirements of § 1026.40, except as provided in paragraphs (c)(2)(i)(B), (c)(2)(iii) and (c)(2)(v) of this section, when a significant change in account terms as described in paragraph (c)(2)(ii) of this section is made, a creditor must provide a written notice of the change at least 45 days prior to the effective date of the change to each consumer who may be affected. The 45-day timing requirement does not apply if the consumer has agreed to a particular change as described in paragraph (c)(2)(i)(B) of this section; for such changes, notice must be given in accordance with the timing requirements of paragraph (c)(2)(i)(B) of this section. Increases in the rate applicable to a consumer's account due to delinquency, default or as a penalty described in paragraph (g) of this section that are not due to a change in the contractual terms of the consumer's account must be disclosed pursuant to paragraph (g) of this section instead of paragraph (c)(2) of this section.

(B) *Changes agreed to by the consumer.* A notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change if the consumer agrees to the particular change. This paragraph (c)(2)(i)(B) applies only when a consumer substitutes collateral or when the creditor can advance additional credit only if a change relatively unique to that consumer is made, such as the consumer's providing additional security or paying an increased minimum payment amount. The following are not considered agreements between the consumer and the creditor for purposes of this paragraph (c)(2)(i)(B): The consumer's general acceptance of the creditor's contract reservation of the right to change terms; the consumer's use of the account (which might imply acceptance of its terms under state law); the consumer's acceptance of a unilateral term change that is not particular to that consumer, but rather is of general applicability to consumers with that type of account; and the consumer's request to reopen a closed account or to upgrade an existing account to another account offered by the creditor with different credit or other features.

(ii) *Significant changes in account terms.* For purposes of this section, a ''significant change in account terms'' means a change to a term required to be disclosed under § 1026.6(b)(1) and (b)(2), an increase in the required minimum periodic payment, a change to a term required to be disclosed under § 1026.6(b)(4), or the acquisition of a security interest.

(iii) *Charges not covered by § 1026.6(b)(1) and (b)(2).* Except as provided in paragraph (c)(2)(vi) of this section, if a creditor increases any component of a charge, or introduces a new charge, required to be disclosed under § 1026.6(b)(3) that is not a significant change in account terms as described in paragraph (c)(2)(ii) of this section, a creditor must either, at its option:

(A) Comply with the requirements of paragraph (c)(2)(i) of this section; or

(B) Provide notice of the amount of the charge before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that a consumer would be likely to notice the disclosure of the charge. The notice may be provided orally or in writing.

(iv) *Disclosure requirements.* (A) *Significant changes in account terms.* If a creditor makes a significant change in account terms as described in paragraph (c)(2)(ii) of this section, the notice provided pursuant to paragraph (c)(2)(i) of this section must provide the following information:

(*1*) A summary of the changes made to terms required by § 1026.6(b)(1) and (b)(2) or § 1026.6(b)(4), a description of any increase in the required minimum periodic payment, and a description of any security interest being acquired by the creditor;

(*2*) A statement that changes are being made to the account;

(*3*) For accounts other than credit card accounts under an open-end (not home-secured) consumer credit plan subject to § 1026.9(c)(2)(iv)(B), a statement indicating the consumer has the right to opt out of these changes, if applicable, and a reference to additional information describing the opt-out right provided in the notice, if applicable;

(*4*) The date the changes will become effective;

(*5*) If applicable, a statement that the consumer may find additional information about the summarized changes, and other changes to the account, in the notice;

(*6*) If the creditor is changing a rate on the account, other than a penalty rate, a statement that if a penalty rate currently applies to the consumer's account, the new rate described in the notice will not apply to the consumer's account until the consumer's account balances are no longer subject to the penalty rate;

(*7*) If the change in terms being disclosed is an increase in an annual percentage rate, the balances to which the increased rate will be applied. If applicable, a statement identifying the balances to which the current rate will continue to apply as of the effective date of the change in terms; and

(*8*) If the change in terms being disclosed is an increase in an annual percentage rate for a credit card account under an open-end (not home-secured) consumer credit plan, a statement of no more than four principal reasons for the rate increase, listed in their order of importance.

(B) *Right to reject for credit card accounts under an open-end (not home-secured) consumer credit plan.* In addition to the disclosures in paragraph (c)(2)(iv)(A) of this section, if a card issuer makes a significant change in account terms on a credit card account under an open-end (not home-secured)

consumer credit plan, the creditor must generally provide the following information on the notice provided pursuant to paragraph (c)(2)(i) of this section. This information is not required to be provided in the case of an increase in the required minimum periodic payment, an increase in a fee as a result of a reevaluation of a determination made under § 1026.52(b)(1)(i) or an adjustment to the safe harbors in § 1026.52(b)(1)(ii) to reflect changes in the Consumer Price Index, a change in an annual percentage rate applicable to a consumer's account, an increase in a fee previously reduced consistent with 50 U.S.C. app. 527 or a similar Federal or state statute or regulation if the amount of the increased fee does not exceed the amount of that fee prior to the reduction, or when the change results from the creditor not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment:

(*1*) A statement that the consumer has the right to reject the change or changes prior to the effective date of the changes, unless the consumer fails to make a required minimum periodic payment within 60 days after the due date for that payment;

(*2*) Instructions for rejecting the change or changes, and a toll-free telephone number that the consumer may use to notify the creditor of the rejection; and

(*3*) If applicable, a statement that if the consumer rejects the change or changes, the consumer's ability to use the account for further advances will be terminated or suspended.

(C) *Changes resulting from failure to make minimum periodic payment within 60 days from due date for credit card accounts under an open-end (not home-secured) consumer credit plan.* For a credit card account under an open-end (not home-secured) consumer credit plan:

(*1*) If the significant change required to be disclosed pursuant to paragraph (c)(2)(i) of this section is an increase in an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) based on the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment, the notice provided pursuant to paragraph (c)(2)(i) of this section must state that the increase will cease to apply to transactions that occurred prior to or within 14 days of provision of the notice, if the creditor receives six consecutive required minimum periodic payments on or before the payment due date, beginning with the first payment due following the effective date of the increase.

(*2*) If the significant change required to be disclosed pursuant to paragraph (c)(2)(i) of this section is an increase in a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) based on the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment, the notice provided pursuant to paragraph (c)(2)(i) of this section must also state the reason for the increase.

(D) *Format requirements.* (*1*) *Tabular format.* The summary of changes described in paragraph (c)(2)(iv)(A)(*1*) of this section must be in a tabular format (except for a summary of any increase in the required minimum periodic payment, a summary of a term required to be disclosed under § 1026.6(b)(4) that is not required to be disclosed under § 1026.6(b)(1) and (b)(2), or a description of any security interest being acquired by the creditor), with headings and format substantially similar to any of the account-opening tables found in G–17 in Appendix G to this part. The table must disclose the changed term and information relevant to the change, if that relevant information is required by § 1026.6(b)(1) and (b)(2). The new terms shall be described in the same level of detail as required when disclosing the terms under § 1026.6(b)(2).

(*2*) *Notice included with periodic statement.* If a notice required by paragraph (c)(2)(i) of this section is included on or with a periodic statement, the information described in paragraph (c)(2)(iv)(A)(*1*) of this section must be disclosed on the front of any page of the statement. The summary of changes described in paragraph (c)(2)(iv)(A)(*1*) of this section must immediately follow the information described in paragraph (c)(2)(iv)(A)(*2*) through (c)(2)(iv)(A)(*7*) and, if applicable, paragraphs (c)(2)(iv)(A)(*8*), (c)(2)(iv)(B), and (c)(2)(iv)(C) of this section, and be substantially similar to the format shown in Sample G–20 or G–21 in Appendix G to this part.

(*3*) *Notice provided separately from periodic statement.* If a notice required by paragraph (c)(2)(i) of this section is not included on or with a periodic statement, the information described in paragraph (c)(2)(iv)(A)(*1*) of this section must, at the creditor's option, be disclosed on the front of the first page of the notice or segregated on a separate page from other information given with the notice. The summary of changes required to be in a table pursuant to paragraph (c)(2)(iv)(A)(*1*) of this section may be on more than one page, and may use both the front and reverse sides, so long as the table begins on the front of the first page of the notice and there is a reference on the first page indicating that the table continues on the following page. The summary of changes described in paragraph (c)(2)(iv)(A)(*1*) of this section must immediately follow the information described in paragraph (c)(2)(iv)(A)(*2*) through (c)(2)(iv)(A)(*7*) and, if applicable, paragraphs (c)(2)(iv)(A)(*8*), (c)(2)(iv)(B), and (c)(2)(iv)(C), of this section, substantially similar to the format shown in Sample G–20 or G–21 in Appendix G to this part.

(v) *Notice not required.* For open-end plans (other than home equity plans subject to the requirements of § 1026.40) a creditor is not required to provide notice under this section:

(A) When the change involves charges for documentary evidence; a reduction of any component of a finance or other charge; suspension of future credit privileges (except as provided in paragraph (c)(2)(vi) of this section) or termination of an account or plan; when the change results from an agreement involving a court proceeding; when the change is an extension of the grace period; or if the change is applicable only to checks that access a credit card account and the changed terms are disclosed on or with the checks in accordance with paragraph (b)(3) of this section;

(B) When the change is an increase in an annual percentage rate or fee upon the expiration of a specified period of time, provided that:

(*1*) Prior to commencement of that period, the creditor disclosed in writing to the consumer, in a clear and conspicuous manner, the length of the period and the annual percentage rate or fee that would apply after expiration of the period;

(*2*) The disclosure of the length of the period and the annual percentage rate or fee that would apply after expiration of the period are set forth in close proximity and in equal prominence to the first listing of the disclosure of the rate or fee that applies during the specified period of time; and

(*3*) The annual percentage rate or fee that applies after that period does not exceed the rate or fee disclosed pursuant to paragraph (c)(2)(v)(B)(*1*) of this paragraph or, if the rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*) of this section was a variable rate, the rate following any such increase is a variable rate determined by the same formula (index and margin) that was used to calculate the variable rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*);

(C) When the change is an increase in a variable annual percentage rate in accordance with a credit card or other account agreement that provides for changes in the rate according to operation of an index that is not under the control of the creditor and is available to the general public; or

(D) When the change is an increase in an annual percentage rate, a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), (b)(2)(viii), (b)(2)(ix), (b)(2)(ix) or (b)(2)(xii), or the required minimum periodic payment due to the completion of a workout or temporary hardship arrangement by the consumer or the consumer's failure to comply with the terms of such an arrangement, provided that:

(*1*) The annual percentage rate or fee or charge applicable to a category of transactions or the required minimum periodic payment following any such increase does not exceed the rate or fee or charge or required minimum periodic payment that applied to that category of transactions prior to commencement of the arrangement or, if the rate that applied to a category of transactions prior to the commencement of the workout or temporary hardship arrangement was a variable rate, the rate following any such increase is a variable rate determined by the same formula (index and margin) that applied to the category of transactions prior to commencement of the workout or temporary hardship arrangement; and

(*2*) The creditor has provided the consumer, prior to the commencement of such arrangement, with a clear and conspicuous disclosure of the terms of the arrangement (including any increases due to such completion or failure). This disclosure must generally be provided in writing. However, a creditor may provide the disclosure of the terms of the arrangement orally by telephone, provided that the creditor mails or delivers a written disclosure of the terms of the arrangement to the consumer as soon as reasonably practicable after the oral disclosure is provided.

(vi) *Reduction of the credit limit.* For open-end plans that are not subject to the requirements of § 1026.40, if a creditor decreases the credit limit on an account, advance notice of the decrease must be provided before an over-the-limit fee or a penalty rate can be imposed solely as a result of the consumer exceeding the newly decreased credit limit. Notice shall be provided in writing or orally at least 45 days prior to imposing the over-the-limit fee or penalty rate and shall state that the credit limit on the account has been or will be decreased.

(d) *Finance charge imposed at time of transaction.* (1) Any person, other than the card issuer, who imposes a finance charge at the time of honoring a consumer's credit card, shall disclose the amount of that finance charge prior to its imposition.

(2) The card issuer, other than the person honoring the consumer's credit card, shall have no responsibility for the disclosure required by paragraph (d)(1) of this section, and shall not consider any such charge for the purposes of §§ 1026.60, 1026.6 and 1026.7.

(e) *Disclosures upon renewal of credit or charge card.* (1) *Notice prior to renewal.* A card issuer that imposes any annual or other periodic fee to renew a credit or charge card account of the type subject to § 1026.60, including any fee based on account activity or inactivity or any card issuer that has changed or amended any term of a cardholder's account required to be disclosed under § 1026.6(b)(1) and (b)(2) that has not previously been disclosed to the consumer, shall mail or deliver written notice of the renewal to the cardholder. If the card issuer imposes any annual or other periodic fee for renewal, the notice shall be provided at least 30 days or one billing cycle, whichever is less, before the mailing or the delivery of the periodic statement on which any renewal fee is initially charged to the account. If the card issuer has changed or amended any term required to be disclosed under § 1026.6(b)(1) and (b)(2) and such changed or amended term has not previously been disclosed to the consumer, the notice shall be provided at least 30 days prior to the scheduled renewal date of the consumer's credit or charge card. The notice shall contain the following information:

(i) The disclosures contained in § 1026.60(b)(1) through (b)(7) that would apply if the account were renewed; and

(ii) How and when the cardholder may terminate credit availability under the account to avoid paying the renewal fee, if applicable.

(2) *Notification on periodic statements.* The disclosures required by this paragraph may be made on or with a periodic statement. If any of the disclosures are provided on the back of a periodic statement, the card issuer shall include a reference to those disclosures on the front of the statement.

(f) *Change in credit card account insurance provider.* (1) *Notice prior to change.* If a credit card issuer plans to change the provider of insurance for repayment of all or part of the outstanding balance of an open-end credit card account of the type subject to § 1026.60, the card issuer shall mail or deliver to the cardholder written notice of the change not less than 30 days before the change in provider occurs. The notice shall also include the following items, to the extent applicable:

(i) Any increase in the rate that will result from the change;

(ii) Any substantial decrease in coverage that will result from the change; and

(iii) A statement that the cardholder may discontinue the insurance.

(2) *Notice when change in provider occurs.* If a change described in paragraph (f)(1) of this section occurs, the card issuer shall provide the cardholder with a written notice no later than 30 days after the change, including the following items, to the extent applicable:

(i) The name and address of the new insurance provider;

(ii) A copy of the new policy or group certificate containing the basic terms of the insurance, including the rate to be charged; and

(iii) A statement that the cardholder may discontinue the insurance.

(3) *Substantial decrease in coverage.* For purposes of this paragraph, a substantial decrease in coverage is a decrease in a significant term of coverage that might reasonably be expected to affect the cardholder's decision to continue the insurance. Significant terms of coverage include, for example, the following:

(i) Type of coverage provided;

(ii) Age at which coverage terminates or becomes more restrictive;

(iii) Maximum insurable loan balance, maximum periodic benefit payment, maximum number of payments, or other term affecting the dollar amount of coverage or benefits provided;

(iv) Eligibility requirements and number and identity of persons covered;

(v) Definition of a key term of coverage such as disability;

(vi) Exclusions from or limitations on coverage; and

(vii) Waiting periods and whether coverage is retroactive.

(4) *Combined notification.* The notices required by paragraph (f)(1) and (2) of this section may be combined provided the timing requirement of paragraph (f)(1) of this section is met. The notices may be provided on or with a periodic statement.

(g) *Increase in rates due to delinquency or default or as a penalty.* (1) *Increases subject to this section.* For plans other than home-equity plans subject to the requirements of § 1026.40, except as provided in paragraph (g)(4) of this section, a creditor must provide a written notice to each consumer who may be affected when:

(i) A rate is increased due to the consumer's delinquency or default; or

(ii) A rate is increased as a penalty for one or more events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit.

(2) *Timing of written notice.* Whenever any notice is required to be given pursuant to paragraph (g)(1) of this section, the creditor shall provide written notice of the increase in rates at least 45 days prior to the effective date of the increase. The notice must be provided after the occurrence of the events described in paragraphs (g)(1)(i) and (g)(1)(ii) of this section that trigger the imposition of the rate increase.

(3)(i) *Disclosure requirements for rate increases.* (A) *General.* If a creditor is increasing the rate due to delinquency or default or as a penalty, the creditor must provide the following information on the notice sent pursuant to paragraph (g)(1) of this section:

(*1*) A statement that the delinquency or default rate or penalty rate, as applicable, has been triggered;

(*2*) The date on which the delinquency or default rate or penalty rate will apply;

(*3*) The circumstances under which the delinquency or default rate or penalty rate, as applicable, will cease to apply to the consumer's account, or that the delinquency or default rate or penalty rate will remain in effect for a potentially indefinite time period;

(*4*) A statement indicating to which balances the delinquency or default rate or penalty rate will be applied;

(*5*) If applicable, a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless a consumer fails to make a minimum periodic payment within 60 days from the due date for that payment; and

(*6*) For a credit card account under an open-end (not home-secured) consumer credit plan, a statement of no more than four principal reasons for the rate increase, listed in their order of importance.

(B) *Rate increases resulting from failure to make minimum periodic payment within 60 days from due date.* For a credit card account under an open-end (not home-secured) consumer credit plan, if the rate increase required to be disclosed pursuant to paragraph (g)(1) of this section is an increase pursuant to § 1026.55(b)(4) based on the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment, the notice provided pursuant to paragraph (g)(1) of this section must also state that the increase will cease to apply to transactions that occurred prior to or within 14 days of provision of the notice, if the creditor receives six consecutive required minimum periodic payments on or before the payment due date, beginning with the first payment due following the effective date of the increase.

(ii) *Format requirements.* (A) If a notice required by paragraph (g)(1) of this section is included on or with a periodic statement, the information described in paragraph (g)(3)(i) of this section must be in the form of a table and provided on the front of any page of the periodic statement, above the notice described in paragraph (c)(2)(iv) of this section if that notice is provided on the same statement.

(B) If a notice required by paragraph (g)(1) of this section is not included on or with a periodic statement, the information described in paragraph (g)(3)(i) of this section must be disclosed on the front of the first page of the notice. Only information related to the increase in the rate to a penalty rate may be included with the notice, except that this notice may be combined with a notice described in paragraph (c)(2)(iv) or (g)(4) of this section.

(4) *Exception for decrease in credit limit.* A creditor is not required to provide a notice pursuant to paragraph (g)(1) of this section prior to increasing the rate for obtaining an extension of credit that exceeds the credit limit, provided that:

(i) The creditor provides at least 45 days in advance of imposing the penalty rate a notice, in writing, that includes:

(A) A statement that the credit limit on the account has been or will be decreased.

(B) A statement indicating the date on which the penalty rate will apply, if the outstanding balance exceeds the credit limit as of that date;

(C) A statement that the penalty rate will not be imposed on the date specified in paragraph (g)(4)(i)(B) of this section, if the outstanding balance does not exceed the credit limit as of that date;

(D) The circumstances under which the penalty rate, if applied, will cease to apply to the account, or that the penalty rate, if applied, will remain in effect for a potentially indefinite time period;

(E) A statement indicating to which balances the penalty rate may be applied; and

(F) If applicable, a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless the consumer fails to make a minimum periodic payment within 60 days from the due date for that payment; and

(ii) The creditor does not increase the rate applicable to the consumer's account to the penalty rate if the outstanding balance does not exceed the credit limit on the date set forth in the notice and described in paragraph (g)(4)(i)(B) of this section.

(iii)(A) If a notice provided pursuant to paragraph (g)(4)(i) of this section is included on or with a periodic statement, the information described in paragraph (g)(4)(i) of this section must be in the form of a table and provided on the front of any page of the periodic statement; or

(B) If a notice required by paragraph (g)(4)(i) of this section is not included on or with a periodic statement, the information described in paragraph (g)(4)(i) of this section must be disclosed on the front of the first page of the notice. Only information related to the reduction in credit limit may be included with the notice, except that this notice may be combined with a notice described in paragraph (c)(2)(iv) or (g)(1) of this section.

(h) *Consumer rejection of certain significant changes in terms.* (1) *Right to reject.* If paragraph (c)(2)(iv)(B) of this section requires disclosure of the consumer's right to reject a significant change to an account term, the consumer may reject that change by notifying the creditor of the rejection before the effective date of the change.

(2) *Effect of rejection.* If a creditor is notified of a rejection of a significant change to an account term as provided in paragraph (h)(1) of this section, the creditor must not:

(i) Apply the change to the account;

(ii) Impose a fee or charge or treat the account as in default solely as a result of the rejection; or

(iii) Require repayment of the balance on the account using a method that is less beneficial to the consumer than one of the methods listed in § 1026.55(c)(2).

(3) *Exception.* Section 1026.9(h) does not apply when the creditor has not received the consumer's required minimum periodic payment within 60 days after the due date for that payment.

§ 1026.10 Payments.

(a) *General rule.* A creditor shall credit a payment to the consumer's account as of the date of receipt, except when a delay in crediting does not result in a finance or other charge or except as provided in paragraph (b) of this section.

(b) *Specific requirements for payments.* (1) *General rule.* A creditor may specify reasonable requirements for payments that enable most consumers to make conforming payments.

(2) *Examples of reasonable requirements for payments.* Reasonable requirements for making payment may include:

(i) Requiring that payments be accompanied by the account number or payment stub;

(ii) Setting reasonable cut-off times for payments to be received by mail, by electronic means, by telephone, and in person (except as provided in paragraph (b)(3) of this section), provided that such cut-off times shall be no earlier than 5 p.m. on the payment due date at the location specified by the creditor for the receipt of such payments;

(iii) Specifying that only checks or money orders should be sent by mail;

(iv) Specifying that payment is to be made in U.S. dollars; or

(v) Specifying one particular address for receiving payments, such as a post office box.

(3) *In-person payments on credit card accounts.* (i) *General.* Notwithstanding § 1026.10(b), payments on a credit card account under an open-end (not home-secured) consumer credit plan made in person at a branch or office of a card issuer that is a financial institution prior to the close of business of that branch or office shall be considered received on the date on which the consumer makes the payment. A card issuer that is a financial institution shall not impose a cut-off time earlier than the close of business for any such payments made in person at any branch or office of the card issuer at which such payments are accepted. Notwithstanding § 1026.10(b)(2)(ii), a card issuer may impose a cut-off time earlier than 5 p.m. for such payments, if the close of business of the branch or office is earlier than 5 p.m.

(ii) *Financial institution.* For purposes of paragraph (b)(3) of this section, ''financial institution'' shall mean a bank, savings association, or credit union.

(4) *Nonconforming payments.* (i) *In general.* Except as provided in paragraph (b)(4)(ii) of this section, if a creditor specifies, on or with the periodic statement, requirements for the consumer to follow in making payments as permitted under this § 1026.10, but accepts a payment that does not conform to the requirements, the creditor shall credit the payment within five days of receipt.

(ii) *Payment methods promoted by creditor.* If a creditor promotes a method for making payments, such payments shall be considered conforming payments in accordance with this paragraph (b) and shall be credited to the consumer's account as of the date of receipt, except when a delay in crediting does not result in a finance or other charge.

(c) *Adjustment of account.* If a creditor fails to credit a payment, as required by paragraphs (a) or (b) of this section, in time to avoid the imposition of finance or other charges, the creditor shall adjust the consumer's account so that the charges imposed are credited to the consumer's account during the next billing cycle.

(d) *Crediting of payments when creditor does not receive or accept payments on due date.* (1) *General.* Except as provided in paragraph (d)(2) of this section, if a creditor does not receive or accept payments by mail on the due date for payments, the creditor may generally not treat a payment received the next business day as late for any purpose. For purposes of this paragraph (d), the ''next business day'' means the next day on which the creditor accepts or receives payments by mail.

(2) *Payments accepted or received other than by mail.* If a creditor accepts or receives payments made on the due date by a method other than mail, such as electronic or telephone payments, the creditor is not required to treat a payment made by that method on the next business day as timely, even if it does not accept mailed payments on the due date.

(e) *Limitations on fees related to method of payment.* For credit card accounts under an open-end (not home-secured) consumer credit plan, a creditor may not impose a separate fee to allow consumers to make a payment by any method, such as mail, electronic, or telephone payments, unless such payment method involves an expedited service by a customer service representative of the creditor. For purposes of paragraph (e) of this section, the term ''creditor'' includes a third party that collects, receives, or processes payments on behalf of a creditor.

(f) *Changes by card issuer.* If a card issuer makes a material change in the address for receiving payments or procedures for handling payments, and such change causes a material delay in the crediting of a payment to the consumer's account during the 60-day period following the date on which such change took effect, the card issuer may not impose any late fee or finance charge for a late payment on the credit card account during the 60-day period following the date on which the change took effect.

§ 1026.11 Treatment of credit balances; account termination.

(a) *Credit balances.* When a credit balance in excess of $1 is created on a credit account (through transmittal of funds to a creditor in excess of the total balance due on an account, through rebates of unearned finance charges or insurance premiums, or through amounts otherwise owed to or held for the benefit of the consumer), the creditor shall:

(1) Credit the amount of the credit balance to the consumer's account;

(2) Refund any part of the remaining credit balance within seven business days from receipt of a written request from the consumer;

(3) Make a good faith effort to refund to the consumer by cash, check, or money order, or credit to a deposit account of the consumer, any part of the credit balance remaining in the account for more than six months. No further action is required if the consumer's current location is not known to the creditor and cannot be traced through the consumer's last known address or telephone number.

(b) *Account termination.* (1) A creditor shall not terminate an account prior to its expiration date solely because the consumer does not incur a finance charge.

(2) Nothing in paragraph (b)(1) of this section prohibits a creditor from terminating an account that is inactive for three or more consecutive months. An account is inactive for purposes of this paragraph if no credit has been extended (such as by purchase, cash advance or balance transfer) and if the account has no outstanding balance.

(c) *Timely settlement of estate debts.* (1) *General rule.* (i) *Reasonable policies and procedures required.* For credit card accounts under an open-end (not home-secured) consumer credit plan, card issuers must adopt reasonable written policies and procedures designed to ensure that an administrator of an estate of a deceased accountholder can determine the amount of and pay any balance on the account in a timely manner.

(ii) *Application to joint accounts.* Paragraph (c) of this section does not apply to the account of a deceased consumer if a joint accountholder remains on the account.

(2) *Timely statement of balance.* (i) *Requirement.* Upon request by the administrator of an estate, a card issuer must provide the administrator with the amount of the balance on a deceased consumer's account in a timely manner.

(ii) *Safe harbor.* For purposes of paragraph (c)(2)(i) of this section, providing the amount of the balance on the account within 30 days of receiving the request is deemed to be timely.

(3) *Limitations after receipt of request from administrator.* (i) *Limitation on*

fees and increases in annual percentage rates. After receiving a request from the administrator of an estate for the amount of the balance on a deceased consumer's account, a card issuer must not impose any fees on the account (such as a late fee, annual fee, or over-the-limit fee) or increase any annual percentage rate, except as provided by § 1026.55(b)(2).

(ii) *Limitation on trailing or residual interest.* A card issuer must waive or rebate any additional finance charge due to a periodic interest rate if payment in full of the balance disclosed pursuant to paragraph (c)(2) of this section is received within 30 days after disclosure.

§ 1026.12 Special credit card provisions.

(a) *Issuance of credit cards.* Regardless of the purpose for which a credit card is to be used, including business, commercial, or agricultural use, no credit card shall be issued to any person except:

(1) In response to an oral or written request or application for the card; or

(2) As a renewal of, or substitute for, an accepted credit card.

(b) *Liability of cardholder for unauthorized use.* (1)(i) *Definition of unauthorized use.* For purposes of this section, the term ''unauthorized use'' means the use of a credit card by a person, other than the cardholder, who does not have actual, implied, or apparent authority for such use, and from which the cardholder receives no benefit.

(ii) *Limitation on amount.* The liability of a cardholder for unauthorized use of a credit card shall not exceed the lesser of $50 or the amount of money, property, labor, or services obtained by the unauthorized use before notification to the card issuer under paragraph (b)(3) of this section.

(2) *Conditions of liability.* A cardholder shall be liable for unauthorized use of a credit card only if:

(i) The credit card is an accepted credit card;

(ii) The card issuer has provided adequate notice of the cardholder's maximum potential liability and of means by which the card issuer may be notified of loss or theft of the card. The notice shall state that the cardholder's liability shall not exceed $50 (or any lesser amount) and that the cardholder may give oral or written notification, and shall describe a means of notification (for example, a telephone number, an address, or both); and

(iii) The card issuer has provided a means to identify the cardholder on the account or the authorized user of the card.

(3) *Notification to card issuer.* Notification to a card issuer is given when steps have been taken as may be reasonably required in the ordinary course of business to provide the card issuer with the pertinent information about the loss, theft, or possible unauthorized use of a credit card, regardless of whether any particular officer, employee, or agent of the card issuer does, in fact, receive the information. Notification may be given, at the option of the person giving it, in person, by telephone, or in writing. Notification in writing is considered given at the time of receipt or, whether or not received, at the expiration of the time ordinarily required for transmission, whichever is earlier.

(4) *Effect of other applicable law or agreement.* If state law or an agreement between a cardholder and the card issuer imposes lesser liability than that provided in this paragraph, the lesser liability shall govern.

(5) *Business use of credit cards.* If 10 or more credit cards are issued by one card issuer for use by the employees of an organization, this section does not prohibit the card issuer and the organization from agreeing to liability for unauthorized use without regard to this section. However, liability for unauthorized use may be imposed on an employee of the organization, by either the card issuer or the organization, only in accordance with this section.

(c) *Right of cardholder to assert claims or defenses against card issuer.* (1) *General rule.* When a person who honors a credit card fails to resolve satisfactorily a dispute as to property or services purchased with the credit card in a consumer credit transaction, the cardholder may assert against the card issuer all claims (other than tort claims) and defenses arising out of the transaction and relating to the failure to resolve the dispute. The cardholder may withhold payment up to the amount of credit outstanding for the property or services that gave rise to the dispute and any finance or other charges imposed on that amount.

(2) *Adverse credit reports prohibited.* If, in accordance with paragraph (c)(1) of this section, the cardholder withholds payment of the amount of credit outstanding for the disputed transaction, the card issuer shall not report that amount as delinquent until the dispute is settled or judgment is rendered.

(3) *Limitations.* (i) *General.* The rights stated in paragraphs (c)(1) and (c)(2) of this section apply only if:

(A) The cardholder has made a good faith attempt to resolve the dispute with the person honoring the credit card; and

(B) The amount of credit extended to obtain the property or services that result in the assertion of the claim or defense by the cardholder exceeds $50, and the disputed transaction occurred in the same state as the cardholder's current designated address or, if not within the same state, within 100 miles from that address.

(ii) *Exclusion.* The limitations stated in paragraph (c)(3)(i)(B) of this section shall not apply when the person honoring the credit card:

(A) Is the same person as the card issuer;

(B) Is controlled by the card issuer directly or indirectly;

(C) Is under the direct or indirect control of a third person that also directly or indirectly controls the card issuer;

(D) Controls the card issuer directly or indirectly;

(E) Is a franchised dealer in the card issuer's products or services; or

(F) Has obtained the order for the disputed transaction through a mail solicitation made or participated in by the card issuer.

(d) *Offsets by card issuer prohibited.* (1) A card issuer may not take any action, either before or after termination of credit card privileges, to offset a cardholder's indebtedness arising from a consumer credit transaction under the relevant credit card plan against funds of the cardholder held on deposit with the card issuer.

(2) This paragraph does not alter or affect the right of a card issuer acting under state or Federal law to do any of the following with regard to funds of a cardholder held on deposit with the card issuer if the same procedure is constitutionally available to creditors generally: Obtain or enforce a consensual security interest in the funds; attach or otherwise levy upon the funds; or obtain or enforce a court order relating to the funds.

(3) This paragraph does not prohibit a plan, if authorized in writing by the cardholder, under which the card issuer may periodically deduct all or part of the cardholder's credit card debt from a deposit account held with the card issuer (subject to the limitations in § 1026.13(d)(1)).

(e) *Prompt notification of returns and crediting of refunds.* (1) When a creditor other than the card issuer accepts the return of property or forgives a debt for services that is to be reflected as a credit to the consumer's credit card account, that creditor shall, within 7 business days from accepting the return or forgiving the debt, transmit a credit statement to the card issuer through the

card issuer's normal channels for credit statements.

(2) The card issuer shall, within 3 business days from receipt of a credit statement, credit the consumer's account with the amount of the refund.

(3) If a creditor other than a card issuer routinely gives cash refunds to consumers paying in cash, the creditor shall also give credit or cash refunds to consumers using credit cards, unless it discloses at the time the transaction is consummated that credit or cash refunds for returns are not given. This section does not require refunds for returns nor does it prohibit refunds in kind.

(f) *Discounts; tie-in arrangements.* No card issuer may, by contract or otherwise:

(1) Prohibit any person who honors a credit card from offering a discount to a consumer to induce the consumer to pay by cash, check, or similar means rather than by use of a credit card or its underlying account for the purchase of property or services; or

(2) Require any person who honors the card issuer's credit card to open or maintain any account or obtain any other service not essential to the operation of the credit card plan from the card issuer or any other person, as a condition of participation in a credit card plan. If maintenance of an account for clearing purposes is determined to be essential to the operation of the credit card plan, it may be required only if no service charges or minimum balance requirements are imposed.

(g) *Relation to Electronic Fund Transfer Act and Regulation E.* For guidance on whether Regulation Z (12 CFR part 1026) or Regulation E (12 CFR part 1005) applies in instances involving both credit and electronic fund transfer aspects, refer to Regulation E, 12 CFR 1005.12(a) regarding issuance and liability for unauthorized use. On matters other than issuance and liability, this section applies to the credit aspects of combined credit/electronic fund transfer transactions, as applicable.

§ 1026.13 Billing error resolution.

(a) *Definition of billing error.* For purposes of this section, the term billing error means:

(1) A reflection on or with a periodic statement of an extension of credit that is not made to the consumer or to a person who has actual, implied, or apparent authority to use the consumer's credit card or open-end credit plan.

(2) A reflection on or with a periodic statement of an extension of credit that is not identified in accordance with the requirements of §§ 1026.7(a)(2) or (b)(2), as applicable, and 1026.8.

(3) A reflection on or with a periodic statement of an extension of credit for property or services not accepted by the consumer or the consumer's designee, or not delivered to the consumer or the consumer's designee as agreed.

(4) A reflection on a periodic statement of the creditor's failure to credit properly a payment or other credit issued to the consumer's account.

(5) A reflection on a periodic statement of a computational or similar error of an accounting nature that is made by the creditor.

(6) A reflection on a periodic statement of an extension of credit for which the consumer requests additional clarification, including documentary evidence.

(7) The creditor's failure to mail or deliver a periodic statement to the consumer's last known address if that address was received by the creditor, in writing, at least 20 days before the end of the billing cycle for which the statement was required.

(b) *Billing error notice.* A billing error notice is a written notice from a consumer that:

(1) Is received by a creditor at the address disclosed under § 1026.7(a)(9) or (b)(9), as applicable, no later than 60 days after the creditor transmitted the first periodic statement that reflects the alleged billing error;

(2) Enables the creditor to identify the consumer's name and account number; and

(3) To the extent possible, indicates the consumer's belief and the reasons for the belief that a billing error exists, and the type, date, and amount of the error.

(c) *Time for resolution; general procedures.* (1) The creditor shall mail or deliver written acknowledgment to the consumer within 30 days of receiving a billing error notice, unless the creditor has complied with the appropriate resolution procedures of paragraphs (e) and (f) of this section, as applicable, within the 30-day period; and

(2) The creditor shall comply with the appropriate resolution procedures of paragraphs (e) and (f) of this section, as applicable, within 2 complete billing cycles (but in no event later than 90 days) after receiving a billing error notice.

(d) *Rules pending resolution.* Until a billing error is resolved under paragraph (e) or (f) of this section, the following rules apply:

(1) *Consumer's right to withhold disputed amount; collection action prohibited.* The consumer need not pay (and the creditor may not try to collect) any portion of any required payment that the consumer believes is related to the disputed amount (including related finance or other charges). If the cardholder has enrolled in an automatic payment plan offered by the card issuer and has agreed to pay the credit card indebtedness by periodic deductions from the cardholder's deposit account, the card issuer shall not deduct any part of the disputed amount or related finance or other charges if a billing error notice is received any time up to 3 business days before the scheduled payment date.

(2) *Adverse credit reports prohibited.* The creditor or its agent shall not (directly or indirectly) make or threaten to make an adverse report to any person about the consumer's credit standing, or report that an amount or account is delinquent, because the consumer failed to pay the disputed amount or related finance or other charges.

(3) *Acceleration of debt and restriction of account prohibited.* A creditor shall not accelerate any part of the consumer's indebtedness or restrict or close a consumer's account solely because the consumer has exercised in good faith rights provided by this section. A creditor may be subject to the forfeiture penalty under 15 U.S.C. 1666(e) for failure to comply with any of the requirements of this section.

(4) *Permitted creditor actions.* A creditor is not prohibited from taking action to collect any undisputed portion of the item or bill; from deducting any disputed amount and related finance or other charges from the consumer's credit limit on the account; or from reflecting a disputed amount and related finance or other charges on a periodic statement, provided that the creditor indicates on or with the periodic statement that payment of any disputed amount and related finance or other charges is not required pending the creditor's compliance with this section.

(e) *Procedures if billing error occurred as asserted.* If a creditor determines that a billing error occurred as asserted, it shall within the time limits in paragraph (c)(2) of this section:

(1) Correct the billing error and credit the consumer's account with any disputed amount and related finance or other charges, as applicable; and

(2) Mail or deliver a correction notice to the consumer.

(f) *Procedures if different billing error or no billing error occurred.* If, after conducting a reasonable investigation, a creditor determines that no billing error occurred or that a different billing error occurred from that asserted, the creditor

shall within the time limits in paragraph (c)(2) of this section:

(1) Mail or deliver to the consumer an explanation that sets forth the reasons for the creditor's belief that the billing error alleged by the consumer is incorrect in whole or in part;

(2) Furnish copies of documentary evidence of the consumer's indebtedness, if the consumer so requests; and

(3) If a different billing error occurred, correct the billing error and credit the consumer's account with any disputed amount and related finance or other charges, as applicable.

(g) *Creditor's rights and duties after resolution.* If a creditor, after complying with all of the requirements of this section, determines that a consumer owes all or part of the disputed amount and related finance or other charges, the creditor:

(1) Shall promptly notify the consumer in writing of the time when payment is due and the portion of the disputed amount and related finance or other charges that the consumer still owes;

(2) Shall allow any time period disclosed under § 1026.6(a)(1) or (b)(2)(v), as applicable, and § 1026.7(a)(8) or (b)(8), as applicable, during which the consumer can pay the amount due under paragraph (g)(1) of this section without incurring additional finance or other charges;

(3) May report an account or amount as delinquent because the amount due under paragraph (g)(1) of this section remains unpaid after the creditor has allowed any time period disclosed under § 1026.6(a)(1) or (b)(2)(v), as applicable, and § 1026.7(a)(8) or (b)(8), as applicable or 10 days (whichever is longer) during which the consumer can pay the amount; but

(4) May not report that an amount or account is delinquent because the amount due under paragraph (g)(1) of the section remains unpaid, if the creditor receives (within the time allowed for payment in paragraph (g)(3) of this section) further written notice from the consumer that any portion of the billing error is still in dispute, unless the creditor also:

(i) Promptly reports that the amount or account is in dispute;

(ii) Mails or delivers to the consumer (at the same time the report is made) a written notice of the name and address of each person to whom the creditor makes a report; and

(iii) Promptly reports any subsequent resolution of the reported delinquency to all persons to whom the creditor has made a report.

(h) *Reassertion of billing error.* A creditor that has fully complied with the requirements of this section has no further responsibilities under this section (other than as provided in paragraph (g)(4) of this section) if a consumer reasserts substantially the same billing error.

(i) *Relation to Electronic Fund Transfer Act and Regulation E.* If an extension of credit is incident to an electronic fund transfer, under an agreement between a consumer and a financial institution to extend credit when the consumer's account is overdrawn or to maintain a specified minimum balance in the consumer's account, the creditor shall comply with the requirements of Regulation E, 12 CFR 1005.11 governing error resolution rather than those of paragraphs (a), (b), (c), (e), (f), and (h) of this section.

§ 1026.14 Determination of annual percentage rate.

(a) *General rule.* The annual percentage rate is a measure of the cost of credit, expressed as a yearly rate. An annual percentage rate shall be considered accurate if it is not more than ⅛th of 1 percentage point above or below the annual percentage rate determined in accordance with this section. An error in disclosure of the annual percentage rate or finance charge shall not, in itself, be considered a violation of this part if:

(1) The error resulted from a corresponding error in a calculation tool used in good faith by the creditor; and

(2) Upon discovery of the error, the creditor promptly discontinues use of that calculation tool for disclosure purposes, and notifies the Bureau in writing of the error in the calculation tool.

(b) *Annual percentage rate—in general.* Where one or more periodic rates may be used to compute the finance charge, the annual percentage rate(s) to be disclosed for purposes of §§ 1026.60, 1026.40, 1026.6, 1026.7(a)(4) or (b)(4), 1026.9, 1026.15, 1026.16, 1026.26, 1026.55, and 1026.56 shall be computed by multiplying each periodic rate by the number of periods in a year.

(c) *Optional effective annual percentage rate for periodic statements for creditors offering open-end credit plans secured by a consumer's dwelling.* A creditor offering an open-end plan subject to the requirements of § 1026.40 need not disclose an effective annual percentage rate. Such a creditor may, at its option, disclose an effective annual percentage rate(s) pursuant to § 1026.7(a)(7) and compute the effective annual percentage rate as follows:

(1) *Solely periodic rates imposed.* If the finance charge is determined solely by applying one or more periodic rates, at the creditor's option, either:

(i) By multiplying each periodic rate by the number of periods in a year; or

(ii) By dividing the total finance charge for the billing cycle by the sum of the balances to which the periodic rates were applied and multiplying the quotient (expressed as a percentage) by the number of billing cycles in a year.

(2) *Minimum or fixed charge, but not transaction charge, imposed.* If the finance charge imposed during the billing cycle is or includes a minimum, fixed, or other charge not due to the application of a periodic rate, other than a charge with respect to any specific transaction during the billing cycle, by dividing the total finance charge for the billing cycle by the amount of the balance(s) to which it is applicable and multiplying the quotient (expressed as a percentage) by the number of billing cycles in a year. If there is no balance to which the finance charge is applicable, an annual percentage rate cannot be determined under this section. Where the finance charge imposed during the billing cycle is or includes a loan fee, points, or similar charge that relates to opening, renewing, or continuing an account, the amount of such charge shall not be included in the calculation of the annual percentage rate.

(3) *Transaction charge imposed.* If the finance charge imposed during the billing cycle is or includes a charge relating to a specific transaction during the billing cycle (even if the total finance charge also includes any other minimum, fixed, or other charge not due to the application of a periodic rate), by dividing the total finance charge imposed during the billing cycle by the total of all balances and other amounts on which a finance charge was imposed during the billing cycle without duplication, and multiplying the quotient (expressed as a percentage) by the number of billing cycles in a year, except that the annual percentage rate shall not be less than the largest rate determined by multiplying each periodic rate imposed during the billing cycle by the number of periods in a year. Where the finance charge imposed during the billing cycle is or includes a loan fee, points, or similar charge that relates to the opening, renewing, or continuing an account, the amount of such charge shall not be included in the calculation of the annual percentage rate. See Appendix F to this part regarding determination of the denominator of the fraction under this paragraph.

(4) If the finance charge imposed during the billing cycle is or includes a minimum, fixed, or other charge not due to the application of a periodic rate and the total finance charge imposed during the billing cycle does not exceed 50 cents for a monthly or longer billing cycle, or the pro rata part of 50 cents for a billing cycle shorter than monthly, at the creditor's option, by multiplying each applicable periodic rate by the number of periods in a year, notwithstanding the provisions of paragraphs (c)(2) and (c)(3) of this section.

(d) *Calculations where daily periodic rate applied.* If the provisions of paragraph (c)(1)(ii) or (c)(2) of this section apply and all or a portion of the finance charge is determined by the application of one or more daily periodic rates, the annual percentage rate may be determined either:

(1) By dividing the total finance charge by the average of the daily balances and multiplying the quotient by the number of billing cycles in a year; or

(2) By dividing the total finance charge by the sum of the daily balances and multiplying the quotient by 365.

§ 1026.15 Right of rescission.

(a) *Consumer's right to rescind.* (1)(i) Except as provided in paragraph (a)(1)(ii) of this section, in a credit plan in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind: each credit extension made under the plan; the plan when the plan is opened; a security interest when added or increased to secure an existing plan; and the increase when a credit limit on the plan is increased.

(ii) As provided in section 125(e) of the Act, the consumer does not have the right to rescind each credit extension made under the plan if such extension is made in accordance with a previously established credit limit for the plan.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram, or other means of written communication. Notice is considered given when mailed, or when filed for telegraphic transmission, or, if sent by other means, when delivered to the creditor's designated place of business.

(3) The consumer may exercise the right to rescind until midnight of the third business day following the occurrence described in paragraph (a)(1) of this section that gave rise to the right of rescission, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice and material disclosures are not delivered, the right to rescind shall expire 3 years after the occurrence giving rise to the right of rescission, or upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act. The term *material disclosures* means the information that must be provided to satisfy the requirements in § 1026.6 with regard to the method of determining the finance charge and the balance upon which a finance charge will be imposed, the annual percentage rate, the amount or method of determining the amount of any membership or participation fee that may be imposed as part of the plan, and the payment information described in § 1026.40(d)(5)(i) and (ii) that is required under § 1026.6(e)(2).

(4) When more than one consumer has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b) *Notice of right to rescind.* In any transaction or occurrence subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). The notice shall identify the transaction or occurrence and clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind, as described in paragraph (a)(1) of this section.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires.

(c) *Delay of creditor's performance.* Unless a consumer waives the right to rescind under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed, and no materials delivered until after the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded. A creditor does not violate this section if a third party with no knowledge of the event activating the rescission right does not delay in providing materials or services, as long as the debt incurred for those materials or services is not secured by the property subject to rescission.

(d) *Effects of rescission.* (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void, and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.

(e) *Consumer's waiver of right to rescind.* The consumer may modify or waive the right to rescind if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the signature of all the consumers entitled to rescind. Printed forms for this purpose are prohibited.

(f) *Exempt transactions.* The right to rescind does not apply to the following:

(1) A residential mortgage transaction.

(2) A credit plan in which a state agency is a creditor.

§ 1026.16 Advertising.

(a) *Actually available terms.* If an advertisement for credit states specific credit terms, it shall state only those terms that actually are or will be arranged or offered by the creditor.

(b) *Advertisement of terms that require additional disclosures.* (1) Any term required to be disclosed under § 1026.6(b)(3) set forth affirmatively or negatively in an advertisement for an open-end (not home-secured) credit plan triggers additional disclosures under this section. Any term required to be disclosed under § 1026.6(a)(1) or (a)(2) set forth affirmatively or negatively in an advertisement for a home-equity plan subject to the requirements of § 1026.40 triggers additional disclosures under this section. If any of the terms that trigger additional disclosures under this paragraph is set forth in an advertisement, the advertisement shall also clearly and conspicuously set forth the following:

(i) Any minimum, fixed, transaction, activity or similar charge that is a finance charge under § 1026.4 that could be imposed.

(ii) Any periodic rate that may be applied expressed as an annual percentage rate as determined under § 1026.14(b). If the plan provides for a variable periodic rate, that fact shall be disclosed.

(iii) Any membership or participation fee that could be imposed.

(2) If an advertisement for credit to finance the purchase of goods or services specified in the advertisement states a periodic payment amount, the advertisement shall also state the total of payments and the time period to repay the obligation, assuming that the consumer pays only the periodic payment amount advertised. The disclosure of the total of payments and the time period to repay the obligation must be equally prominent to the statement of the periodic payment amount.

(c) *Catalogs or other multiple-page advertisements; electronic advertisements.* (1) If a catalog or other multiple-page advertisement, or an electronic advertisement (such as an advertisement appearing on an Internet Web site), gives information in a table or schedule in sufficient detail to permit determination of the disclosures required by paragraph (b) of this section, it shall be considered a single advertisement if:

(i) The table or schedule is clearly and conspicuously set forth; and

(ii) Any statement of terms set forth in § 1026.6 appearing anywhere else in the catalog or advertisement clearly refers to the page or location where the table or schedule begins.

(2) A catalog or other multiple-page advertisement or an electronic advertisement (such as an advertisement appearing on an Internet Web site) complies with this paragraph if the table or schedule of terms includes all appropriate disclosures for a representative scale of amounts up to the level of the more commonly sold higher-priced property or services offered.

(d) *Additional requirements for home-equity plans.* (1) *Advertisement of terms that require additional disclosures.* If any of the terms required to be disclosed under § 1026.6(a)(1) or (a)(2) or the payment terms of the plan are set forth, affirmatively or negatively, in an advertisement for a home-equity plan subject to the requirements of § 1026.40, the advertisement also shall clearly and conspicuously set forth the following:

(i) Any loan fee that is a percentage of the credit limit under the plan and an estimate of any other fees imposed for opening the plan, stated as a single dollar amount or a reasonable range.

(ii) Any periodic rate used to compute the finance charge, expressed as an annual percentage rate as determined under § 1026.14(b).

(iii) The maximum annual percentage rate that may be imposed in a variable-rate plan.

(2) *Discounted and premium rates.* If an advertisement states an initial annual percentage rate that is not based on the index and margin used to make later rate adjustments in a variable-rate plan, the advertisement also shall state with equal prominence and in close proximity to the initial rate:

(i) The period of time such initial rate will be in effect; and

(ii) A reasonably current annual percentage rate that would have been in effect using the index and margin.

(3) *Balloon payment.* If an advertisement contains a statement of any minimum periodic payment and a balloon payment may result if only the minimum periodic payments are made, even if such a payment is uncertain or unlikely, the advertisement also shall state with equal prominence and in close proximity to the minimum periodic payment statement that a balloon payment may result, if applicable. A balloon payment results if paying the minimum periodic payments does not fully amortize the outstanding balance by a specified date or time, and the consumer is required to repay the entire outstanding balance at such time. If a balloon payment will occur when the consumer makes only the minimum payments required under the plan, an advertisement for such a program which contains any statement of any minimum periodic payment shall also state with equal prominence and in close proximity to the minimum periodic payment statement:

(i) That a balloon payment will result; and

(ii) The amount and timing of the balloon payment that will result if the consumer makes only the minimum payments for the maximum period of time that the consumer is permitted to make such payments.

(4) *Tax implications.* An advertisement that states that any interest expense incurred under the home-equity plan is or may be tax deductible may not be misleading in this regard. If an advertisement distributed in paper form or through the Internet (rather than by radio or television) is for a home-equity plan secured by the consumer's principal dwelling, and the advertisement states that the advertised extension of credit may exceed the fair market value of the dwelling, the advertisement shall clearly and conspicuously state that:

(i) The interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and

(ii) The consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

(5) *Misleading terms.* An advertisement may not refer to a home-equity plan as ''free money'' or contain a similarly misleading term.

(6) *Promotional rates and payments.* (i) *Definitions.* The following definitions apply for purposes of paragraph (d)(6) of this section:

(A) *Promotional rate.* The term ''promotional rate'' means, in a variable-rate plan, any annual percentage rate that is not based on the index and margin that will be used to make rate adjustments under the plan, if that rate is less than a reasonably current annual percentage rate that would be in effect under the index and margin that will be used to make rate adjustments under the plan.

(B) *Promotional payment.* The term ''promotional payment'' means:

(*1*) For a variable-rate plan, any minimum payment applicable for a promotional period that:

(*i*) Is not derived by applying the index and margin to the outstanding balance when such index and margin will be used to determine other minimum payments under the plan; and

(*ii*) Is less than other minimum payments under the plan derived by applying a reasonably current index and margin that will be used to determine the amount of such payments, given an assumed balance.

(*2*) For a plan other than a variable-rate plan, any minimum payment

applicable for a promotional period if that payment is less than other payments required under the plan given an assumed balance.

(C) *Promotional period.* A ''promotional period'' means a period of time, less than the full term of the loan, that the promotional rate or promotional payment may be applicable.

(ii) *Stating the promotional period and post-promotional rate or payments.* If any annual percentage rate that may be applied to a plan is a promotional rate, or if any payment applicable to a plan is a promotional payment, the following must be disclosed in any advertisement, other than television or radio advertisements, in a clear and conspicuous manner with equal prominence and in close proximity to each listing of the promotional rate or payment:

(A) The period of time during which the promotional rate or promotional payment will apply;

(B) In the case of a promotional rate, any annual percentage rate that will apply under the plan. If such rate is variable, the annual percentage rate must be disclosed in accordance with the accuracy standards in §§ 1026.40 or 1026.16(b)(1)(ii) as applicable; and

(C) In the case of a promotional payment, the amounts and time periods of any payments that will apply under the plan. In variable-rate transactions, payments that will be determined based on application of an index and margin shall be disclosed based on a reasonably current index and margin.

(iii) *Envelope excluded.* The requirements in paragraph (d)(6)(ii) of this section do not apply to an envelope in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement linked to an application or solicitation provided electronically.

(e) *Alternative disclosures—television or radio advertisements.* An advertisement made through television or radio stating any of the terms requiring additional disclosures under paragraphs (b)(1) or (d)(1) of this section may alternatively comply with paragraphs (b)(1) or (d)(1) of this section by stating the information required by paragraphs (b)(1)(ii) or (d)(1)(ii) of this section, as applicable, and listing a toll-free telephone number, or any telephone number that allows a consumer to reverse the phone charges when calling for information, along with a reference that such number may be used by consumers to obtain the additional cost information.

(f) *Misleading terms.* An advertisement may not refer to an annual percentage rate as ''fixed,'' or use a similar term, unless the advertisement also specifies a time period that the rate will be fixed and the rate will not increase during that period, or if no such time period is provided, the rate will not increase while the plan is open.

(g) *Promotional rates and fees.* (1) *Scope.* The requirements of this paragraph apply to any advertisement of an open-end (not home-secured) plan, including promotional materials accompanying applications or solicitations subject to § 1026.60(c) or accompanying applications or solicitations subject to § 1026.60(e).

(2) *Definitions.* (i) *Promotional rate* means any annual percentage rate applicable to one or more balances or transactions on an open-end (not home-secured) plan for a specified period of time that is lower than the annual percentage rate that will be in effect at the end of that period on such balances or transactions.

(ii) *Introductory rate* means a promotional rate offered in connection with the opening of an account.

(iii) *Promotional period* means the maximum time period for which a promotional rate or promotional fee may be applicable.

(iv) *Promotional fee* means a fee required to be disclosed under § 1026.6(b)(1) and (2) applicable to an open-end (not home-secured) plan, or to one or more balances or transactions on an open-end (not home-secured) plan, for a specified period of time that is lower than the fee that will be in effect at the end of that period for such plan or types of balances or transactions.

(v) *Introductory fee* means a promotional fee offered in connection with the opening of an account.

(3) *Stating the term ''introductory''.* If any annual percentage rate or fee that may be applied to the account is an introductory rate or introductory fee, the term *introductory* or *intro* must be in immediate proximity to each listing of the introductory rate or introductory fee in a written or electronic advertisement.

(4) *Stating the promotional period and post-promotional rate or fee.* If any annual percentage rate that may be applied to the account is a promotional rate under paragraph (g)(2)(i) of this section or any fee that may be applied to the account is a promotional fee under paragraph (g)(2)(iv) of this section, the information in paragraphs (g)(4)(i) and, as applicable, (g)(4)(ii) or (iii) of this section must be stated in a clear and conspicuous manner in the advertisement. If the rate or fee is stated in a written or electronic advertisement, the information in paragraphs (g)(4)(i) and, as applicable, (g)(4)(ii) or (iii) of this section must also be stated in a prominent location closely proximate to the first listing of the promotional rate or promotional fee.

(i) When the promotional rate or promotional fee will end;

(ii) The annual percentage rate that will apply after the end of the promotional period. If such rate is variable, the annual percentage rate must comply with the accuracy standards in §§ 1026.60(c)(2), 1026.60(d)(3), 1026.60(e)(4), or 1026.16(b)(1)(ii), as applicable. If such rate cannot be determined at the time disclosures are given because the rate depends at least in part on a later determination of the consumer's creditworthiness, the advertisement must disclose the specific rates or the range of rates that might apply; and

(iii) The fee that will apply after the end of the promotional period.

(5) *Envelope excluded.* The requirements in paragraph (g)(4) of this section do not apply to an envelope or other enclosure in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement, linked to an application or solicitation provided electronically.

(h) *Deferred interest or similar offers.* (1) *Scope.* The requirements of this paragraph apply to any advertisement of an open-end credit plan not subject to § 1026.40, including promotional materials accompanying applications or solicitations subject to § 1026.60(c) or accompanying applications or solicitations subject to § 1026.60(e).

(2) *Definitions.* ''Deferred interest'' means finance charges, accrued on balances or transactions, that a consumer is not obligated to pay or that will be waived or refunded to a consumer if those balances or transactions are paid in full by a specified date. The maximum period from the date the consumer becomes obligated for the balance or transaction until the specified date by which the consumer must pay the balance or transaction in full in order to avoid finance charges, or receive a waiver or refund of finance charges, is the ''deferred interest period.'' ''Deferred interest'' does not include any finance charges the consumer avoids paying in connection with any recurring grace period.

(3) *Stating the deferred interest period.* If a deferred interest offer is advertised, the deferred interest period must be stated in a clear and conspicuous manner in the advertisement. If the phrase ''no interest'' or similar term regarding the possible avoidance of interest obligations under the deferred interest program is stated, the term ''if paid in

full'' must also be stated in a clear and conspicuous manner preceding the disclosure of the deferred interest period in the advertisement. If the deferred interest offer is included in a written or electronic advertisement, the deferred interest period and, if applicable, the term ''if paid in full'' must also be stated in immediate proximity to each statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred interest period.

(4) *Stating the terms of the deferred interest or similar offer.* If any deferred interest offer is advertised, the information in paragraphs (h)(4)(i) and (h)(4)(ii) of this section must be stated in the advertisement, in language similar to Sample G–24 in Appendix G to this part. If the deferred interest offer is included in a written or electronic advertisement, the information in paragraphs (h)(4)(i) and (h)(4)(ii) of this section must also be stated in a prominent location closely proximate to the first statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred interest period.

(i) A statement that interest will be charged from the date the consumer becomes obligated for the balance or transaction subject to the deferred interest offer if the balance or transaction is not paid in full within the deferred interest period; and

(ii) A statement, if applicable, that interest will be charged from the date the consumer incurs the balance or transaction subject to the deferred interest offer if the account is in default before the end of the deferred interest period.

(5) *Envelope excluded.* The requirements in paragraph (h)(4) of this section do not apply to an envelope or other enclosure in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement linked to an application or solicitation provided electronically.

Subpart C—Closed-End Credit

§ 1026.17 General disclosure requirements.

(a) *Form of disclosures.* (1) The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures required by this subpart may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). The disclosures required by §§ 1026.17(g), 1026.19(b), and 1026.24 may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the E-Sign Act in the circumstances set forth in those sections. The disclosures shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosures required under § 1026.18 or § 1026.47. The disclosures may include an acknowledgment of receipt, the date of the transaction, and the consumer's name, address, and account number. The following disclosures may be made together with or separately from other required disclosures: the creditor's identity under § 1026.18(a), the variable rate example under § 1026.18(f)(1)(iv), insurance or debt cancellation under § 1026.18(n), and certain security interest charges under § 1026.18(o). The itemization of the amount financed under § 1026.18(c)(1) must be separate from the other disclosures under § 1026.18, except for private education loan disclosures made in compliance with § 1026.47.

(2) Except for private education loan disclosures made in compliance with § 1026.47, the terms ''finance charge'' and ''annual percentage rate,'' when required to be disclosed under § 1026.18(d) and (e) together with a corresponding amount or percentage rate, shall be more conspicuous than any other disclosure, except the creditor's identity under § 1026.18(a). For private education loan disclosures made in compliance with § 1026.47, the term ''annual percentage rate,'' and the corresponding percentage rate must be less conspicuous than the term ''finance charge'' and corresponding amount under § 1026.18(d), the interest rate under §§ 1026.47(b)(1)(i) and (c)(1), and the notice of the right to cancel under § 1026.47(c)(4).

(b) *Time of disclosures.* The creditor shall make disclosures before consummation of the transaction. In certain residential mortgage transactions, special timing requirements are set forth in § 1026.19(a). In certain variable-rate transactions, special timing requirements for variable-rate disclosures are set forth in § 1026.19(b) and § 1026.20(c). For private education loan disclosures made in compliance with § 1026.47, special timing requirements are set forth in § 1026.46(d). In certain transactions involving mail or telephone orders or a series of sales, the timing of disclosures may be delayed in accordance with paragraphs (g) and (h) of this section.

(c) *Basis of disclosures and use of estimates.* (1) The disclosures shall reflect the terms of the legal obligation between the parties.

(2)(i) If any information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure based on the best information reasonably available at the time the disclosure is provided to the consumer, and shall state clearly that the disclosure is an estimate.

(ii) For a transaction in which a portion of the interest is determined on a per-diem basis and collected at consummation, any disclosure affected by the per-diem interest shall be considered accurate if the disclosure is based on the information known to the creditor at the time that the disclosure documents are prepared for consummation of the transaction.

(3) The creditor may disregard the effects of the following in making calculations and disclosures.

(i) That payments must be collected in whole cents.

(ii) That dates of scheduled payments and advances may be changed because the scheduled date is not a business day.

(iii) That months have different numbers of days.

(iv) The occurrence of leap year.

(4) In making calculations and disclosures, the creditor may disregard any irregularity in the first period that falls within the limits described below and any payment schedule irregularity that results from the irregular first period:

(i) For transactions in which the term is less than 1 year, a first period not more than 6 days shorter or 13 days longer than a regular period;

(ii) For transactions in which the term is at least 1 year and less than 10 years, a first period not more than 11 days shorter or 21 days longer than a regular period; and

(iii) For transactions in which the term is at least 10 years, a first period shorter than or not more than 32 days longer than a regular period.

(5) If an obligation is payable on demand, the creditor shall make the disclosures based on an assumed maturity of 1 year. If an alternate maturity date is stated in the legal obligation between the parties, the disclosures shall be based on that date.

(6)(i) A series of advances under an agreement to extend credit up to a certain amount may be considered as one transaction.

(ii) When a multiple-advance loan to finance the construction of a dwelling

may be permanently financed by the same creditor, the construction phase and the permanent phase may be treated as either one transaction or more than one transaction.

(d) *Multiple creditors; multiple consumers.* If a transaction involves more than one creditor, only one set of disclosures shall be given and the creditors shall agree among themselves which creditor must comply with the requirements that this part imposes on any or all of them. If there is more than one consumer, the disclosures may be made to any consumer who is primarily liable on the obligation. If the transaction is rescindable under § 1026.23, however, the disclosures shall be made to each consumer who has the right to rescind.

(e) *Effect of subsequent events.* If a disclosure becomes inaccurate because of an event that occurs after the creditor delivers the required disclosures, the inaccuracy is not a violation of this part, although new disclosures may be required under paragraph (f) of this section, § 1026.19, § 1026.20, or § 1026.48(c)(4).

(f) *Early disclosures.* Except for private education loan disclosures made in compliance with § 1026.47, if disclosures required by this subpart are given before the date of consummation of a transaction and a subsequent event makes them inaccurate, the creditor shall disclose before consummation (subject to the provisions of § 1026.19(a)(2) and § 1026.19(a)(5)(iii)):

(1) Any changed term unless the term was based on an estimate in accordance with § 1026.17(c)(2) and was labeled an estimate;

(2) All changed terms, if the annual percentage rate at the time of consummation varies from the annual percentage rate disclosed earlier by more than ⅛ of 1 percentage point in a regular transaction, or more than ¼ of 1 percentage point in an irregular transaction, as defined in § 1026.22(a).

(g) *Mail or telephone orders—delay in disclosures.* Except for private education loan disclosures made in compliance with § 1026.47, if a creditor receives a purchase order or a request for an extension of credit by mail, telephone, or facsimile machine without face-to-face or direct telephone solicitation, the creditor may delay the disclosures until the due date of the first payment, if the following information for representative amounts or ranges of credit is made available in written form or in electronic form to the consumer or to the public before the actual purchase order or request:

(1) The cash price or the principal loan amount.

(2) The total sale price.

(3) The finance charge.

(4) The annual percentage rate, and if the rate may increase after consummation, the following disclosures:

(i) The circumstances under which the rate may increase.

(ii) Any limitations on the increase.

(iii) The effect of an increase.

(5) The terms of repayment.

(h) *Series of sales—delay in disclosures.* If a credit sale is one of a series made under an agreement providing that subsequent sales may be added to an outstanding balance, the creditor may delay the required disclosures until the due date of the first payment for the current sale, if the following two conditions are met:

(1) The consumer has approved in writing the annual percentage rate or rates, the range of balances to which they apply, and the method of treating any unearned finance charge on an existing balance.

(2) The creditor retains no security interest in any property after the creditor has received payments equal to the cash price and any finance charge attributable to the sale of that property. For purposes of this provision, in the case of items purchased on different dates, the first purchased is deemed the first item paid for; in the case of items purchased on the same date, the lowest priced is deemed the first item paid for.

(i) *Interim student credit extensions.* For transactions involving an interim credit extension under a student credit program for which an application is received prior to the mandatory compliance date of §§ 1026.46, 47, and 48, the creditor need not make the following disclosures: the finance charge under § 1026.18(d), the payment schedule under § 1026.18(g), the total of payments under § 1026.18(h), or the total sale price under § 1026.18(j) at the time the credit is actually extended. The creditor must make complete disclosures at the time the creditor and consumer agree upon the repayment schedule for the total obligation. At that time, a new set of disclosures must be made of all applicable items under § 1026.18.

§ 1026.18 Content of disclosures.

For each transaction, the creditor shall disclose the following information as applicable:

(a) *Creditor.* The identity of the creditor making the disclosures.

(b) *Amount financed.* The *amount financed,* using that term, and a brief description such as *the amount of credit provided to you or on your behalf.* The amount financed is calculated by:

(1) Determining the principal loan amount or the cash price (subtracting any downpayment);

(2) Adding any other amounts that are financed by the creditor and are not part of the finance charge; and

(3) Subtracting any prepaid finance charge.

(c) *Itemization of amount financed.* (1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, a separate written itemization of the amount financed, including:

(i) The amount of any proceeds distributed directly to the consumer.

(ii) The amount credited to the consumer's account with the creditor.

(iii) Any amounts paid to other persons by the creditor on the consumer's behalf. The creditor shall identify those persons. The following payees may be described using generic or other general terms and need not be further identified: public officials or government agencies, credit reporting agencies, appraisers, and insurance companies.

(iv) The prepaid finance charge.

(2) The creditor need not comply with paragraph (c)(1) of this section if the creditor provides a statement that the consumer has the right to receive a written itemization of the amount financed, together with a space for the consumer to indicate whether it is desired, and the consumer does not request it.

(3) Good faith estimates of settlement costs provided for transactions subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) may be substituted for the disclosures required by paragraph (c)(1) of this section.

(d) *Finance charge.* The *finance charge,* using that term, and a brief description such as ''the dollar amount the credit will cost you.''

(1) *Mortgage loans.* In a transaction secured by real property or a dwelling, the disclosed finance charge and other disclosures affected by the disclosed finance charge (including the amount financed and the annual percentage rate) shall be treated as accurate if the amount disclosed as the finance charge:

(i) Is understated by no more than $100; or

(ii) Is greater than the amount required to be disclosed.

(2) *Other credit.* In any other transaction, the amount disclosed as the finance charge shall be treated as accurate if, in a transaction involving an amount financed of $1,000 or less, it is not more than $5 above or below the amount required to be disclosed; or, in a transaction involving an amount financed of more than $1,000, it is not

more than $10 above or below the amount required to be disclosed.

(e) *Annual percentage rate.* The *annual percentage rate,* using that term, and a brief description such as ''the cost of your credit as a yearly rate.'' For any transaction involving a finance charge of $5 or less on an amount financed of $75 or less, or a finance charge of $7.50 or less on an amount financed of more than $75, the creditor need not disclose the annual percentage rate.

(f) *Variable rate.* (1) Except as provided in paragraph (f)(3) of this section, if the annual percentage rate may increase after consummation in a transaction not secured by the consumer's principal dwelling or in a transaction secured by the consumer's principal dwelling with a term of one year or less, the following disclosures:

(i) The circumstances under which the rate may increase.

(ii) Any limitations on the increase.

(iii) The effect of an increase.

(iv) An example of the payment terms that would result from an increase.

(2) If the annual percentage rate may increase after consummation in a transaction secured by the consumer's principal dwelling with a term greater than one year, the following disclosures:

(i) The fact that the transaction contains a variable-rate feature.

(ii) A statement that variable-rate disclosures have been provided earlier.

(3) Information provided in accordance with §§ 1026.18(f)(2) and 1026.19(b) may be substituted for the disclosures required by paragraph (f)(1) of this section.

(g) *Payment schedule.* Other than for a transaction that is subject to paragraph (s) of this section, the number, amounts, and timing of payments scheduled to repay the obligation.

(1) In a demand obligation with no alternate maturity date, the creditor may comply with this paragraph by disclosing the due dates or payment periods of any scheduled interest payments for the first year.

(2) In a transaction in which a series of payments varies because a finance charge is applied to the unpaid principal balance, the creditor may comply with this paragraph by disclosing the following information:

(i) The dollar amounts of the largest and smallest payments in the series.

(ii) A reference to the variations in the other payments in the series.

(h) *Total of payments.* The *total of payments,* using that term, and a descriptive explanation such as ''the amount you will have paid when you have made all scheduled payments.'' In any transaction involving a single payment, the creditor need not disclose the total of payments.

(i) *Demand feature.* If the obligation has a demand feature, that fact shall be disclosed. When the disclosures are based on an assumed maturity of 1 year as provided in § 1026.17(c)(5), that fact shall also be disclosed.

(j) *Total sale price.* In a credit sale, the *total sale price,* using that term, and a descriptive explanation (including the amount of any downpayment) such as ''the total price of your purchase on credit, including your downpayment of $__.'' The total sale price is the sum of the cash price, the items described in paragraph (b)(2), and the finance charge disclosed under paragraph (d) of this section.

(k) *Prepayment.* (1) When an obligation includes a finance charge computed from time to time by application of a rate to the unpaid principal balance, a statement indicating whether or not a penalty may be imposed if the obligation is prepaid in full.

(2) When an obligation includes a finance charge other than the finance charge described in paragraph (k)(1) of this section, a statement indicating whether or not the consumer is entitled to a rebate of any finance charge if the obligation is prepaid in full.

(l) *Late payment.* Any dollar or percentage charge that may be imposed before maturity due to a late payment, other than a deferral or extension charge.

(m) *Security interest.* The fact that the creditor has or will acquire a security interest in the property purchased as part of the transaction, or in other property identified by item or type.

(n) *Insurance and debt cancellation.* The items required by § 1026.4(d) in order to exclude certain insurance premiums and debt cancellation fees from the finance charge.

(o) *Certain security interest charges.* The disclosures required by § 1026.4(e) in order to exclude from the finance charge certain fees prescribed by law or certain premiums for insurance in lieu of perfecting a security interest.

(p) *Contract reference.* A statement that the consumer should refer to the appropriate contract document for information about nonpayment, default, the right to accelerate the maturity of the obligation, and prepayment rebates and penalties. At the creditor's option, the statement may also include a reference to the contract for further information about security interests and, in a residential mortgage transaction, about the creditor's policy regarding assumption of the obligation.

(q) *Assumption policy.* In a residential mortgage transaction, a statement whether or not a subsequent purchaser of the dwelling from the consumer may be permitted to assume the remaining obligation on its original terms.

(r) *Required deposit.* If the creditor requires the consumer to maintain a deposit as a condition of the specific transaction, a statement that the annual percentage rate does not reflect the effect of the required deposit. A required deposit need not include, for example:

(1) An escrow account for items such as taxes, insurance or repairs;

(2) A deposit that earns not less than 5 percent per year; or

(3) Payments under a Morris Plan.

(s) *Interest rate and payment summary for mortgage transactions.* For a closed-end transaction secured by real property or a dwelling, other than a transaction secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D), the creditor shall disclose the following information about the interest rate and payments:

(1) *Form of disclosures.* The information in paragraphs (s)(2)–(4) of this section shall be in the form of a table, with no more than five columns, with headings and format substantially similar to Model Clause H–4(E), H–4(F), H–4(G), or H–4(H) in Appendix H to this part. The table shall contain only the information required in paragraphs (s)(2)–(4) of this section, shall be placed in a prominent location, and shall be in a minimum 10-point font.

(2) *Interest rates.* (i) *Amortizing loans.* (A) For a fixed-rate mortgage, the interest rate at consummation.

(B) For an adjustable-rate or step-rate mortgage:

(*1*) The interest rate at consummation and the period of time until the first interest rate adjustment may occur, labeled as the ''introductory rate and monthly payment'';

(*2*) The maximum interest rate that may apply during the first five years after the date on which the first regular periodic payment will be due and the earliest date on which that rate may apply, labeled as ''maximum during first five years''; and

(*3*) The maximum interest rate that may apply during the life of the loan and the earliest date on which that rate may apply, labeled as ''maximum ever.''

(C) If the loan provides for payment increases as described in paragraph (s)(3)(i)(B) of this section, the interest rate in effect at the time the first such payment increase is scheduled to occur and the date on which the increase will occur, labeled as ''first adjustment'' if the loan is an adjustable-rate mortgage or, otherwise, labeled as ''first increase.''

(ii) *Negative amortization loans.* For a negative amortization loan:

(A) The interest rate at consummation and, if it will adjust after consummation, the length of time until it will adjust, and the label ''introductory'' or ''intro'';

(B) The maximum interest rate that could apply when the consumer must begin making fully amortizing payments under the terms of the legal obligation;

(C) If the minimum required payment will increase before the consumer must begin making fully amortizing payments, the maximum interest rate that could apply at the time of the first payment increase and the date the increase is scheduled to occur; and

(D) If a second increase in the minimum required payment may occur before the consumer must begin making fully amortizing payments, the maximum interest rate that could apply at the time of the second payment increase and the date the increase is scheduled to occur.

(iii) *Introductory rate disclosure for amortizing adjustable-rate mortgages.* For an amortizing adjustable-rate mortgage, if the interest rate at consummation is less than the fully-indexed rate, placed in a box directly beneath the table required by paragraph (s)(1) of this section, in a format substantially similar to Model Clause H–4(I) in Appendix H to this part:

(A) The interest rate that applies at consummation and the period of time for which it applies;

(B) A statement that, even if market rates do not change, the interest rate will increase at the first adjustment and a designation of the place in sequence of the month or year, as applicable, of such rate adjustment; and

(C) The fully-indexed rate.

(3) *Payments for amortizing loans.* (i) *Principal and interest payments.* If all periodic payments will be applied to accrued interest and principal, for each interest rate disclosed under paragraph (s)(2)(i) of this section:

(A) The corresponding periodic principal and interest payment, labeled as ''principal and interest;''

(B) If the periodic payment may increase without regard to an interest rate adjustment, the payment that corresponds to the first such increase and the earliest date on which the increase could occur;

(C) If an escrow account will be established, an estimate of the amount of taxes and insurance, including any mortgage insurance, payable with each periodic payment; and

(D) The sum of the amounts disclosed under paragraphs (s)(3)(i)(A) and (C) of this section or (s)(3)(i)(B) and (C) of this section, as applicable, labeled as ''total estimated monthly payment.''

(ii) *Interest-only payments.* If the loan is an interest-only loan, for each interest rate disclosed under paragraph (s)(2)(i) of this section, the corresponding periodic payment and:

(A) If the payment will be applied to only accrued interest, the amount applied to interest, labeled as ''interest payment,'' and a statement that none of the payment is being applied to principal;

(B) If the payment will be applied to accrued interest and principal, an itemization of the amount of the first such payment applied to accrued interest and to principal, labeled as ''interest payment'' and ''principal payment,'' respectively;

(C) The escrow information described in paragraph (s)(3)(i)(C) of this section; and

(D) The sum of all amounts required to be disclosed under paragraphs (s)(3)(ii)(A) and (C) of this section or (s)(3)(ii)(B) and (C) of this section, as applicable, labeled as ''total estimated monthly payment.''

(4) *Payments for negative amortization loans.* For negative amortization loans:

(i)(A) The minimum periodic payment required until the first payment increase or interest rate increase, corresponding to the interest rate disclosed under paragraph (s)(2)(ii)(A) of this section;

(B) The minimum periodic payment that would be due at the first payment increase and the second, if any, corresponding to the interest rates described in paragraphs (s)(2)(ii)(C) and (D) of this section; and

(C) A statement that the minimum payment pays only some interest, does not repay any principal, and will cause the loan amount to increase;

(ii) The fully amortizing periodic payment amount at the earliest time when such a payment must be made, corresponding to the interest rate disclosed under paragraph (s)(2)(ii)(B) of this section; and

(iii) If applicable, in addition to the payments in paragraphs (s)(4)(i) and (ii) of this section, for each interest rate disclosed under paragraph (s)(2)(ii) of this section, the amount of the fully amortizing periodic payment, labeled as the ''full payment option,'' and a statement that these payments pay all principal and all accrued interest.

(5) *Balloon payments.* (i) Except as provided in paragraph (s)(5)(ii) of this section, if the transaction will require a balloon payment, defined as a payment that is more than two times a regular periodic payment, the balloon payment shall be disclosed separately from other periodic payments disclosed in the table under this paragraph (s), outside the table and in a manner substantially similar to Model Clause H–4(J) in Appendix H to this part.

(ii) If the balloon payment is scheduled to occur at the same time as another payment required to be disclosed in the table pursuant to paragraph (s)(3) or (s)(4) of this section, then the balloon payment must be disclosed in the table.

(6) *Special disclosures for loans with negative amortization.* For a negative amortization loan, the following information, in close proximity to the table required in paragraph (s)(1) of this section, with headings, content, and format substantially similar to Model Clause H–4(G) in Appendix H to this part:

(i) The maximum interest rate, the shortest period of time in which such interest rate could be reached, the amount of estimated taxes and insurance included in each payment disclosed, and a statement that the loan offers payment options, two of which are shown.

(ii) The dollar amount of the increase in the loan's principal balance if the consumer makes only the minimum required payments for the maximum possible time and the earliest date on which the consumer must begin making fully amortizing payments, assuming that the maximum interest rate is reached at the earliest possible time.

(7) *Definitions.* For purposes of this § 1026.18(s):

(i) The term ''adjustable-rate mortgage'' means a transaction secured by real property or a dwelling for which the annual percentage rate may increase after consummation.

(ii) The term ''step-rate mortgage'' means a transaction secured by real property or a dwelling for which the interest rate will change after consummation, and the rates that will apply and the periods for which they will apply are known at consummation.

(iii) The term ''fixed-rate mortgage'' means a transaction secured by real property or a dwelling that is not an adjustable-rate mortgage or a step-rate mortgage.

(iv) The term ''interest-only'' means that, under the terms of the legal obligation, one or more of the periodic payments may be applied solely to accrued interest and not to loan principal; an ''interest-only loan'' is a loan that permits interest-only payments.

(v) The term ''amortizing loan'' means a loan in which payment of the periodic payments does not result in an increase in the principal balance under the terms of the legal obligation; the term

''negative amortization'' means payment of periodic payments that will result in an increase in the principal balance under the terms of the legal obligation; the term ''negative amortization loan'' means a loan, other than a reverse mortgage subject to § 1026.33, that provides for a minimum periodic payment that covers only a portion of the accrued interest, resulting in negative amortization.

(vi) The term ''fully-indexed rate'' means the interest rate calculated using the index value and margin at the time of consummation.

(t) '' *No-guarantee-to-refinance'' statement.* (1) *Disclosure.* For a closed-end transaction secured by real property or a dwelling, other than a transaction secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D), the creditor shall disclose a statement that there is no guarantee the consumer can refinance the transaction to lower the interest rate or periodic payments.

(2) *Format.* The statement required by paragraph (t)(1) of this section must be in a form substantially similar to Model Clause H–4(K) in Appendix H to this part.

§ 1026.19 Certain mortgage and variable-rate transactions.

(a) *Mortgage transactions subject to RESPA.* (1)(i) *Time of disclosures.* In a mortgage transaction subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) that is secured by the consumer's dwelling, other than a home equity line of credit subject to § 1026.40 or mortgage transaction subject to paragraph (a)(5) of this section, the creditor shall make good faith estimates of the disclosures required by § 1026.18 and shall deliver or place them in the mail not later than the third business day after the creditor receives the consumer's written application.

(ii) *Imposition of fees.* Except as provided in paragraph (a)(1)(iii) of this section, neither a creditor nor any other person may impose a fee on a consumer in connection with the consumer's application for a mortgage transaction subject to paragraph (a)(1)(i) of this section before the consumer has received the disclosures required by paragraph (a)(1)(i) of this section. If the disclosures are mailed to the consumer, the consumer is considered to have received them three business days after they are mailed.

(iii) *Exception to fee restriction.* A creditor or other person may impose a fee for obtaining the consumer's credit history before the consumer has received the disclosures required by paragraph (a)(1)(i) of this section, provided the fee is *bona fide* and reasonable in amount.

(2) *Waiting periods for early disclosures and corrected disclosures.* (i) The creditor shall deliver or place in the mail the good faith estimates required by paragraph (a)(1)(i) of this section not later than the seventh business day before consummation of the transaction.

(ii) If the annual percentage rate disclosed under paragraph (a)(1)(i) of this section becomes inaccurate, as defined in § 1026.22, the creditor shall provide corrected disclosures with all changed terms. The consumer must receive the corrected disclosures no later than three business days before consummation. If the corrected disclosures are mailed to the consumer or delivered to the consumer by means other than delivery in person, the consumer is deemed to have received the corrected disclosures three business days after they are mailed or delivered.

(3) *Consumer's waiver of waiting period before consummation.* If the consumer determines that the extension of credit is needed to meet a *bona fide* personal financial emergency, the consumer may modify or waive the seven-business-day waiting period or the three-business-day waiting period required by paragraph (a)(2) of this section, after receiving the disclosures required by § 1026.18. To modify or waive a waiting period, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the signature of all the consumers who are primarily liable on the legal obligation. Printed forms for this purpose are prohibited.

(4) *Notice.* Disclosures made pursuant to paragraph (a)(1) or paragraph (a)(2) of this section shall contain the following statement: ''You are not required to complete this agreement merely because you have received these disclosures or signed a loan application.'' The disclosure required by this paragraph shall be grouped together with the disclosures required by paragraphs (a)(1) or (a)(2) of this section.

(5) *Timeshare plans.* In a mortgage transaction subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) that is secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53(D)):

(i) The requirements of paragraphs (a)(1) through (a)(4) of this section do not apply;

(ii) The creditor shall make good faith estimates of the disclosures required by § 1026.18 before consummation, or shall deliver or place them in the mail not later than three business days after the creditor receives the consumer's written application, whichever is earlier; and

(iii) If the annual percentage rate at the time of consummation varies from the annual percentage rate disclosed under paragraph (a)(5)(ii) of this section by more than ⅛ of 1 percentage point in a regular transaction or more than ¼ of 1 percentage point in an irregular transaction, as defined in § 1026.22, the creditor shall disclose all the changed terms no later than consummation or settlement.

(b) *Certain variable-rate transactions.* Except as provided in paragraph (d) of this section, if the annual percentage rate may increase after consummation in a transaction secured by the consumer's principal dwelling with a term greater than one year, the following disclosures must be provided at the time an application form is provided or before the consumer pays a non-refundable fee, whichever is earlier (except that the disclosures may be delivered or placed in the mail not later than three business days following receipt of a consumer's application when the application reaches the creditor by telephone, or through an intermediary agent or broker):

(1) The booklet titled *Consumer Handbook on Adjustable Rate Mortgages,* or a suitable substitute.

(2) A loan program disclosure for each variable-rate program in which the consumer expresses an interest. The following disclosures, as applicable, shall be provided:

(i) The fact that the interest rate, payment, or term of the loan can change.

(ii) The index or formula used in making adjustments, and a source of information about the index or formula.

(iii) An explanation of how the interest rate and payment will be determined, including an explanation of how the index is adjusted, such as by the addition of a margin.

(iv) A statement that the consumer should ask about the current margin value and current interest rate.

(v) The fact that the interest rate will be discounted, and a statement that the consumer should ask about the amount of the interest rate discount.

(vi) The frequency of interest rate and payment changes.

(vii) Any rules relating to changes in the index, interest rate, payment amount, and outstanding loan balance including, for example, an explanation of interest rate or payment limitations, negative amortization, and interest rate carryover.

(viii) At the option of the creditor, either of the following:

(A) A historical example, based on a $10,000 loan amount, illustrating how payments and the loan balance would have been affected by interest rate changes implemented according to the terms of the loan program disclosure. The example shall reflect the most recent 15 years of index values. The example shall reflect all significant loan program terms, such as negative amortization, interest rate carryover, interest rate discounts, and interest rate and payment limitations, that would have been affected by the index movement during the period.

(B) The maximum interest rate and payment for a $10,000 loan originated at the initial interest rate (index value plus margin, adjusted by the amount of any discount or premium) in effect as of an identified month and year for the loan program disclosure assuming the maximum periodic increases in rates and payments under the program; and the initial interest rate and payment for that loan and a statement that the periodic payment may increase or decrease substantially depending on changes in the rate.

(ix) An explanation of how the consumer may calculate the payments for the loan amount to be borrowed based on either:

(A) The most recent payment shown in the historical example in paragraph (b)(2)(viii)(A) of this section; or

(B) The initial interest rate used to calculate the maximum interest rate and payment in paragraph (b)(2)(viii)(B) of this section.

(x) The fact that the loan program contains a demand feature.

(xi) The type of information that will be provided in notices of adjustments and the timing of such notices.

(xii) A statement that disclosure forms are available for the creditor's other variable-rate loan programs.

(c) *Electronic disclosures.* For an application that is accessed by the consumer in electronic form, the disclosures required by paragraph (b) of this section may be provided to the consumer in electronic form on or with the application.

(d) Information provided in accordance with variable-rate regulations of other Federal agencies may be substituted for the disclosures required by paragraph (b) of this section.

§ 1026.20 Subsequent disclosure requirements.

(a) *Refinancings.* A refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer. A refinancing is a new transaction requiring new disclosures to the consumer. The new finance charge shall include any unearned portion of the old finance charge that is not credited to the existing obligation. The following shall not be treated as a refinancing:

(1) A renewal of a single payment obligation with no change in the original terms.

(2) A reduction in the annual percentage rate with a corresponding change in the payment schedule.

(3) An agreement involving a court proceeding.

(4) A change in the payment schedule or a change in collateral requirements as a result of the consumer's default or delinquency, unless the rate is increased, or the new amount financed exceeds the unpaid balance plus earned finance charge and premiums for continuation of insurance of the types described in § 1026.4(d).

(5) The renewal of optional insurance purchased by the consumer and added to an existing transaction, if disclosures relating to the initial purchase were provided as required by this subpart.

(b) *Assumptions.* An assumption occurs when a creditor expressly agrees in writing with a subsequent consumer to accept that consumer as a primary obligor on an existing residential mortgage transaction. Before the assumption occurs, the creditor shall make new disclosures to the subsequent consumer, based on the remaining obligation. If the finance charge originally imposed on the existing obligation was an add-on or discount finance charge, the creditor need only disclose:

(1) The unpaid balance of the obligation assumed.

(2) The total charges imposed by the creditor in connection with the assumption.

(3) The information required to be disclosed under § 1026.18(k), (l), (m), and (n).

(4) The annual percentage rate originally imposed on the obligation.

(5) The payment schedule under § 1026.18(g) and the total of payments under § 1026.18(h) based on the remaining obligation.

(c) *Variable-rate adjustments.* Except as provided in paragraph (d) of this section, an adjustment to the interest rate with or without a corresponding adjustment to the payment in a variable-rate transaction subject to § 1026.19(b) is an event requiring new disclosures to the consumer. At least once each year during which an interest rate adjustment is implemented without an accompanying payment change, and at least 25, but no more than 120, calendar days before a payment at a new level is due, the following disclosures, as applicable, must be delivered or placed in the mail:

(1) The current and prior interest rates.

(2) The index values upon which the current and prior interest rates are based.

(3) The extent to which the creditor has foregone any increase in the interest rate.

(4) The contractual effects of the adjustment, including the payment due after the adjustment is made, and a statement of the loan balance.

(5) The payment, if different from that referred to in paragraph (c)(4) of this section, that would be required to fully amortize the loan at the new interest rate over the remainder of the loan term.

(d) Information provided in accordance with variable-rate subsequent disclosure regulations of other Federal agencies may be substituted for the disclosure required by paragraph (c) of this section.

§ 1026.21 Treatment of credit balances.

When a credit balance in excess of $1 is created in connection with a transaction (through transmittal of funds to a creditor in excess of the total balance due on an account, through rebates of unearned finance charges or insurance premiums, or through amounts otherwise owed to or held for the benefit of a consumer), the creditor shall:

(a) Credit the amount of the credit balance to the consumer's account;

(b) Refund any part of the remaining credit balance, upon the written request of the consumer; and

(c) Make a good faith effort to refund to the consumer by cash, check, or money order, or credit to a deposit account of the consumer, any part of the credit balance remaining in the account for more than 6 months, except that no further action is required if the consumer's current location is not known to the creditor and cannot be traced through the consumer's last known address or telephone number.

§ 1026.22 Determination of annual percentage rate.

(a) *Accuracy of annual percentage rate.* (1) The annual percentage rate is a measure of the cost of credit, expressed as a yearly rate, that relates the amount and timing of value received by the consumer to the amount and timing of payments made. The annual percentage rate shall be determined in accordance with either the actuarial method or the United States Rule method. Explanations, equations and instructions for determining the annual

percentage rate in accordance with the actuarial method are set forth in Appendix J to this part. An error in disclosure of the annual percentage rate or finance charge shall not, in itself, be considered a violation of this part if:

(i) The error resulted from a corresponding error in a calculation tool used in good faith by the creditor; and

(ii) Upon discovery of the error, the creditor promptly discontinues use of that calculation tool for disclosure purposes and notifies the Bureau in writing of the error in the calculation tool.

(2) As a general rule, the annual percentage rate shall be considered accurate if it is not more than ⅛ of 1 percentage point above or below the annual percentage rate determined in accordance with paragraph (a)(1) of this section.

(3) In an irregular transaction, the annual percentage rate shall be considered accurate if it is not more than ¼ of 1 percentage point above or below the annual percentage rate determined in accordance with paragraph (a)(1) of this section. For purposes of this paragraph (a)(3), an irregular transaction is one that includes one or more of the following features: multiple advances, irregular payment periods, or irregular payment amounts (other than an irregular first period or an irregular first or final payment).

(4) *Mortgage loans.* If the annual percentage rate disclosed in a transaction secured by real property or a dwelling varies from the actual rate determined in accordance with paragraph (a)(1) of this section, in addition to the tolerances applicable under paragraphs (a)(2) and (3) of this section, the disclosed annual percentage rate shall also be considered accurate if:

(i) The rate results from the disclosed finance charge; and

(ii)(A) The disclosed finance charge would be considered accurate under § 1026.18(d)(1); or

(B) For purposes of rescission, if the disclosed finance charge would be considered accurate under § 1026.23(g) or (h), whichever applies.

(5) *Additional tolerance for mortgage loans.* In a transaction secured by real property or a dwelling, in addition to the tolerances applicable under paragraphs (a)(2) and (3) of this section, if the disclosed finance charge is calculated incorrectly but is considered accurate under § 1026.18(d)(1) or § 1026.23(g) or (h), the disclosed annual percentage rate shall be considered accurate:

(i) If the disclosed finance charge is understated, and the disclosed annual percentage rate is also understated but it is closer to the actual annual percentage rate than the rate that would be considered accurate under paragraph (a)(4) of this section;

(ii) If the disclosed finance charge is overstated, and the disclosed annual percentage rate is also overstated but it is closer to the actual annual percentage rate than the rate that would be considered accurate under paragraph (a)(4) of this section.

(b) *Computation tools.* (1) The Regulation Z Annual Percentage Rate Tables produced by the Bureau may be used to determine the annual percentage rate, and any rate determined from those tables in accordance with the accompanying instructions complies with the requirements of this section. Volume I of the tables applies to single advance transactions involving up to 480 monthly payments or 104 weekly payments. It may be used for regular transactions and for transactions with any of the following irregularities: an irregular first period, an irregular first payment, and an irregular final payment. Volume II of the tables applies to transactions involving multiple advances and any type of payment or period irregularity.

(2) Creditors may use any other computation tool in determining the annual percentage rate if the rate so determined equals the rate determined in accordance with Appendix J to this part, within the degree of accuracy set forth in paragraph (a) of this section.

(c) *Single add-on rate transactions.* If a single add-on rate is applied to all transactions with maturities up to 60 months and if all payments are equal in amount and period, a single annual percentage rate may be disclosed for all those transactions, so long as it is the highest annual percentage rate for any such transaction.

(d) *Certain transactions involving ranges of balances.* For purposes of disclosing the annual percentage rate referred to in § 1026.17(g)(4) (Mail or telephone orders—delay in disclosures) and (h) (Series of sales—delay in disclosures), if the same finance charge is imposed on all balances within a specified range of balances, the annual percentage rate computed for the median balance may be disclosed for all the balances. However, if the annual percentage rate computed for the median balance understates the annual percentage rate computed for the lowest balance by more than 8 percent of the latter rate, the annual percentage rate shall be computed on whatever lower balance will produce an annual percentage rate that does not result in an understatement of more than 8 percent of the rate determined on the lowest balance.

§ 1026.23 Right of rescission.

(a) *Consumer's right to rescind.* (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section. For purposes of this section, the addition to an existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. The creditor shall deliver the notice required by paragraph (b) of this section but need not deliver new material disclosures. Delivery of the required notice shall begin the rescission period.

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

(3)(i) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

(ii) For purposes of this paragraph (a)(3), the term ''material disclosures'' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 1026.32(c) and (d) and 1026.35(b)(2).

(4) When more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers.

(b)(1) *Notice of right to rescind.* In a transaction subject to rescission, a creditor shall deliver two copies of the

notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(i) The retention or acquisition of a security interest in the consumer's principal dwelling.

(ii) The consumer's right to rescind the transaction.

(iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(iv) The effects of rescission, as described in paragraph (d) of this section.

(v) The date the rescission period expires.

(2) *Proper form of notice.* To satisfy the disclosure requirements of paragraph (b)(1) of this section, the creditor shall provide the appropriate model form in Appendix H of this part or a substantially similar notice.

(c) *Delay of creditor's performance.* Unless a consumer waives the right of rescission under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded.

(d) *Effects of rescission.* (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation.

(4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.

(e) *Consumer's waiver of right to rescind.* The consumer may modify or waive the right to rescind if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the right to rescind, and bears the signature of all the consumers entitled to rescind. Printed forms for this purpose are prohibited.

(f) *Exempt transactions.* The right to rescind does not apply to the following:

(1) A residential mortgage transaction.

(2) A refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling. The right of rescission shall apply, however, to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation.

(3) A transaction in which a state agency is a creditor.

(4) An advance, other than an initial advance, in a series of advances or in a series of single-payment obligations that is treated as a single transaction under § 1026.17(c)(6), if the notice required by paragraph (b) of this section and all material disclosures have been given to the consumer.

(5) A renewal of optional insurance premiums that is not considered a refinancing under § 1026.20(a)(5).

(g) *Tolerances for accuracy.* (1) *One-half of 1 percent tolerance.* Except as provided in paragraphs (g)(2) and (h)(2) of this section, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) Is understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or

(ii) Is greater than the amount required to be disclosed.

(2) *One percent tolerance.* In a refinancing of a residential mortgage transaction with a new creditor (other than a transaction covered by § 1026.32), if there is no new advance and no consolidation of existing loans, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) Is understated by no more than 1 percent of the face amount of the note or $100, whichever is greater; or

(ii) Is greater than the amount required to be disclosed.

(h) *Special rules for foreclosures.* (1) *Right to rescind.* After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the consumer shall have the right to rescind the transaction if:

(i) A mortgage broker fee that should have been included in the finance charge was not included; or

(ii) The creditor did not provide the properly completed appropriate model form in Appendix H of this part, or a substantially similar notice of rescission.

(2) *Tolerance for disclosures.* After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the finance charge and other disclosures affected by the finance charge (such as the amount financed and the annual percentage rate) shall be considered accurate for purposes of this section if the disclosed finance charge:

(i) Is understated by no more than $35; or

(ii) Is greater than the amount required to be disclosed.

§ 1026.24 Advertising.

(a) *Actually available terms.* If an advertisement for credit states specific credit terms, it shall state only those terms that actually are or will be arranged or offered by the creditor.

(b) *Clear and conspicuous standard.* Disclosures required by this section shall be made clearly and conspicuously.

(c) *Advertisement of rate of finance charge.* If an advertisement states a rate of finance charge, it shall state the rate as an ''annual percentage rate,'' using that term. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. If an advertisement is for credit not secured by a dwelling, the advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate. If an advertisement is for credit secured by a dwelling, the advertisement shall not state any other rate, except that a simple annual rate that is applied to an unpaid balance may be stated in conjunction with, but

not more conspicuously than, the annual percentage rate.

(d) *Advertisement of terms that require additional disclosures.* (1) *Triggering terms.* If any of the following terms is set forth in an advertisement, the advertisement shall meet the requirements of paragraph (d)(2) of this section:

(i) The amount or percentage of any downpayment.

(ii) The number of payments or period of repayment.

(iii) The amount of any payment.

(iv) The amount of any finance charge.

(2) *Additional terms.* An advertisement stating any of the terms in paragraph (d)(1) of this section shall state the following terms, as applicable (an example of one or more typical extensions of credit with a statement of all the terms applicable to each may be used):

(i) The amount or percentage of the downpayment.

(ii) The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment.

(iii) The ''annual percentage rate,'' using that term, and, if the rate may be increased after consummation, that fact.

(e) *Catalogs or other multiple-page advertisements; electronic advertisements.* (1) If a catalog or other multiple-page advertisement, or an electronic advertisement (such as an advertisement appearing on an Internet Web site), gives information in a table or schedule in sufficient detail to permit determination of the disclosures required by paragraph (d)(2) of this section, it shall be considered a single advertisement if:

(i) The table or schedule is clearly and conspicuously set forth; and

(ii) Any statement of the credit terms in paragraph (d)(1) of this section appearing anywhere else in the catalog or advertisement clearly refers to the page or location where the table or schedule begins.

(2) A catalog or other multiple-page advertisement or an electronic advertisement (such as an advertisement appearing on an Internet Web site) complies with paragraph (d)(2) of this section if the table or schedule of terms includes all appropriate disclosures for a representative scale of amounts up to the level of the more commonly sold higher-priced property or services offered.

(f) *Disclosure of rates and payments in advertisements for credit secured by a dwelling.*

(1) *Scope.* The requirements of this paragraph apply to any advertisement for credit secured by a dwelling, other than television or radio advertisements, including promotional materials accompanying applications.

(2) *Disclosure of rates.* (i) *In general.* If an advertisement for credit secured by a dwelling states a simple annual rate of interest and more than one simple annual rate of interest will apply over the term of the advertised loan, the advertisement shall disclose in a clear and conspicuous manner:

(A) Each simple annual rate of interest that will apply. In variable-rate transactions, a rate determined by adding an index and margin shall be disclosed based on a reasonably current index and margin;

(B) The period of time during which each simple annual rate of interest will apply; and

(C) The annual percentage rate for the loan. If such rate is variable, the annual percentage rate shall comply with the accuracy standards in §§ 1026.17(c) and 1026.22.

(ii) *Clear and conspicuous requirement.* For purposes of paragraph (f)(2)(i) of this section, clearly and conspicuously disclosed means that the required information in paragraphs (f)(2)(i)(A) through (C) shall be disclosed with equal prominence and in close proximity to any advertised rate that triggered the required disclosures. The required information in paragraph (f)(2)(i)(C) may be disclosed with greater prominence than the other information.

(3) *Disclosure of payments.* (i) *In general.* In addition to the requirements of paragraph (c) of this section, if an advertisement for credit secured by a dwelling states the amount of any payment, the advertisement shall disclose in a clear and conspicuous manner:

(A) The amount of each payment that will apply over the term of the loan, including any balloon payment. In variable-rate transactions, payments that will be determined based on the application of the sum of an index and margin shall be disclosed based on a reasonably current index and margin;

(B) The period of time during which each payment will apply; and

(C) In an advertisement for credit secured by a first lien on a dwelling, the fact that the payments do not include amounts for taxes and insurance premiums, if applicable, and that the actual payment obligation will be greater.

(ii) *Clear and conspicuous requirement.* For purposes of paragraph (f)(3)(i) of this section, a clear and conspicuous disclosure means that the required information in paragraphs (f)(3)(i)(A) and (B) shall be disclosed with equal prominence and in close proximity to any advertised payment that triggered the required disclosures, and that the required information in paragraph (f)(3)(i)(C) shall be disclosed with prominence and in close proximity to the advertised payments.

(4) *Envelope excluded.* The requirements in paragraphs (f)(2) and (f)(3) of this section do not apply to an envelope in which an application or solicitation is mailed, or to a banner advertisement or pop-up advertisement linked to an application or solicitation provided electronically.

(g) *Alternative disclosures—television or radio advertisements.* An advertisement made through television or radio stating any of the terms requiring additional disclosures under paragraph (d)(2) of this section may comply with paragraph (d)(2) of this section either by:

(1) Stating clearly and conspicuously each of the additional disclosures required under paragraph (d)(2) of this section; or

(2) Stating clearly and conspicuously the information required by paragraph (d)(2)(iii) of this section and listing a toll-free telephone number, or any telephone number that allows a consumer to reverse the phone charges when calling for information, along with a reference that such number may be used by consumers to obtain additional cost information.

(h) *Tax implications.* If an advertisement distributed in paper form or through the Internet (rather than by radio or television) is for a loan secured by the consumer's principal dwelling, and the advertisement states that the advertised extension of credit may exceed the fair market value of the dwelling, the advertisement shall clearly and conspicuously state that:

(1) The interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes; and

(2) The consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

(i) *Prohibited acts or practices in advertisements for credit secured by a dwelling.* The following acts or practices are prohibited in advertisements for credit secured by a dwelling:

(1) *Misleading advertising of ''fixed'' rates and payments.* Using the word ''fixed'' to refer to rates, payments, or the credit transaction in an advertisement for variable-rate transactions or other transactions where the payment will increase, unless:

(i) In the case of an advertisement solely for one or more variable-rate transactions,

(A) The phrase ''Adjustable-Rate Mortgage,'' ''Variable-Rate Mortgage,'' or ''ARM'' appears in the advertisement before the first use of the word ''fixed'' and is at least as conspicuous as any use of the word ''fixed'' in the advertisement; and

(B) Each use of the word ''fixed'' to refer to a rate or payment is accompanied by an equally prominent and closely proximate statement of the time period for which the rate or payment is fixed, and the fact that the rate may vary or the payment may increase after that period;

(ii) In the case of an advertisement solely for non-variable-rate transactions where the payment will increase (*e.g.,* a stepped-rate mortgage transaction with an initial lower payment), each use of the word ''fixed'' to refer to the payment is accompanied by an equally prominent and closely proximate statement of the time period for which the payment is fixed, and the fact that the payment will increase after that period; or

(iii) In the case of an advertisement for both variable-rate transactions and non-variable-rate transactions,

(A) The phrase ''Adjustable-Rate Mortgage,'' ''Variable-Rate Mortgage,'' or ''ARM'' appears in the advertisement with equal prominence as any use of the term ''fixed,'' ''Fixed-Rate Mortgage,'' or similar terms; and

(B) Each use of the word ''fixed'' to refer to a rate, payment, or the credit transaction either refers solely to the transactions for which rates are fixed and complies with paragraph (i)(1)(ii) of this section, if applicable, or, if it refers to the variable-rate transactions, is accompanied by an equally prominent and closely proximate statement of the time period for which the rate or payment is fixed, and the fact that the rate may vary or the payment may increase after that period.

(2) *Misleading comparisons in advertisements.* Making any comparison in an advertisement between actual or hypothetical credit payments or rates and any payment or simple annual rate that will be available under the advertised product for a period less than the full term of the loan, unless:

(i) *In general.* The advertisement includes a clear and conspicuous comparison to the information required to be disclosed under § 1026.24(f)(2) and (3); and

(ii) *Application to variable-rate transactions.* If the advertisement is for a variable-rate transaction, and the advertised payment or simple annual rate is based on the index and margin that will be used to make subsequent rate or payment adjustments over the term of the loan, the advertisement includes an equally prominent statement in close proximity to the payment or rate that the payment or rate is subject to adjustment and the time period when the first adjustment will occur.

(3) *Misrepresentations about government endorsement.* Making any statement in an advertisement that the product offered is a ''government loan program'', ''government-supported loan'', or is otherwise endorsed or sponsored by any Federal, state, or local government entity, unless the advertisement is for an FHA loan, VA loan, or similar loan program that is, in fact, endorsed or sponsored by a Federal, state, or local government entity.

(4) *Misleading use of the current lender's name.* Using the name of the consumer's current lender in an advertisement that is not sent by or on behalf of the consumer's current lender, unless the advertisement:

(i) Discloses with equal prominence the name of the person or creditor making the advertisement; and

(ii) Includes a clear and conspicuous statement that the person making the advertisement is not associated with, or acting on behalf of, the consumer's current lender.

(5) *Misleading claims of debt elimination.* Making any misleading claim in an advertisement that the mortgage product offered will eliminate debt or result in a waiver or forgiveness of a consumer's existing loan terms with, or obligations to, another creditor.

(6) *Misleading use of the term ''counselor''.* Using the term ''counselor'' in an advertisement to refer to a for-profit mortgage broker or mortgage creditor, its employees, or persons working for the broker or creditor that are involved in offering, originating or selling mortgages.

(7) *Misleading foreign-language advertisements.* Providing information about some trigger terms or required disclosures, such as an initial rate or payment, only in a foreign language in an advertisement, but providing information about other trigger terms or required disclosures, such as information about the fully-indexed rate or fully amortizing payment, only in English in the same advertisement.

Subpart D—Miscellaneous

§ 1026.25 Record retention.

(a) *General rule.* A creditor shall retain evidence of compliance with this part (other than advertising requirements under §§ 1026.16 and 1026.24) for 2 years after the date disclosures are required to be made or action is required to be taken. The administrative agencies responsible for enforcing the regulation may require creditors under their jurisdictions to retain records for a longer period if necessary to carry out their enforcement responsibilities under section 108 of the Act.

(b) *Inspection of records.* A creditor shall permit the agency responsible for enforcing this part with respect to that creditor to inspect its relevant records for compliance.

§ 1026.26 Use of annual percentage rate in oral disclosures.

(a) *Open-end credit.* In an oral response to a consumer's inquiry about the cost of open-end credit, only the annual percentage rate or rates shall be stated, except that the periodic rate or rates also may be stated. If the annual percentage rate cannot be determined in advance because there are finance charges other than a periodic rate, the corresponding annual percentage rate shall be stated, and other cost information may be given.

(b) *Closed-end credit.* In an oral response to a consumer's inquiry about the cost of closed-end credit, only the annual percentage rate shall be stated, except that a simple annual rate or periodic rate also may be stated if it is applied to an unpaid balance. If the annual percentage rate cannot be determined in advance, the annual percentage rate for a sample transaction shall be stated, and other cost information for the consumer's specific transaction may be given.

§ 1026.27 Language of disclosures.

Disclosures required by this part may be made in a language other than English, provided that the disclosures are made available in English upon the consumer's request. This requirement for providing English disclosures on request does not apply to advertisements subject to §§ 1026.16 and 1026.24.

§ 1026.28 Effect on state laws.

(a) *Inconsistent disclosure requirements.* (1) Except as provided in paragraph (d) of this section, state law requirements that are inconsistent with the requirements contained in chapter 1 (General Provisions), chapter 2 (Credit Transactions), or chapter 3 (Credit Advertising) of the Act and the implementing provisions of this part are preempted to the extent of the inconsistency. A state law is

inconsistent if it requires a creditor to make disclosures or take actions that contradict the requirements of the Federal law. A state law is contradictory if it requires the use of the same term to represent a different amount or a different meaning than the Federal law, or if it requires the use of a term different from that required in the Federal law to describe the same item. A creditor, state, or other interested party may request the Bureau to determine whether a state law requirement is inconsistent. After the Bureau determines that a state law is inconsistent, a creditor may not make disclosures using the inconsistent term or form.

(2)(i) State law requirements are inconsistent with the requirements contained in sections 161 (Correction of billing errors) or 162 (Regulation of credit reports) of the Act and the implementing provisions of this part and are preempted if they provide rights, responsibilities, or procedures for consumers or creditors that are different from those required by the Federal law. However, a state law that allows a consumer to inquire about an open-end credit account and imposes on the creditor an obligation to respond to such inquiry after the time allowed in the Federal law for the consumer to submit written notice of a billing error shall not be preempted in any situation where the time period for making written notice under this part has expired. If a creditor gives written notice of a consumer's rights under such state law, the notice shall state that reliance on the longer time period available under state law may result in the loss of important rights that could be preserved by acting more promptly under Federal law; it shall also explain that the state law provisions apply only after expiration of the time period for submitting a proper written notice of a billing error under the Federal law. If the state disclosures are made on the same side of a page as the required Federal disclosures, the state disclosures shall appear under a demarcation line below the Federal disclosures, and the Federal disclosures shall be identified by a heading indicating that they are made in compliance with Federal law.

(ii) State law requirements are inconsistent with the requirements contained in chapter 4 (Credit billing) of the Act (other than section 161 or 162) and the implementing provisions of this part and are preempted if the creditor cannot comply with state law without violating Federal law.

(iii) A state may request the Bureau to determine whether its law is inconsistent with chapter 4 of the Act and its implementing provisions.

(b) *Equivalent disclosure requirements.* If the Bureau determines that a disclosure required by state law (other than a requirement relating to the finance charge, annual percentage rate, or the disclosures required under § 1026.32) is substantially the same in meaning as a disclosure required under the Act or this part, creditors in that state may make the state disclosure in lieu of the Federal disclosure. A creditor, state, or other interested party may request the Bureau to determine whether a state disclosure is substantially the same in meaning as a Federal disclosure.

(c) *Request for determination.* The procedures under which a request for a determination may be made under this section are set forth in Appendix A.

(d) *Special rule for credit and charge cards.* State law requirements relating to the disclosure of credit information in any credit or charge card application or solicitation that is subject to the requirements of section 127(c) of chapter 2 of the Act (§ 1026.60 of the regulation) or in any renewal notice for a credit or charge card that is subject to the requirements of section 127(d) of chapter 2 of the Act (§ 1026.9(e) of the regulation) are preempted. State laws relating to the enforcement of section 127(c) and (d) of the Act are not preempted.

§ 1026.29 State exemptions.

(a) *General rule.* Any state may apply to the Bureau to exempt a class of transactions within the state from the requirements of chapter 2 (Credit transactions) or chapter 4 (Credit billing) of the Act and the corresponding provisions of this part. The Bureau shall grant an exemption if it determines that:

(1) The state law is substantially similar to the Federal law or, in the case of chapter 4, affords the consumer greater protection than the Federal law; and

(2) There is adequate provision for enforcement.

(b) *Civil liability.* (1) No exemptions granted under this section shall extend to the civil liability provisions of sections 130 and 131 of the Act.

(2) If an exemption has been granted, the disclosures required by the applicable state law (except any additional requirements not imposed by Federal law) shall constitute the disclosures required by the Act.

(c) *Applications.* The procedures under which a state may apply for an exemption under this section are set forth in Appendix B to this part.

§ 1026.30 Limitation on rates.

A creditor shall include in any consumer credit contract secured by a dwelling and subject to the Act and this part the maximum interest rate that may be imposed during the term of the obligation when:

(a) In the case of closed-end credit, the annual percentage rate may increase after consummation, or

(b) In the case of open-end credit, the annual percentage rate may increase during the plan.

Subpart E—Special Rules for Certain Home Mortgage Transactions

§ 1026.31 General rules.

(a) *Relation to other subparts in this part.* The requirements and limitations of this subpart are in addition to and not in lieu of those contained in other subparts of this part.

(b) *Form of disclosures.* The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures required by this subpart may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

(c) *Timing of disclosure.* (1) *Disclosures for certain closed-end home mortgages.* The creditor shall furnish the disclosures required by § 1026.32 at least three business days prior to consummation of a mortgage transaction covered by § 1026.32.

(i) *Change in terms.* After complying with paragraph (c)(1) of this section and prior to consummation, if the creditor changes any term that makes the disclosures inaccurate, new disclosures shall be provided in accordance with the requirements of this subpart.

(ii) *Telephone disclosures.* A creditor may provide new disclosures by telephone if the consumer initiates the change and if, at consummation:

(A) The creditor provides new written disclosures; and

(B) The consumer and creditor sign a statement that the new disclosures were provided by telephone at least three days prior to consummation.

(iii) *Consumer's waiver of waiting period before consummation.* The consumer may, after receiving the disclosures required by paragraph (c)(1) of this section, modify or waive the three-day waiting period between delivery of those disclosures and consummation if the consumer determines that the extension of credit is needed to meet a bona fide personal

financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the signature of all the consumers entitled to the waiting period. Printed forms for this purpose are prohibited, except when creditors are permitted to use printed forms pursuant to § 1026.23(e)(2).

(2) *Disclosures for reverse mortgages.* The creditor shall furnish the disclosures required by § 1026.33 at least three business days prior to:

(i) Consummation of a closed-end credit transaction; or

(ii) The first transaction under an open-end credit plan.

(d) *Basis of disclosures and use of estimates.* (1) *Legal Obligation.* Disclosures shall reflect the terms of the legal obligation between the parties.

(2) *Estimates.* If any information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure based on the best information reasonably available at the time the disclosure is provided, and shall state clearly that the disclosure is an estimate.

(3) *Per-diem interest.* For a transaction in which a portion of the interest is determined on a per-diem basis and collected at consummation, any disclosure affected by the per-diem interest shall be considered accurate if the disclosure is based on the information known to the creditor at the time that the disclosure documents are prepared.

(e) *Multiple creditors; multiple consumers.* If a transaction involves more than one creditor, only one set of disclosures shall be given and the creditors shall agree among themselves which creditor must comply with the requirements that this part imposes on any or all of them. If there is more than one consumer, the disclosures may be made to any consumer who is primarily liable on the obligation. If the transaction is rescindable under § 1026.15 or § 1026.23, however, the disclosures shall be made to each consumer who has the right to rescind.

(f) *Effect of subsequent events.* If a disclosure becomes inaccurate because of an event that occurs after the creditor delivers the required disclosures, the inaccuracy is not a violation of Regulation Z (12 CFR part 1026), although new disclosures may be required for mortgages covered by § 1026.32 under paragraph (c) of this section, § 1026.9(c), § 1026.19, or § 1026.20.

(g) *Accuracy of annual percentage rate.* For purposes of § 1026.32, the annual percentage rate shall be considered accurate, and may be used in determining whether a transaction is covered by § 1026.32, if it is accurate according to the requirements and within the tolerances under § 1026.22. The finance charge tolerances for rescission under § 1026.23(g) or (h) shall not apply for this purpose.

§ 1026.32 Requirements for certain closed-end home mortgages.

(a) *Coverage.* (1) Except as provided in paragraph (a)(2) of this section, the requirements of this section apply to a consumer credit transaction that is secured by the consumer's principal dwelling, and in which either:

(i) The annual percentage rate at consummation will exceed by more than 8 percentage points for first-lien loans, or by more than 10 percentage points for subordinate-lien loans, the yield on Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor; or

(ii) The total points and fees payable by the consumer at or before loan closing will exceed the greater of 8 percent of the total loan amount, or $400; the $400 figure shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1.

(2) This section does not apply to the following:

(i) A residential mortgage transaction.

(ii) A reverse mortgage transaction subject to § 1026.33.

(iii) An open-end credit plan subject to subpart B of this part.

(b) *Definitions.* For purposes of this subpart, the following definitions apply:

(1) For purposes of paragraph (a)(1)(ii) of this section, *points and fees* means:

(i) All items required to be disclosed under § 1026.4(a) and 1026.4(b), except interest or the time-price differential;

(ii) All compensation paid to mortgage brokers;

(iii) All items listed in § 1026.4(c)(7) (other than amounts held for future payment of taxes) unless the charge is reasonable, the creditor receives no direct or indirect compensation in connection with the charge, and the charge is not paid to an affiliate of the creditor; and

(iv) Premiums or other charges for credit life, accident, health, or loss-of-income insurance, or debt-cancellation coverage (whether or not the debt-cancellation coverage is insurance under applicable law) that provides for cancellation of all or part of the consumer's liability in the event of the loss of life, health, or income or in the case of accident, written in connection with the credit transaction.

(2) *Affiliate* means any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*).

(c) *Disclosures.* In addition to other disclosures required by this part, in a mortgage subject to this section, the creditor shall disclose the following in conspicuous type size:

(1) *Notices.* The following statement: ''You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application. If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.''

(2) *Annual percentage rate.* The annual percentage rate.

(3) *Regular payment; balloon payment.* The amount of the regular monthly (or other periodic) payment and the amount of any balloon payment. The regular payment disclosed under this paragraph shall be treated as accurate if it is based on an amount borrowed that is deemed accurate and is disclosed under paragraph (c)(5) of this section.

(4) *Variable-rate.* For variable-rate transactions, a statement that the interest rate and monthly payment may increase, and the amount of the single maximum monthly payment, based on the maximum interest rate required to be disclosed under § 1026.30.

(5) *Amount borrowed.* For a mortgage refinancing, the total amount the consumer will borrow, as reflected by the face amount of the note; and where the amount borrowed includes premiums or other charges for optional credit insurance or debt-cancellation coverage, that fact shall be stated, grouped together with the disclosure of the amount borrowed. The disclosure of the amount borrowed shall be treated as accurate if it is not more than $100 above or below the amount required to be disclosed.

(d) *Limitations.* A mortgage transaction subject to this section shall not include the following terms:

(1)(i) *Balloon payment.* For a loan with a term of less than five years, a payment schedule with regular periodic payments that when aggregated do not fully amortize the outstanding principal balance.

(ii) *Exception.* The limitations in paragraph (d)(1)(i) of this section do not apply to loans with maturities of less than one year, if the purpose of the loan is a ''bridge'' loan connected with the acquisition or construction of a dwelling intended to become the consumer's principal dwelling.

(2) *Negative amortization.* A payment schedule with regular periodic payments that cause the principal balance to increase.

(3) *Advance payments.* A payment schedule that consolidates more than two periodic payments and pays them in advance from the proceeds.

(4) *Increased interest rate.* An increase in the interest rate after default.

(5) *Rebates.* A refund calculated by a method less favorable than the actuarial method (as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 U.S.C. 1615(d)), for rebates of interest arising from a loan acceleration due to default.

(6) *Prepayment penalties.* Except as allowed under paragraph (d)(7) of this section, a penalty for paying all or part of the principal before the date on which the principal is due. A prepayment penalty includes computing a refund of unearned interest by a method that is less favorable to the consumer than the actuarial method, as defined by section 933(d) of the Housing and Community Development Act of 1992, 15 U.S.C. 1615(d).

(7) *Prepayment penalty exception.* A mortgage transaction subject to this section may provide for a prepayment penalty (including a refund calculated according to the rule of 78s) otherwise permitted by law if, under the terms of the loan:

(i) The penalty will not apply after the two-year period following consummation;

(ii) The penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or an affiliate of the creditor;

(iii) At consummation, the consumer's total monthly debt payments (including amounts owed under the mortgage) do not exceed 50 percent of the consumer's monthly gross income, as verified in accordance with § 1026.34(a)(4)(ii); and

(iv) The amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation.

(8) *Due-on-demand clause.* A demand feature that permits the creditor to terminate the loan in advance of the original maturity date and to demand repayment of the entire outstanding balance, except in the following circumstances:

(i) There is fraud or material misrepresentation by the consumer in connection with the loan;

(ii) The consumer fails to meet the repayment terms of the agreement for any outstanding balance; or

(iii) There is any action or inaction by the consumer that adversely affects the creditor's security for the loan, or any right of the creditor in such security.

§ 1026.33 Requirements for reverse mortgages.

(a) *Definition.* For purposes of this subpart, *reverse mortgage transaction* means a nonrecourse consumer credit obligation in which:

(1) A mortgage, deed of trust, or equivalent consensual security interest securing one or more advances is created in the consumer's principal dwelling; and

(2) Any principal, interest, or shared appreciation or equity is due and payable (other than in the case of default) only after:

(i) The consumer dies;

(ii) The dwelling is transferred; or

(iii) The consumer ceases to occupy the dwelling as a principal dwelling.

(b) *Content of disclosures.* In addition to other disclosures required by this part, in a reverse mortgage transaction the creditor shall provide the following disclosures in a form substantially similar to the model form found in paragraph (d) of Appendix K of this part:

(1) *Notice.* A statement that the consumer is not obligated to complete the reverse mortgage transaction merely because the consumer has received the disclosures required by this section or has signed an application for a reverse mortgage loan.

(2) *Total annual loan cost rates.* A good-faith projection of the total cost of the credit, determined in accordance with paragraph (c) of this section and expressed as a table of ''total annual loan cost rates,'' using that term, in accordance with Appendix K of this part.

(3) *Itemization of pertinent information.* An itemization of loan terms, charges, the age of the youngest borrower and the appraised property value.

(4) *Explanation of table.* An explanation of the table of total annual loan cost rates as provided in the model form found in paragraph (d) of Appendix K of this part.

(c) *Projected total cost of credit.* The projected total cost of credit shall reflect the following factors, as applicable:

(1) *Costs to consumer.* All costs and charges to the consumer, including the costs of any annuity the consumer purchases as part of the reverse mortgage transaction.

(2) *Payments to consumer.* All advances to and for the benefit of the consumer, including annuity payments that the consumer will receive from an annuity that the consumer purchases as part of the reverse mortgage transaction.

(3) *Additional creditor compensation.* Any shared appreciation or equity in the dwelling that the creditor is entitled by contract to receive.

(4) *Limitations on consumer liability.* Any limitation on the consumer's liability (such as nonrecourse limits and equity conservation agreements).

(5) *Assumed annual appreciation rates.* Each of the following assumed annual appreciation rates for the dwelling:

(i) 0 percent.

(ii) 4 percent.

(iii) 8 percent.

(6) *Assumed loan period.* (i) Each of the following assumed loan periods, as provided in Appendix L of this part:

(A) Two years.

(B) The actuarial life expectancy of the consumer to become obligated on the reverse mortgage transaction (as of that consumer's most recent birthday). In the case of multiple consumers, the period shall be the actuarial life expectancy of the youngest consumer (as of that consumer's most recent birthday).

(C) The actuarial life expectancy specified by paragraph (c)(6)(i)(B) of this section, multiplied by a factor of 1.4 and rounded to the nearest full year.

(ii) At the creditor's option, the actuarial life expectancy specified by paragraph (c)(6)(i)(B) of this section, multiplied by a factor of .5 and rounded to the nearest full year.

§ 1026.34 Prohibited acts or practices in connection with high-cost mortgages.

(a) *Prohibited acts or practices for high-cost mortgages.* A creditor extending mortgage credit subject to § 1026.32 shall not:

(1) *Home improvement contracts.* Pay a contractor under a home improvement contract from the proceeds of a mortgage covered by § 1026.32, other than:

(i) By an instrument payable to the consumer or jointly to the consumer and the contractor; or

(ii) At the election of the consumer, through a third-party escrow agent in accordance with terms established in a written agreement signed by the consumer, the creditor, and the contractor prior to the disbursement.

(2) *Notice to assignee.* Sell or otherwise assign a mortgage subject to § 1026.32 without furnishing the following statement to the purchaser or

assignee: ''Notice: This is a mortgage subject to special rules under the Federal Truth in Lending Act. Purchasers or assignees of this mortgage could be liable for all claims and defenses with respect to the mortgage that the borrower could assert against the creditor.''

(3) *Refinancings within one-year period.* Within one year of having extended credit subject to § 1026.32, refinance any loan subject to § 1026.32 to the same borrower into another loan subject to § 1026.32, unless the refinancing is in the borrower's interest. An assignee holding or servicing an extension of mortgage credit subject to § 1026.32, shall not, for the remainder of the one-year period following the date of origination of the credit, refinance any loan subject to § 1026.32 to the same borrower into another loan subject to § 1026.32, unless the refinancing is in the borrower's interest. A creditor (or assignee) is prohibited from engaging in acts or practices to evade this provision, including a pattern or practice of arranging for the refinancing of its own loans by affiliated or unaffiliated creditors, or modifying a loan agreement (whether or not the existing loan is satisfied and replaced by the new loan) and charging a fee.

(4) *Repayment ability.* Extend credit subject to § 1026.32 to a consumer based on the value of the consumer's collateral without regard to the consumer's repayment ability as of consummation, including the consumer's current and reasonably expected income, employment, assets other than the collateral, current obligations, and mortgage-related obligations.

(i) *Mortgage-related obligations.* For purposes of this paragraph (a)(4), mortgage-related obligations are expected property taxes, premiums for mortgage-related insurance required by the creditor as set forth in § 1026.35(b)(3)(i), and similar expenses.

(ii) *Verification of repayment ability.* Under this paragraph (a)(4) a creditor must verify the consumer's repayment ability as follows:

(A) A creditor must verify amounts of income or assets that it relies on to determine repayment ability, including expected income or assets, by the consumer's Internal Revenue Service Form W–2, tax returns, payroll receipts, financial institution records, or other third-party documents that provide reasonably reliable evidence of the consumer's income or assets.

(B) Notwithstanding paragraph (a)(4)(ii)(A), a creditor has not violated paragraph (a)(4)(ii) if the amounts of income and assets that the creditor relied upon in determining repayment ability are not materially greater than the amounts of the consumer's income or assets that the creditor could have verified pursuant to paragraph (a)(4)(ii)(A) at the time the loan was consummated.

(C) A creditor must verify the consumer's current obligations.

(iii) *Presumption of compliance.* A creditor is presumed to have complied with this paragraph (a)(4) with respect to a transaction if the creditor:

(A) Verifies the consumer's repayment ability as provided in paragraph (a)(4)(ii);

(B) Determines the consumer's repayment ability using the largest payment of principal and interest scheduled in the first seven years following consummation and taking into account current obligations and mortgage-related obligations as defined in paragraph (a)(4)(i); and

(C) Assesses the consumer's repayment ability taking into account at least one of the following: The ratio of total debt obligations to income, or the income the consumer will have after paying debt obligations.

(iv) *Exclusions from presumption of compliance.* Notwithstanding the previous paragraph, no presumption of compliance is available for a transaction for which:

(A) The regular periodic payments for the first seven years would cause the principal balance to increase; or

(B) The term of the loan is less than seven years and the regular periodic payments when aggregated do not fully amortize the outstanding principal balance.

(v) *Exemption.* This paragraph (a)(4) does not apply to temporary or ''bridge'' loans with terms of twelve months or less, such as a loan to purchase a new dwelling where the consumer plans to sell a current dwelling within twelve months.

(b) *Prohibited acts or practices for dwelling-secured loans; open-end credit.* In connection with credit secured by the consumer's dwelling that does not meet the definition in § 1026.2(a)(20), a creditor shall not structure a home-secured loan as an open-end plan to evade the requirements of § 1026.32.

§ 1026.35 Prohibited acts or practices in connection with higher-priced mortgage loans.

(a) *Higher-priced mortgage loans.* (1) For purposes of this section, except as provided in paragraph (b)(3)(v) of this section, a higher-priced mortgage loan is a consumer credit transaction secured by the consumer's principal dwelling with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by 1.5 or more percentage points for loans secured by a first lien on a dwelling, or by 3.5 or more percentage points for loans secured by a subordinate lien on a dwelling.

(2) ''Average prime offer rate'' means an annual percentage rate that is derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. The Bureau publishes average prime offer rates for a broad range of types of transactions in a table updated at least weekly as well as the methodology the Bureau uses to derive these rates.

(3) Notwithstanding paragraph (a)(1) of this section, the term ''higher-priced mortgage loan'' does not include a transaction to finance the initial construction of a dwelling, a temporary or ''bridge'' loan with a term of twelve months or less, such as a loan to purchase a new dwelling where the consumer plans to sell a current dwelling within twelve months, a reverse-mortgage transaction subject to § 1026.33, or a home equity line of credit subject to § 1026.40.

(b) *Rules for higher-priced mortgage loans.* Higher-priced mortgage loans are subject to the following restrictions:

(1) *Repayment ability.* A creditor shall not extend credit based on the value of the consumer's collateral without regard to the consumer's repayment ability as of consummation as provided in § 1026.34(a)(4).

(2) *Prepayment penalties.* A loan may not include a penalty described by § 1026.32(d)(6) unless:

(i) The penalty is otherwise permitted by law, including § 1026.32(d)(7) if the loan is a mortgage transaction described in § 1026.32(a); and

(ii) Under the terms of the loan:

(A) The penalty will not apply after the two-year period following consummation;

(B) The penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or an affiliate of the creditor; and

(C) The amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation.

(3) *Escrows.* (i) *Failure to escrow for property taxes and insurance.* Except as provided in paragraph (b)(3)(ii) of this section, a creditor may not extend a loan secured by a first lien on a principal dwelling unless an escrow account is established before consummation for payment of property taxes and

premiums for mortgage-related insurance required by the creditor, such as insurance against loss of or damage to property, or against liability arising out of the ownership or use of the property, or insurance protecting the creditor against the consumer's default or other credit loss.

(ii) *Exemptions for loans secured by shares in a cooperative and for certain condominium units.* (A) Escrow accounts need not be established for loans secured by shares in a cooperative; and

(B) Insurance premiums described in paragraph (b)(3)(i) of this section need not be included in escrow accounts for loans secured by condominium units, where the condominium association has an obligation to the condominium unit owners to maintain a master policy insuring condominium units.

(iii) *Cancellation.* A creditor or servicer may permit a consumer to cancel the escrow account required in paragraph (b)(3)(i) of this section only in response to a consumer's dated written request to cancel the escrow account that is received no earlier than 365 days after consummation.

(iv) *Definition of escrow account.* For purposes of this section, ''escrow account'' shall have the same meaning as in 12 CFR 1024.17(b) as amended.

(v) *''Jumbo'' loans.* For purposes of this § 1026.35(b)(3), for a transaction with a principal obligation at consummation that exceeds the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac, the coverage threshold set forth in paragraph (a)(1) of this section for loans secured by a first lien on a dwelling shall be 2.5 or more percentage points greater than the applicable average prime offer rate.

(4) *Evasion; open-end credit.* In connection with credit secured by a consumer's principal dwelling that does not meet the definition of open-end credit in § 1026.2(a)(20), a creditor shall not structure a home-secured loan as an open-end plan to evade the requirements of this section.

§ 1026.36 Prohibited acts or practices in connection with credit secured by a dwelling.

(a) *Loan originator and mortgage broker defined.* (1) *Loan originator.* For purposes of this section, the term ''loan originator'' means with respect to a particular transaction, a person who for compensation or other monetary gain, or in expectation of compensation or other monetary gain, arranges, negotiates, or otherwise obtains an extension of consumer credit for another person. The term ''loan originator'' includes an employee of the creditor if the employee meets this definition. The term ''loan originator'' includes the creditor only if the creditor does not provide the funds for the transaction at consummation out of the creditor's own resources, including drawing on a *bona fide* warehouse line of credit, or out of deposits held by the creditor.

(2) *Mortgage broker.* For purposes of this section, a mortgage broker with respect to a particular transaction is any loan originator that is not an employee of the creditor.

(b) [Reserved]

(c) *Servicing practices.* (1) In connection with a consumer credit transaction secured by a consumer's principal dwelling, no servicer shall:

(i) Fail to credit a payment to the consumer's loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency, or except as provided in paragraph (c)(2) of this section;

(ii) Impose on the consumer any late fee or delinquency charge in connection with a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on an earlier payment, and the payment is otherwise a full payment for the applicable period and is paid on its due date or within any applicable grace period; or

(iii) Fail to provide, within a reasonable time after receiving a request from the consumer or any person acting on behalf of the consumer, an accurate statement of the total outstanding balance that would be required to satisfy the consumer's obligation in full as of a specified date.

(2) If a servicer specifies in writing requirements for the consumer to follow in making payments, but accepts a payment that does not conform to the requirements, the servicer shall credit the payment as of 5 days after receipt.

(3) For purposes of this paragraph (c), the terms ''servicer'' and ''servicing'' have the same meanings as provided in 12 CFR 1024.2(b), as amended.

(d) *Prohibited payments to loan originators.* (1) *Payments based on transaction terms or conditions.* (i) In connection with a consumer credit transaction secured by a dwelling, no loan originator shall receive and no person shall pay to a loan originator, directly or indirectly, compensation in an amount that is based on any of the transaction's terms or conditions.

(ii) For purposes of this paragraph (d)(1), the amount of credit extended is not deemed to be a transaction term or condition, provided compensation received by or paid to a loan originator, directly or indirectly, is based on a fixed percentage of the amount of credit extended; however, such compensation may be subject to a minimum or maximum dollar amount.

(iii) This paragraph (d)(1) shall not apply to any transaction in which paragraph (d)(2) of this section applies.

(2) *Payments by persons other than consumer.* If any loan originator receives compensation directly from a consumer in a consumer credit transaction secured by a dwelling:

(i) No loan originator shall receive compensation, directly or indirectly, from any person other than the consumer in connection with the transaction; and

(ii) No person who knows or has reason to know of the consumer-paid compensation to the loan originator (other than the consumer) shall pay any compensation to a loan originator, directly or indirectly, in connection with the transaction.

(3) *Affiliates.* For purposes of this paragraph (d), affiliates shall be treated as a single ''person.''

(e) *Prohibition on steering.* (1) *General.* In connection with a consumer credit transaction secured by a dwelling, a loan originator shall not direct or ''steer'' a consumer to consummate a transaction based on the fact that the originator will receive greater compensation from the creditor in that transaction than in other transactions the originator offered or could have offered to the consumer, unless the consummated transaction is in the consumer's interest.

(2) *Permissible transactions.* A transaction does not violate paragraph (e)(1) of this section if the consumer is presented with loan options that meet the conditions in paragraph (e)(3) of this section for each type of transaction in which the consumer expressed an interest. For purposes of paragraph (e) of this section, the term ''type of transaction'' refers to whether:

(i) A loan has an annual percentage rate that cannot increase after consummation;

(ii) A loan has an annual percentage rate that may increase after consummation; or

(iii) A loan is a reverse mortgage.

(3) *Loan options presented.* A transaction satisfies paragraph (e)(2) of this section only if the loan originator presents the loan options required by that paragraph and all of the following conditions are met:

(i) The loan originator must obtain loan options from a significant number of the creditors with which the

originator regularly does business and, for each type of transaction in which the consumer expressed an interest, must present the consumer with loan options that include:

(A) The loan with the lowest interest rate;

(B) The loan with the lowest interest rate without negative amortization, a prepayment penalty, interest-only payments, a balloon payment in the first 7 years of the life of the loan, a demand feature, shared equity, or shared appreciation; or, in the case of a reverse mortgage, a loan without a prepayment penalty, or shared equity or shared appreciation; and

(C) The loan with the lowest total dollar amount for origination points or fees and discount points.

(ii) The loan originator must have a good faith belief that the options presented to the consumer pursuant to paragraph (e)(3)(i) of this section are loans for which the consumer likely qualifies.

(iii) For each type of transaction, if the originator presents to the consumer more than three loans, the originator must highlight the loans that satisfy the criteria specified in paragraph (e)(3)(i) of this section.

(4) *Number of loan options presented.* The loan originator can present fewer than three loans and satisfy paragraphs (e)(2) and (e)(3)(i) of this section if the loan(s) presented to the consumer satisfy the criteria of the options in paragraph (e)(3)(i) of this section and the provisions of paragraph (e)(3) of this section are otherwise met.

(f) This section does not apply to a home-equity line of credit subject to § 1026.40. Section 1026.36(d) and (e) do not apply to a loan that is secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D).

§§ 1026.37–1026.38 [Reserved]

§ 1026.39 Mortgage transfer disclosures.

(a) *Scope.* The disclosure requirements of this section apply to any covered person except as otherwise provided in this section. For purposes of this section:

(1) A ''*covered person*'' means any person, as defined in § 1026.2(a)(22), that becomes the owner of an existing mortgage loan by acquiring legal title to the debt obligation, whether through a purchase, assignment or other transfer, and who acquires more than one mortgage loan in any twelve-month period. For purposes of this section, a servicer of a mortgage loan shall not be treated as the owner of the obligation if the servicer holds title to the loan, or title is assigned to the servicer, solely for the administrative convenience of the servicer in servicing the obligation.

(2) A ''*mortgage loan*'' means any consumer credit transaction that is secured by the principal dwelling of a consumer.

(b) *Disclosure required.* Except as provided in paragraph (c) of this section, each covered person is subject to the requirements of this section and shall mail or deliver the disclosures required by this section to the consumer on or before the 30th calendar day following the date of transfer.

(1) *Form of disclosures.* The disclosures required by this section shall be provided clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures required by this section may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

(2) *The date of transfer.* For purposes of this section, the date of transfer to the covered person may, at the covered person's option, be either the date of acquisition recognized in the books and records of the acquiring party, or the date of transfer recognized in the books and records of the transferring party.

(3) *Multiple consumers.* If more than one consumer is liable on the obligation, a covered person may mail or deliver the disclosures to any consumer who is primarily liable.

(4) *Multiple transfers.* If a mortgage loan is acquired by a covered person and subsequently sold, assigned, or otherwise transferred to another covered person, a single disclosure may be provided on behalf of both covered persons if the disclosure satisfies the timing and content requirements applicable to each covered person.

(5) *Multiple covered persons.* If an acquisition involves multiple covered persons who jointly acquire the loan, a single disclosure must be provided on behalf of all covered persons.

(c) *Exceptions.* Notwithstanding paragraph (b) of this section, a covered person is not subject to the requirements of this section with respect to a particular mortgage loan if:

(1) The covered person sells, or otherwise transfers or assigns legal title to the mortgage loan on or before the 30th calendar day following the date that the covered person acquired the mortgage loan which shall be the date of transfer recognized for purposes of paragraph (b)(2) of this section;

(2) The mortgage loan is transferred to the covered person in connection with a repurchase agreement that obligates the transferor to repurchase the loan. However, if the transferor does not repurchase the loan, the covered person must provide the disclosures required by this section within 30 days after the date that the transaction is recognized as an acquisition on its books and records; or

(3) The covered person acquires only a partial interest in the loan and the party authorized to receive the consumer's notice of the right to rescind and resolve issues concerning the consumer's payments on the loan does not change as a result of the transfer of the partial interest.

(d) *Content of required disclosures.* The disclosures required by this section shall identify the loan that was sold, assigned or otherwise transferred, and state the following:

(1) The name, address, and telephone number of the covered person.

(i) If a single disclosure is provided on behalf of more than one covered person, the information required by this paragraph shall be provided for each of them unless paragraph (d)(1)(ii) of this section applies.

(ii) If a single disclosure is provided on behalf of more than one covered person and one of them has been authorized in accordance with paragraph (d)(3) of this section to receive the consumer's notice of the right to rescind and resolve issues concerning the consumer's payments on the loan, the information required by paragraph (d)(1) of this section may be provided only for that covered person.

(2) The date of transfer.

(3) The name, address and telephone number of an agent or party authorized to receive notice of the right to rescind and resolve issues concerning the consumer's payments on the loan. However, no information is required to be provided under this paragraph if the consumer can use the information provided under paragraph (d)(1) of this section for these purposes.

(4) Where transfer of ownership of the debt to the covered person is or may be recorded in public records, or, alternatively, that the transfer of ownership has not been recorded in public records at the time the disclosure is provided.

(e) *Optional disclosures.* In addition to the information required to be disclosed under paragraph (d) of this section, a covered person may, at its option, provide any other information regarding the transaction.

§ 1026.40 Requirements for home equity plans.

The requirements of this section apply to open-end credit plans secured

by the consumer's dwelling. For purposes of this section, an annual percentage rate is the annual percentage rate corresponding to the periodic rate as determined under § 1026.14(b).

(a) *Form of disclosures.* (1) *General.* The disclosures required by paragraph (d) of this section shall be made clearly and conspicuously and shall be grouped together and segregated from all unrelated information. The disclosures may be provided on the application form or on a separate form. The disclosure described in paragraph (d)(4)(iii), the itemization of third-party fees described in paragraph (d)(8), and the variable-rate information described in paragraph (d)(12) of this section may be provided separately from the other required disclosures.

(2) *Precedence of certain disclosures.* The disclosures described in paragraph (d)(1) through (4)(ii) of this section shall precede the other required disclosures.

(3) For an application that is accessed by the consumer in electronic form, the disclosures required under this section may be provided to the consumer in electronic form on or with the application.

(b) *Time of disclosures.* The disclosures and brochure required by paragraphs (d) and (e) of this section shall be provided at the time an application is provided to the consumer. The disclosures and the brochure may be delivered or placed in the mail not later than three business days following receipt of a consumer's application in the case of applications contained in magazines or other publications, or when the application is received by telephone or through an intermediary agent or broker.

(c) *Duties of third parties.* Persons other than the creditor who provide applications to consumers for home equity plans must provide the brochure required under paragraph (e) of this section at the time an application is provided. If such persons have the disclosures required under paragraph (d) of this section for a creditor's home equity plan, they also shall provide the disclosures at such time. The disclosures and the brochure may be delivered or placed in the mail not later than three business days following receipt of a consumer's application in the case of applications contained in magazines or other publications, or when the application is received by telephone or through an intermediary agent or broker.

(d) *Content of disclosures.* The creditor shall provide the following disclosures, as applicable:

(1) *Retention of information.* A statement that the consumer should make or otherwise retain a copy of the disclosures.

(2) *Conditions for disclosed terms.* (i) A statement of the time by which the consumer must submit an application to obtain specific terms disclosed and an identification of any disclosed term that is subject to change prior to opening the plan.

(ii) A statement that, if a disclosed term changes (other than a change due to fluctuations in the index in a variable-rate plan) prior to opening the plan and the consumer therefore elects not to open the plan, the consumer may receive a refund of all fees paid in connection with the application.

(3) *Security interest and risk to home.* A statement that the creditor will acquire a security interest in the consumer's dwelling and that loss of the dwelling may occur in the event of default.

(4) *Possible actions by creditor.* (i) A statement that, under certain conditions, the creditor may terminate the plan and require payment of the outstanding balance in full in a single payment and impose fees upon termination; prohibit additional extensions of credit or reduce the credit limit; and, as specified in the initial agreement, implement certain changes in the plan.

(ii) A statement that the consumer may receive, upon request, information about the conditions under which such actions may occur.

(iii) In lieu of the disclosure required under paragraph (d)(4)(ii) of this section, a statement of such conditions.

(5) *Payment terms.* The payment terms of the plan. If different payment terms may apply to the draw and any repayment period, or if different payment terms may apply within either period, the disclosures shall reflect the different payment terms. The payment terms of the plan include:

(i) The length of the draw period and any repayment period.

(ii) An explanation of how the minimum periodic payment will be determined and the timing of the payments. If paying only the minimum periodic payments may not repay any of the principal or may repay less than the outstanding balance, a statement of this fact, as well as a statement that a balloon payment may result. A balloon payment results if paying the minimum periodic payments does not fully amortize the outstanding balance by a specified date or time, and the consumer must repay the entire outstanding balance at such time.

(iii) An example, based on a $10,000 outstanding balance and a recent annual percentage rate, showing the minimum periodic payment, any balloon payment, and the time it would take to repay the $10,000 outstanding balance if the consumer made only those payments and obtained no additional extensions of credit. For fixed-rate plans, a recent annual percentage rate is a rate that has been in effect under the plan within the twelve months preceding the date the disclosures are provided to the consumer. For variable-rate plans, a recent annual percentage rate is the most recent rate provided in the historical example described in paragraph (d)(12)(xi) of this section or a rate that has been in effect under the plan since the date of the most recent rate in the table.

(6) *Annual percentage rate.* For fixed-rate plans, a recent annual percentage rate imposed under the plan and a statement that the rate does not include costs other than interest. A recent annual percentage rate is a rate that has been in effect under the plan within the twelve months preceding the date the disclosures are provided to the consumer.

(7) *Fees imposed by creditor.* An itemization of any fees imposed by the creditor to open, use, or maintain the plan, stated as a dollar amount or percentage, and when such fees are payable.

(8) *Fees imposed by third parties to open a plan.* A good faith estimate, stated as a single dollar amount or range, of any fees that may be imposed by persons other than the creditor to open the plan, as well as a statement that the consumer may receive, upon request, a good faith itemization of such fees. In lieu of the statement, the itemization of such fees may be provided.

(9) *Negative amortization.* A statement that negative amortization may occur and that negative amortization increases the principal balance and reduces the consumer's equity in the dwelling.

(10) *Transaction requirements.* Any limitations on the number of extensions of credit and the amount of credit that may be obtained during any time period, as well as any minimum outstanding balance and minimum draw requirements, stated as dollar amounts or percentages.

(11) *Tax implications.* A statement that the consumer should consult a tax advisor regarding the deductibility of interest and charges under the plan.

(12) *Disclosures for variable-rate plans.* For a plan in which the annual percentage rate is variable, the following disclosures, as applicable:

(i) The fact that the annual percentage rate, payment, or term may change due to the variable-rate feature.

(ii) A statement that the annual percentage rate does not include costs other than interest.

(iii) The index used in making rate adjustments and a source of information about the index.

(iv) An explanation of how the annual percentage rate will be determined, including an explanation of how the index is adjusted, such as by the addition of a margin.

(v) A statement that the consumer should ask about the current index value, margin, discount or premium, and annual percentage rate.

(vi) A statement that the initial annual percentage rate is not based on the index and margin used to make later rate adjustments, and the period of time such initial rate will be in effect.

(vii) The frequency of changes in the annual percentage rate.

(viii) Any rules relating to changes in the index value and the annual percentage rate and resulting changes in the payment amount, including, for example, an explanation of payment limitations and rate carryover.

(ix) A statement of any annual or more frequent periodic limitations on changes in the annual percentage rate (or a statement that no annual limitation exists), as well as a statement of the maximum annual percentage rate that may be imposed under each payment option.

(x) The minimum periodic payment required when the maximum annual percentage rate for each payment option is in effect for a $10,000 outstanding balance, and a statement of the earliest date or time the maximum rate may be imposed.

(xi) An historical example, based on a $10,000 extension of credit, illustrating how annual percentage rates and payments would have been affected by index value changes implemented according to the terms of the plan. The historical example shall be based on the most recent 15 years of index values (selected for the same time period each year) and shall reflect all significant plan terms, such as negative amortization, rate carryover, rate discounts, and rate and payment limitations, that would have been affected by the index movement during the period.

(xii) A statement that rate information will be provided on or with each periodic statement.

(e) *Brochure.* The home equity brochure entitled ''What You Should Know About Home Equity Lines of Credit'' or a suitable substitute shall be provided.

(f) *Limitations on home equity plans.* No creditor may, by contract or otherwise:

(1) Change the annual percentage rate unless:

(i) Such change is based on an index that is not under the creditor's control; and

(ii) Such index is available to the general public.

(2) Terminate a plan and demand repayment of the entire outstanding balance in advance of the original term (except for reverse mortgage transactions that are subject to paragraph (f)(4) of this section) unless:

(i) There is fraud or material misrepresentation by the consumer in connection with the plan;

(ii) The consumer fails to meet the repayment terms of the agreement for any outstanding balance;

(iii) Any action or inaction by the consumer adversely affects the creditor's security for the plan, or any right of the creditor in such security; or

(iv) Federal law dealing with credit extended by a depository institution to its executive officers specifically requires that as a condition of the plan the credit shall become due and payable on demand, provided that the creditor includes such a provision in the initial agreement.

(3) Change any term, except that a creditor may:

(i) Provide in the initial agreement that it may prohibit additional extensions of credit or reduce the credit limit during any period in which the maximum annual percentage rate is reached. A creditor also may provide in the initial agreement that specified changes will occur if a specified event takes place (for example, that the annual percentage rate will increase a specified amount if the consumer leaves the creditor's employment).

(ii) Change the index and margin used under the plan if the original index is no longer available, the new index has an historical movement substantially similar to that of the original index, and the new index and margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the original index became unavailable.

(iii) Make a specified change if the consumer specifically agrees to it in writing at that time.

(iv) Make a change that will unequivocally benefit the consumer throughout the remainder of the plan.

(v) Make an insignificant change to terms.

(vi) Prohibit additional extensions of credit or reduce the credit limit applicable to an agreement during any period in which:

(A) The value of the dwelling that secures the plan declines significantly below the dwelling's appraised value for purposes of the plan;

(B) The creditor reasonably believes that the consumer will be unable to fulfill the repayment obligations under the plan because of a material change in the consumer's financial circumstances;

(C) The consumer is in default of any material obligation under the agreement;

(D) The creditor is precluded by government action from imposing the annual percentage rate provided for in the agreement;

(E) The priority of the creditor's security interest is adversely affected by government action to the extent that the value of the security interest is less than 120 percent of the credit line; or

(F) The creditor is notified by its regulatory agency that continued advances constitute an unsafe and unsound practice.

(4) For reverse mortgage transactions that are subject to § 1026.33, terminate a plan and demand repayment of the entire outstanding balance in advance of the original term except:

(i) In the case of default;

(ii) If the consumer transfers title to the property securing the note;

(iii) If the consumer ceases using the property securing the note as the primary dwelling; or

(iv) Upon the consumer's death.

(g) *Refund of fees.* A creditor shall refund all fees paid by the consumer to anyone in connection with an application if any term required to be disclosed under paragraph (d) of this section changes (other than a change due to fluctuations in the index in a variable-rate plan) before the plan is opened and, as a result, the consumer elects not to open the plan.

(h) *Imposition of nonrefundable fees.* Neither a creditor nor any other person may impose a nonrefundable fee in connection with an application until three business days after the consumer receives the disclosures and brochure required under this section. If the disclosures and brochure are mailed to the consumer, the consumer is considered to have received them three business days after they are mailed.

§ 1026.41 [Reserved]

§ 1026.42 Valuation independence.

(a) *Scope.* This section applies to any consumer credit transaction secured by the consumer's principal dwelling.

(b) *Definitions.* For purposes of this section:

(1) ''Covered person'' means a creditor with respect to a covered transaction or

a person that provides ''settlement services,'' as defined in 12 U.S.C. 2602(3) and implementing regulations, in connection with a covered transaction.

(2) ''Covered transaction'' means an extension of consumer credit that is or will be secured by the consumer's principal dwelling, as defined in § 1026.2(a)(19).

(3) ''Valuation'' means an estimate of the value of the consumer's principal dwelling in written or electronic form, other than one produced solely by an automated model or system.

(4) ''Valuation management functions'' means:

(i) Recruiting, selecting, or retaining a person to prepare a valuation;

(ii) Contracting with or employing a person to prepare a valuation;

(iii) Managing or overseeing the process of preparing a valuation, including by providing administrative services such as receiving orders for and receiving a valuation, submitting a completed valuation to creditors and underwriters, collecting fees from creditors and underwriters for services provided in connection with a valuation, and compensating a person that prepares valuations; or

(iv) Reviewing or verifying the work of a person that prepares valuations.

(c) *Valuation of consumer's principal dwelling.* (1) *Coercion.* In connection with a covered transaction, no covered person shall or shall attempt to directly or indirectly cause the value assigned to the consumer's principal dwelling to be based on any factor other than the independent judgment of a person that prepares valuations, through coercion, extortion, inducement, bribery, or intimidation of, compensation or instruction to, or collusion with a person that prepares valuations or performs valuation management functions.

(i) Examples of actions that violate paragraph (c)(1) include:

(A) Seeking to influence a person that prepares a valuation to report a minimum or maximum value for the consumer's principal dwelling;

(B) Withholding or threatening to withhold timely payment to a person that prepares a valuation or performs valuation management functions because the person does not value the consumer's principal dwelling at or above a certain amount;

(C) Implying to a person that prepares valuations that current or future retention of the person depends on the amount at which the person estimates the value of the consumer's principal dwelling;

(D) Excluding a person that prepares a valuation from consideration for future engagement because the person reports a value for the consumer's principal dwelling that does not meet or exceed a predetermined threshold; and

(E) Conditioning the compensation paid to a person that prepares a valuation on consummation of the covered transaction.

(2) *Mischaracterization of value.* (i) *Misrepresentation.* In connection with a covered transaction, no person that prepares valuations shall materially misrepresent the value of the consumer's principal dwelling in a valuation. A misrepresentation is material for purposes of this paragraph (c)(2)(i) if it is likely to significantly affect the value assigned to the consumer's principal dwelling. A *bona fide* error shall not be a misrepresentation.

(ii) *Falsification or alteration.* In connection with a covered transaction, no covered person shall falsify and no covered person other than a person that prepares valuations shall materially alter a valuation. An alteration is material for purposes of this paragraph (c)(2)(ii) if it is likely to significantly affect the value assigned to the consumer's principal dwelling.

(iii) *Inducement of mischaracterization.* In connection with a covered transaction, no covered person shall induce a person to violate paragraph (c)(2)(i) or (ii) of this section.

(3) *Permitted actions.* Examples of actions that do not violate paragraph (c)(1) or (c)(2) include:

(i) Asking a person that prepares a valuation to consider additional, appropriate property information, including information about comparable properties, to make or support a valuation;

(ii) Requesting that a person that prepares a valuation provide further detail, substantiation, or explanation for the person's conclusion about the value of the consumer's principal dwelling;

(iii) Asking a person that prepares a valuation to correct errors in the valuation;

(iv) Obtaining multiple valuations for the consumer's principal dwelling to select the most reliable valuation;

(v) Withholding compensation due to breach of contract or substandard performance of services; and

(vi) Taking action permitted or required by applicable Federal or state statute, regulation, or agency guidance.

(d) *Prohibition on conflicts of interest.* (1)(i) *In general.* No person preparing a valuation or performing valuation management functions for a covered transaction may have a direct or indirect interest, financial or otherwise, in the property or transaction for which the valuation is or will be performed.

(ii) *Employees and affiliates of creditors; providers of multiple settlement services.* In any covered transaction, no person violates paragraph (d)(1)(i) of this section based solely on the fact that the person:

(A) Is an employee or affiliate of the creditor; or

(B) Provides a settlement service in addition to preparing valuations or performing valuation management functions, or based solely on the fact that the person's affiliate performs another settlement service.

(2) *Employees and affiliates of creditors with assets of more than $250 million for both of the past two calendar years.* For any covered transaction in which the creditor had assets of more than $250 million as of December 31st for both of the past two calendar years, a person subject to paragraph (d)(1)(i) of this section who is employed by or affiliated with the creditor does not have a conflict of interest in violation of paragraph (d)(1)(i) of this section based on the person's employment or affiliate relationship with the creditor if:

(i) The compensation of the person preparing a valuation or performing valuation management functions is not based on the value arrived at in any valuation;

(ii) The person preparing a valuation or performing valuation management functions reports to a person who is not part of the creditor's loan production function, as defined in paragraph (d)(5)(i) of this section, and whose compensation is not based on the closing of the transaction to which the valuation relates; and

(iii) No employee, officer or director in the creditor's loan production function, as defined in paragraph (d)(5)(i) of this section, is directly or indirectly involved in selecting, retaining, recommending or influencing the selection of the person to prepare a valuation or perform valuation management functions, or to be included in or excluded from a list of approved persons who prepare valuations or perform valuation management functions.

(3) *Employees and affiliates of creditors with assets of $250 million or less for either of the past two calendar years.* For any covered transaction in which the creditor had assets of $250 million or less as of December 31st for either of the past two calendar years, a person subject to paragraph (d)(1)(i) of this section who is employed by or affiliated with the creditor does not have a conflict of interest in violation of

paragraph (d)(1)(i) of this section based on the person's employment or affiliate relationship with the creditor if:

(i) The compensation of the person preparing a valuation or performing valuation management functions is not based on the value arrived at in any valuation; and

(ii) The creditor requires that any employee, officer or director of the creditor who orders, performs, or reviews a valuation for a covered transaction abstain from participating in any decision to approve, not approve, or set the terms of that transaction.

(4) *Providers of multiple settlement services.* For any covered transaction, a person who prepares a valuation or performs valuation management functions in addition to performing another settlement service for the transaction, or whose affiliate performs another settlement service for the transaction, does not have a conflict of interest in violation of paragraph (d)(1)(i) of this section as a result of the person or the person's affiliate performing another settlement service for the transaction if:

(i) The creditor had assets of more than $250 million as of December 31st for both of the past two calendar years and the conditions in paragraph (d)(2)(i)-(iii) are met; or

(ii) The creditor had assets of $250 million or less as of December 31st for either of the past two calendar years and the conditions in paragraph (d)(3)(i)-(ii) are met.

(5) *Definitions.* For purposes of this paragraph (d), the following definitions apply:

(i) *Loan production function.* The term ''loan production function'' means an employee, officer, director, department, division, or other unit of a creditor with responsibility for generating covered transactions, approving covered transactions, or both.

(ii) *Settlement service.* The term ''settlement service'' has the same meaning as in the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq.*

(iii) *Affiliate.* The term ''affiliate'' has the same meaning as in Regulation Y of the Board of Governors of the Federal Reserve System, 12 CFR 225.2(a).

(e) *When extension of credit prohibited.* In connection with a covered transaction, a creditor that knows, at or before consummation, of a violation of paragraph (c) or (d) of this section in connection with a valuation shall not extend credit based on the valuation, unless the creditor documents that it has acted with reasonable diligence to determine that the valuation does not materially misstate or misrepresent the value of the consumer's principal dwelling. For purposes of this paragraph (e), a valuation materially misstates or misrepresents the value of the consumer's principal dwelling if the valuation contains a misstatement or misrepresentation that affects the credit decision or the terms on which credit is extended.

(f) *Customary and reasonable compensation.* (1) *Requirement to provide customary and reasonable compensation to fee appraisers.* In any covered transaction, the creditor and its agents shall compensate a fee appraiser for performing appraisal services at a rate that is customary and reasonable for comparable appraisal services performed in the geographic market of the property being appraised. For purposes of paragraph (f) of this section, ''agents'' of the creditor do not include any fee appraiser as defined in paragraph (f)(4)(i) of this section.

(2) *Presumption of compliance.* A creditor and its agents shall be presumed to comply with paragraph (f)(1) of this section if:

(i) The creditor or its agents compensate the fee appraiser in an amount that is reasonably related to recent rates paid for comparable appraisal services performed in the geographic market of the property being appraised. In determining this amount, a creditor or its agents shall review the factors below and make any adjustments to recent rates paid in the relevant geographic market necessary to ensure that the amount of compensation is reasonable:

(A) The type of property,

(B) The scope of work,

(C) The time in which the appraisal services are required to be performed,

(D) Fee appraiser qualifications,

(E) Fee appraiser experience and professional record, and

(F) Fee appraiser work quality; and

(ii) The creditor and its agents do not engage in any anticompetitive acts in violation of state or Federal law that affect the compensation paid to fee appraisers, including:

(A) Entering into any contracts or engaging in any conspiracies to restrain trade through methods such as price fixing or market allocation, as prohibited under section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, or any other relevant antitrust laws; or

(B) Engaging in any acts of monopolization such as restricting any person from entering the relevant geographic market or causing any person to leave the relevant geographic market, as prohibited under section 2 of the Sherman Antitrust Act, 15 U.S.C. 2, or any other relevant antitrust laws.

(3) *Alternative presumption of compliance.* A creditor and its agents shall be presumed to comply with paragraph (f)(1) of this section if the creditor or its agents determine the amount of compensation paid to the fee appraiser by relying on information about rates that:

(i) Is based on objective third-party information, including fee schedules, studies, and surveys prepared by independent third parties such as government agencies, academic institutions, and private research firms;

(ii) Is based on recent rates paid to a representative sample of providers of appraisal services in the geographic market of the property being appraised or the fee schedules of those providers; and

(iii) In the case of information based on fee schedules, studies, and surveys, such fee schedules, studies, or surveys, or the information derived therefrom, excludes compensation paid to fee appraisers for appraisals ordered by appraisal management companies, as defined in paragraph (f)(4)(iii) of this section.

(4) *Definitions.* For purposes of this paragraph (f), the following definitions apply:

(i) *Fee appraiser.* The term ''fee appraiser'' means:

(A) A natural person who is a state-licensed or state-certified appraiser and receives a fee for performing an appraisal, but who is not an employee of the person engaging the appraiser; or

(B) An organization that, in the ordinary course of business, employs state-licensed or state-certified appraisers to perform appraisals, receives a fee for performing appraisals, and is not subject to the requirements of section 1124 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3353).

(ii) *Appraisal services.* The term ''appraisal services'' means the services required to perform an appraisal, including defining the scope of work, inspecting the property, reviewing necessary and appropriate public and private data sources (for example, multiple listing services, tax assessment records and public land records), developing and rendering an opinion of value, and preparing and submitting the appraisal report.

(iii) *Appraisal management company.* The term ''appraisal management company'' means any person authorized to perform one or more of the following actions on behalf of the creditor:

(A) Recruit, select, and retain fee appraisers;

(B) Contract with fee appraisers to perform appraisal services;

(C) Manage the process of having an appraisal performed, including providing administrative services such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and underwriters, collecting fees from creditors and underwriters for services provided, and compensating fee appraisers for services performed; or

(D) Review and verify the work of fee appraisers.

(g) *Mandatory reporting.* (1) *Reporting required.* Any covered person that reasonably believes an appraiser has not complied with the Uniform Standards of Professional Appraisal Practice or ethical or professional requirements for appraisers under applicable state or Federal statutes or regulations shall refer the matter to the appropriate state agency if the failure to comply is material. For purposes of this paragraph (g)(1), a failure to comply is material if it is likely to significantly affect the value assigned to the consumer's principal dwelling.

(2) *Timing of reporting.* A covered person shall notify the appropriate state agency within a reasonable period of time after the person determines that there is a reasonable basis to believe that a failure to comply required to be reported under paragraph (g)(1) of this section has occurred.

(3) *Definition.* For purposes of this paragraph (g), ''state agency'' means ''state appraiser certifying and licensing agency'' under 12 U.S.C. 3350(1) and any implementing regulations. The appropriate state agency to which a covered person must refer a matter under paragraph (g)(1) of this section is the agency for the state in which the consumer's principal dwelling is located.

§§ 1026.43–1026.45 [Reserved]

Subpart F—Special Rules for Private Education Loans

§ 1026.46 Special disclosure requirements for private education loans.

(a) *Coverage.* The requirements of this subpart apply to private education loans as defined in § 1026.46(b)(5). A creditor may, at its option, comply with the requirements of this subpart for an extension of credit subject to §§ 1026.17 and 1026.18 that is extended to a consumer for expenses incurred after graduation from a law, medical, dental, veterinary, or other graduate school and related to relocation, study for a bar or other examination, participation in an internship or residency program, or similar purposes.

(1) *Relation to other subparts in this part.* Except as otherwise specifically provided, the requirements and limitations of this subpart are in addition to and not in lieu of those contained in other subparts of this Part.

(2) [Reserved]

(b) *Definitions.* For purposes of this subpart, the following definitions apply:

(1) *Covered educational institution* means:

(i) An educational institution that meets the definition of an institution of higher education, as defined in paragraph (b)(2) of this section, without regard to the institution's accreditation status; and

(ii) Includes an agent, officer, or employee of the institution of higher education. An agent means an institution-affiliated organization as defined by section 151 of the Higher Education Act of 1965 (20 U.S.C. 1019) or an officer or employee of an institution-affiliated organization.

(2) *Institution of higher education* has the same meaning as in sections 101 and 102 of the Higher Education Act of 1965 (20 U.S.C. 1001–1002) and the implementing regulations published by the U.S. Department of Education.

(3) *Postsecondary educational expenses* means any of the expenses that are listed as part of the cost of attendance, as defined under section 472 of the Higher Education Act of 1965 (20 U.S.C. 1087ll), of a student at a covered educational institution. These expenses include tuition and fees, books, supplies, miscellaneous personal expenses, room and board, and an allowance for any loan fee, origination fee, or insurance premium charged to a student or parent for a loan incurred to cover the cost of the student's attendance.

(4) *Preferred lender arrangement* has the same meaning as in section 151 of the Higher Education Act of 1965 (20 U.S.C. 1019).

(5) *Private education loan* means an extension of credit that:

(i) Is not made, insured, or guaranteed under Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*);

(ii) Is extended to a consumer expressly, in whole or in part, for postsecondary educational expenses, regardless of whether the loan is provided by the educational institution that the student attends;

(iii) Does not include open-end credit or any loan that is secured by real property or a dwelling; and

(iv) Does not include an extension of credit in which the covered educational institution is the creditor if:

(A) The term of the extension of credit is 90 days or less; or

(B) an interest rate will not be applied to the credit balance and the term of the extension of credit is one year or less, even if the credit is payable in more than four installments.

(c) *Form of disclosures.* (1) *Clear and conspicuous.* The disclosures required by this subpart shall be made clearly and conspicuously.

(2) *Transaction disclosures.* (i) The disclosures required under §§ 1026.47(b) and (c) shall be made in writing, in a form that the consumer may keep. The disclosures shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosures required under §§ 1026.47(b) and (c), which include the disclosures required under § 1026.18.

(ii) The disclosures may include an acknowledgement of receipt, the date of the transaction, and the consumer's name, address, and account number. The following disclosures may be made together with or separately from other required disclosures: the creditor's identity under § 1026.18(a), insurance or debt cancellation under § 1026.18(n), and certain security interest charges under § 1026.18(o).

(iii) The term ''finance charge'' and corresponding amount, when required to be disclosed under § 1026.18(d), and the interest rate required to be disclosed under §§ 1026.47(b)(1)(i) and (c)(1), shall be more conspicuous than any other disclosure, except the creditor's identity under § 1026.18(a).

(3) *Electronic disclosures.* The disclosures required under §§ 1026.47(b) and (c) may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). The disclosures required by § 1026.47(a) may be provided to the consumer in electronic form on or with an application or solicitation that is accessed by the consumer in electronic form without regard to the consumer consent or other provisions of the E-Sign Act. The form required to be received under § 1026.48(e) may be accepted by the creditor in electronic form as provided for in that section.

(d) *Timing of disclosures.* (1) *Application or solicitation disclosures.* (i) The disclosures required by § 1026.47(a) shall be provided on or with any application or solicitation. For purposes of this subpart, the term solicitation means an offer of credit that does not require the consumer to complete an application. A ''firm offer of credit'' as defined in section 603(l) of

the Fair Credit Reporting Act (15 U.S.C. 1681a(l)) is a solicitation for purposes of this section.

(ii) The creditor may, at its option, disclose orally the information in § 1026.47(a) in a telephone application or solicitation. Alternatively, if the creditor does not disclose orally the information in § 1026.47(a), the creditor must provide the disclosures or place them in the mail no later than three business days after the consumer has applied for the credit, except that, if the creditor either denies the consumer's application or provides or places in the mail the disclosures in § 1026.47(b) no later than three business days after the consumer requests the credit, the creditor need not also provide the § 1026.47(a) disclosures.

(iii) Notwithstanding paragraph (d)(1)(i) of this section, for a loan that the consumer may use for multiple purposes including, but not limited to, postsecondary educational expenses, the creditor need not provide the disclosures required by § 1026.47(a).

(2) *Approval disclosures.* The creditor shall provide the disclosures required by § 1026.47(b) before consummation on or with any notice of approval provided to the consumer. If the creditor mails notice of approval, the disclosures must be mailed with the notice. If the creditor communicates notice of approval by telephone, the creditor must mail the disclosures within three business days of providing the notice of approval. If the creditor communicates notice of approval electronically, the creditor may provide the disclosures in electronic form in accordance with § 1026.46(d)(3); otherwise the creditor must mail the disclosures within three business days of communicating the notice of approval. If the creditor communicates approval in person, the creditor must provide the disclosures to the consumer at that time.

(3) *Final disclosures.* The disclosures required by § 1026.47(c) shall be provided after the consumer accepts the loan in accordance with § 1026.48(c)(1).

(4) *Receipt of mailed disclosures.* If the disclosures under paragraphs (d)(1), (d)(2) or (d)(3) of this section are mailed to the consumer, the consumer is considered to have received them three business days after they are mailed.

(e) *Basis of disclosures and use of estimates.* (1) *Legal obligation.* Disclosures shall reflect the terms of the legal obligation between the parties.

(2) *Estimates.* If any information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure based on the best information reasonably available at the time the disclosure is provided, and shall state clearly that the disclosure is an estimate.

(f) *Multiple creditors; multiple consumers.* If a transaction involves more than one creditor, only one set of disclosures shall be given and the creditors shall agree among themselves which creditor will comply with the requirements that this part imposes on any or all of them. If there is more than one consumer, the disclosures may be made to any consumer who is primarily liable on the obligation.

(g) *Effect of subsequent events.* (1) *Approval disclosures.* If a disclosure under § 1026.47(b) becomes inaccurate because of an event that occurs after the creditor delivers the required disclosures, the inaccuracy is not a violation of Regulation Z (12 CFR part 1026), although new disclosures may be required under § 1026.48(c).

(2) *Final disclosures.* If a disclosure under § 1026.47(c) becomes inaccurate because of an event that occurs after the creditor delivers the required disclosures, the inaccuracy is not a violation of Regulation Z (12 CFR part 1026).

§ 1026.47 Content of disclosures.

(a) *Application or solicitation disclosures.* A creditor shall provide the disclosures required under paragraph (a) of this section on or with a solicitation or an application for a private education loan.

(1) *Interest Rates.* (i) The interest rate or range of interest rates applicable to the loan and actually offered by the creditor at the time of application or solicitation. If the rate will depend, in part, on a later determination of the consumer's creditworthiness or other factors, a statement that the rate for which the consumer may qualify will depend on the consumer's creditworthiness and other factors, if applicable.

(ii) Whether the interest rates applicable to the loan are fixed or variable.

(iii) If the interest rate may increase after consummation of the transaction, any limitations on the interest rate adjustments, or lack thereof; a statement that the consumer's actual rate could be higher or lower than the rates disclosed under paragraph (a)(1)(i) of this section, if applicable; and, if the limitation is determined by applicable law, that fact.

(iv) Whether the applicable interest rates typically will be higher if the loan is not co-signed or guaranteed.

(2) *Fees and default or late payment costs.* (i) An itemization of the fees or range of fees required to obtain the private education loan.

(ii) Any fees, changes to the interest rate, and adjustments to principal based on the consumer's defaults or late payments.

(3) *Repayment terms.* (i) The term of the loan, which is the period during which regularly scheduled payments of principal and interest will be due.

(ii) A description of any payment deferral options, or, if the consumer does not have the option to defer payments, that fact.

(iii) For each payment deferral option applicable while the student is enrolled at a covered educational institution:

(A) Whether interest will accrue during the deferral period; and

(B) If interest accrues, whether payment of interest may be deferred and added to the principal balance.

(iv) A statement that if the consumer files for bankruptcy, the consumer may still be required to pay back the loan.

(4) *Cost estimates.* An example of the total cost of the loan calculated as the total of payments over the term of the loan:

(i) Using the highest rate of interest disclosed under paragraph (a)(1) of this section and including all finance charges applicable to loans at that rate;

(ii) Using an amount financed of $10,000, or $5000 if the creditor only offers loans of this type for less than $10,000; and

(iii) Calculated for each payment option.

(5) *Eligibility.* Any age or school enrollment eligibility requirements relating to the consumer or cosigner.

(6) *Alternatives to private education loans.* (i) A statement that the consumer may qualify for Federal student financial assistance through a program under Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*).

(ii) The interest rates available under each program under Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*) and whether the rates are fixed or variable.

(iii) A statement that the consumer may obtain additional information concerning Federal student financial assistance from the institution of higher education that the student attends, or at the Web site of the U.S. Department of Education, including an appropriate Web site address.

(iv) A statement that a covered educational institution may have school-specific education loan benefits and terms not detailed on the disclosure form.

(7) *Rights of the consumer.* A statement that if the loan is approved, the terms of the loan will be available and will not change for 30 days except as a result of adjustments to the interest

rate and other changes permitted by law.

(8) *Self-certification information.* A statement that, before the loan may be consummated, the consumer must complete the self-certification form and that the form may be obtained from the institution of higher education that the student attends.

(b) *Approval disclosures.* On or with any notice of approval provided to the consumer, the creditor shall disclose the information required under § 1026.18 and the following information:

(1) *Interest rate.* (i) The interest rate applicable to the loan.

(ii) Whether the interest rate is fixed or variable.

(iii) If the interest rate may increase after consummation of the transaction, any limitations on the rate adjustments, or lack thereof.

(2) *Fees and default or late payment costs.* (i) An itemization of the fees or range of fees required to obtain the private education loan.

(ii) Any fees, changes to the interest rate, and adjustments to principal based on the consumer's defaults or late payments.

(3) *Repayment terms.* (i) The principal amount of the loan for which the consumer has been approved.

(ii) The term of the loan, which is the period during which regularly scheduled payments of principal and interest will be due.

(iii) A description of the payment deferral option chosen by the consumer, if applicable, and any other payment deferral options that the consumer may elect at a later time.

(iv) Any payments required while the student is enrolled at a covered educational institution, based on the deferral option chosen by the consumer.

(v) The amount of any unpaid interest that will accrue while the student is enrolled at a covered educational institution, based on the deferral option chosen by the consumer.

(vi) A statement that if the consumer files for bankruptcy, the consumer may still be required to pay back the loan.

(vii) An estimate of the total amount of payments calculated based on:

(A) The interest rate applicable to the loan. Compliance with § 1026.18(h) constitutes compliance with this requirement.

(B) The maximum possible rate of interest for the loan or, if a maximum rate cannot be determined, a rate of 25%.

(C) If a maximum rate cannot be determined, the estimate of the total amount for repayment must include a statement that there is no maximum rate and that the total amount for repayment disclosed under paragraph (b)(3)(vii)(B) of this section is an estimate and will be higher if the applicable interest rate increases.

(viii) The maximum monthly payment based on the maximum rate of interest for the loan or, if a maximum rate cannot be determined, a rate of 25%. If a maximum cannot be determined, a statement that there is no maximum rate and that the monthly payment amount disclosed is an estimate and will be higher if the applicable interest rate increases.

(4) *Alternatives to private education loans.* (i) A statement that the consumer may qualify for Federal student financial assistance through a program under Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*).

(ii) The interest rates available under each program under Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*), and whether the rates are fixed or variable.

(iii) A statement that the consumer may obtain additional information concerning Federal student financial assistance from the institution of higher education that the student attends, or at the Web site of the U.S. Department of Education, including an appropriate Web site address.

(5) *Rights of the consumer.* (i) A statement that the consumer may accept the terms of the loan until the acceptance period under § 1026.48(c)(1) has expired. The statement must include the specific date on which the acceptance period expires, based on the date upon which the consumer receives the disclosures required under this subsection for the loan. The disclosure must also specify the method or methods by which the consumer may communicate acceptance.

(ii) A statement that, except for changes to the interest rate and other changes permitted by law, the rates and terms of the loan may not be changed by the creditor during the period described in paragraph (b)(5)(i) of this section.

(c) *Final disclosures.* After the consumer has accepted the loan in accordance with § 1026.48(c)(1), the creditor shall disclose to the consumer the information required by § 1026.18 and the following information:

(1) *Interest rate.* Information required to be disclosed under § 1026.47(b)(1).

(2) *Fees and default or late payment costs.* Information required to be disclosed under § 1026.47(b)(2).

(3) *Repayment terms.* Information required to be disclosed under § 1026.47(b)(3).

(4) *Cancellation right.* A statement that:

(i) The consumer has the right to cancel the loan, without penalty, at any time before the cancellation period under § 1026.48(d) expires, and

(ii) Loan proceeds will not be disbursed until after the cancellation period under § 1026.48(d) expires. The statement must include the specific date on which the cancellation period expires and state that the consumer may cancel by that date. The statement must also specify the method or methods by which the consumer may cancel. If the creditor permits cancellation by mail, the statement must specify that the consumer's mailed request will be deemed timely if placed in the mail not later than the cancellation date specified on the disclosure. The disclosures required by this paragraph (c)(4) must be made more conspicuous than any other disclosure required under this section, except for the finance charge, the interest rate, and the creditor's identity, which must be disclosed in accordance with the requirements of § 1026.46(c)(2)(iii).

§ 1026.48 Limitations on private education loans.

(a) *Co-branding prohibited.* (1) Except as provided in paragraph (b) of this section, a creditor, other than the covered educational institution itself, shall not use the name, emblem, mascot, or logo of a covered educational institution, or other words, pictures, or symbols identified with a covered educational institution, in the marketing of private education loans in a way that implies that the covered education institution endorses the creditor's loans.

(2) A creditor's marketing of private education loans does not imply that the covered education institution endorses the creditor's loans if the marketing includes a clear and conspicuous disclosure that is equally prominent and closely proximate to the reference to the covered educational institution that the covered educational institution does not endorse the creditor's loans and that the creditor is not affiliated with the covered educational institution.

(b) *Endorsed lender arrangements.* If a creditor and a covered educational institution have entered into an arrangement where the covered educational institution agrees to endorse the creditor's private education loans, and such arrangement is not prohibited by other applicable law or regulation, paragraph (a)(1) of this section does not apply if the private education loan marketing includes a clear and conspicuous disclosure that is equally prominent and closely proximate to the reference to the covered educational institution that the creditor's loans are

not offered or made by the covered educational institution, but are made by the creditor.

(c) *Consumer's right to accept.* (1) The consumer has the right to accept the terms of a private education loan at any time within 30 calendar days following the date on which the consumer receives the disclosures required under § 1026.47(b).

(2) Except for changes permitted under paragraphs (c)(3) and (c)(4), the rate and terms of the private education loan that are required to be disclosed under §§ 1026.47(b) and (c) may not be changed by the creditor prior to the earlier of:

(i) The date of disbursement of the loan; or

(ii) The expiration of the 30 calendar day period described in paragraph (c)(1) of this section if the consumer has not accepted the loan within that time.

(3) *Exceptions not requiring re-disclosure.* (i) Notwithstanding paragraph (c)(2) of this section, nothing in this section prevents the creditor from:

(A) Withdrawing an offer before consummation of the transaction if the extension of credit would be prohibited by law or if the creditor has reason to believe that the consumer has committed fraud in connection with the loan application;

(B) Changing the interest rate based on adjustments to the index used for a loan;

(C) Changing the interest rate and terms if the change will unequivocally benefit the consumer; or

(D) Reducing the loan amount based upon a certification or other information received from the covered educational institution, or from the consumer, indicating that the student's cost of attendance has decreased or the consumer's other financial aid has increased. A creditor may make corresponding changes to the rate and other terms only to the extent that the consumer would have received the terms if the consumer had applied for the reduced loan amount.

(ii) If the creditor changes the rate or terms of the loan under this paragraph (c)(3), the creditor need not provide the disclosures required under § 1026.47(b) for the new loan terms, nor need the creditor provide an additional 30-day period to the consumer to accept the new terms of the loan under paragraph (c)(1) of this section.

(4) *Exceptions requiring re-disclosure.* (i) Notwithstanding paragraphs (c)(2) or (c)(3) of this section, nothing in this section prevents the creditor, at its option, from changing the rate or terms of the loan to accommodate a specific request by the consumer. For example, if the consumer requests a different repayment option, the creditor may, but need not, offer to provide the requested repayment option and make any other changes to the rate and terms.

(ii) If the creditor changes the rate or terms of the loan under this paragraph (c)(4), the creditor shall provide the disclosures required under § 1026.47(b) and shall provide the consumer the 30-day period to accept the loan under paragraph (c)(1) of this section. The creditor shall not make further changes to the rates and terms of the loan, except as specified in paragraphs (c)(3) and (4) of this section. Except as permitted under § 1026.48(c)(3), unless the consumer accepts the loan offered by the creditor in response to the consumer's request, the creditor may not withdraw or change the rates or terms of the loan for which the consumer was approved prior to the consumer's request for a change in loan terms.

(d) *Consumer's right to cancel.* The consumer may cancel a private education loan, without penalty, until midnight of the third business day following the date on which the consumer receives the disclosures required by § 1026.47(c). No funds may be disbursed for a private education loan until the three-business day period has expired.

(e) *Self-certification form.* For a private education loan intended to be used for the postsecondary educational expenses of a student while the student is attending an institution of higher education, the creditor shall obtain from the consumer or the institution of higher education the form developed by the Secretary of Education under section 155 of the Higher Education Act of 1965, signed by the consumer, in written or electronic form, before consummating the private education loan.

(f) *Provision of information by preferred lenders.* A creditor that has a preferred lender arrangement with a covered educational institution shall provide to the covered educational institution the information required under §§ 1026.47(a)(1) through (5), for each type of private education loan that the lender plans to offer to consumers for students attending the covered educational institution for the period beginning July 1 of the current year and ending June 30 of the following year. The creditor shall provide the information annually by the later of the 1st day of April, or within 30 days after entering into, or learning the creditor is a party to, a preferred lender arrangement.

Subpart G—Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

§ 1026.51 Ability to Pay.

(a) *General rule.* (1)(i) *Consideration of ability to pay.* A card issuer must not open a credit card account for a consumer under an open-end (not home-secured) consumer credit plan, or increase any credit limit applicable to such account, unless the card issuer considers the consumer's independent ability to make the required minimum periodic payments under the terms of the account based on the consumer's income or assets and current obligations.

(ii) *Reasonable policies and procedures.* Card issuers must establish and maintain reasonable written policies and procedures to consider a consumer's independent income or assets and current obligations. Reasonable policies and procedures to consider a consumer's independent ability to make the required payments include the consideration of at least one of the following: The ratio of debt obligations to income; the ratio of debt obligations to assets; or the income the consumer will have after paying debt obligations. It would be unreasonable for a card issuer to not review any information about a consumer's income, assets, or current obligations, or to issue a credit card to a consumer who does not have any independent income or assets.

(2) *Minimum periodic payments.* (i) *Reasonable method.* For purposes of paragraph (a)(1) of this section, a card issuer must use a reasonable method for estimating the minimum periodic payments the consumer would be required to pay under the terms of the account.

(ii) *Safe harbor.* A card issuer complies with paragraph (a)(2)(i) of this section if it estimates required minimum periodic payments using the following method:

(A) The card issuer assumes utilization, from the first day of the billing cycle, of the full credit line that the issuer is considering offering to the consumer; and

(B) The card issuer uses a minimum payment formula employed by the issuer for the product the issuer is considering offering to the consumer or, in the case of an existing account, the minimum payment formula that currently applies to that account, provided that:

(*1*) If the applicable minimum payment formula includes interest charges, the card issuer estimates those charges using an interest rate that the

issuer is considering offering to the consumer for purchases or, in the case of an existing account, the interest rate that currently applies to purchases; and

(*2*) If the applicable minimum payment formula includes mandatory fees, the card issuer must assume that such fees have been charged to the account.

(b) *Rules affecting young consumers.* (1) *Applications from young consumers.* A card issuer may not open a credit card account under an open-end (not home-secured) consumer credit plan for a consumer less than 21 years old, unless the consumer has submitted a written application and the card issuer has:

(i) Financial information indicating the consumer has an independent ability to make the required minimum periodic payments on the proposed extension of credit in connection with the account, consistent with paragraph (a) of this section; or

(ii)(A) A signed agreement of a cosigner, guarantor, or joint applicant who is at least 21 years old to be either secondarily liable for any debt on the account incurred by the consumer before the consumer has attained the age of 21 or jointly liable with the consumer for any debt on the account, and

(B) Financial information indicating such cosigner, guarantor, or joint applicant has the independent ability to make the required minimum periodic payments on such debts, consistent with paragraph (a) of this section.

(2) *Credit line increases for young consumers.* If a credit card account has been opened pursuant to paragraph (b)(1)(ii) of this section, no increase in the credit limit may be made on such account before the consumer attains the age of 21 unless the cosigner, guarantor, or joint accountholder who assumed liability at account opening agrees in writing to assume liability on the increase.

§ 1026.52 Limitations on fees.

(a) *Limitations prior to account opening and during first year after account opening.* (1) *General rule.* Except as provided in paragraph (a)(2) of this section, the total amount of fees a consumer is required to pay with respect to a credit card account under an open-end (not home-secured) consumer credit plan prior to account opening and during the first year after account opening must not exceed 25 percent of the credit limit in effect when the account is opened. For purposes of this paragraph, an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions.

(2) *Fees not subject to limitations.* Paragraph (a) of this section does not apply to:

(i) Late payment fees, over-the-limit fees, and returned-payment fees; or

(ii) Fees that the consumer is not required to pay with respect to the account.

(3) *Rule of construction.* Paragraph (a) of this section does not authorize the imposition or payment of fees or charges otherwise prohibited by law.

(b) *Limitations on penalty fees.* A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan unless the dollar amount of the fee is consistent with paragraphs (b)(1) and (b)(2) of this section.

(1) *General rule.* Except as provided in paragraph (b)(2) of this section, a card issuer may impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan if the dollar amount of the fee is consistent with either paragraph (b)(1)(i) or (b)(1)(ii) of this section.

(i) *Fees based on costs.* A card issuer may impose a fee for violating the terms or other requirements of an account if the card issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation. A card issuer must reevaluate this determination at least once every twelve months. If as a result of the reevaluation the card issuer determines that a lower fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation, the card issuer must begin imposing the lower fee within 45 days after completing the reevaluation. If as a result of the reevaluation the card issuer determines that a higher fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation, the card issuer may begin imposing the higher fee after complying with the notice requirements in § 1026.9.

(ii) *Safe harbors.* A card issuer may impose a fee for violating the terms or other requirements of an account if the dollar amount of the fee does not exceed, as applicable:

(A) $25.00;

(B) $35.00 if the card issuer previously imposed a fee pursuant to paragraph (b)(1)(ii)(A) of this section for a violation of the same type that occurred during the same billing cycle or one of the next six billing cycles; or

(C) Three percent of the delinquent balance on a charge card account that requires payment of outstanding balances in full at the end of each billing cycle if the card issuer has not received the required payment for two or more consecutive billing cycles.

(D) The amounts in paragraphs (b)(1)(ii)(A) and (b)(1)(ii)(B) of this section will be adjusted annually by the Bureau to reflect changes in the Consumer Price Index.

(2) *Prohibited fees.* (i) *Fees that exceed dollar amount associated with violation.* (A) *Generally.* A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan that exceeds the dollar amount associated with the violation.

(B) *No dollar amount associated with violation.* A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan when there is no dollar amount associated with the violation. For purposes of paragraph (b)(2)(i) of this section, there is no dollar amount associated with the following violations:

(*1*) Transactions that the card issuer declines to authorize;

(*2*) Account inactivity; and

(*3*) The closure or termination of an account.

(ii) *Multiple fees based on a single event or transaction.* A card issuer must not impose more than one fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan based on a single event or transaction. A card issuer may, at its option, comply with this prohibition by imposing no more than one fee for violating the terms or other requirements of an account during a billing cycle.

§ 1026.53 Allocation of payments.

(a) *General rule.* Except as provided in paragraph (b) of this section, when a consumer makes a payment in excess of the required minimum periodic payment for a credit card account under an open-end (not home-secured) consumer credit plan, the card issuer must allocate the excess amount first to the balance with the highest annual percentage rate and any remaining portion to the other balances in descending order based on the applicable annual percentage rate.

(b) *Special rules.* (1) *Accounts with balances subject to deferred interest or similar program.* When a balance on a credit card account under an open-end

(not home-secured) consumer credit plan is subject to a deferred interest or similar program that provides that a consumer will not be obligated to pay interest that accrues on the balance if the balance is paid in full prior to the expiration of a specified period of time:

(i) *Last two billing cycles.* The card issuer must allocate any amount paid by the consumer in excess of the required minimum periodic payment consistent with paragraph (a) of this section, except that, during the two billing cycles immediately preceding expiration of the specified period, the excess amount must be allocated first to the balance subject to the deferred interest or similar program and any remaining portion allocated to any other balances consistent with paragraph (a) of this section; or

(ii) *Consumer request.* The card issuer may at its option allocate any amount paid by the consumer in excess of the required minimum periodic payment among the balances on the account in the manner requested by the consumer.

(2) *Accounts with secured balances.* When a balance on a credit card account under an open-end (not home-secured) consumer credit plan is secured, the card issuer may at its option allocate any amount paid by the consumer in excess of the required minimum periodic payment to that balance if requested by the consumer.

§ 1026.54 Limitations on the imposition of finance charges.

(a) *Limitations on imposing finance charges as a result of the loss of a grace period.* (1) *General rule.* Except as provided in paragraph (b) of this section, a card issuer must not impose finance charges as a result of the loss of a grace period on a credit card account under an open-end (not home-secured) consumer credit plan if those finance charges are based on:

(i) Balances for days in billing cycles that precede the most recent billing cycle; or

(ii) Any portion of a balance subject to a grace period that was repaid prior to the expiration of the grace period.

(2) *Definition of grace period.* For purposes of paragraph (a)(1) of this section, ''grace period'' has the same meaning as in § 1026.5(b)(2)(ii)(B)(*3*).

(b) *Exceptions.* Paragraph (a) of this section does not apply to:

(1) Adjustments to finance charges as a result of the resolution of a dispute under § 1026.12 or § 1026.13; or

(2) Adjustments to finance charges as a result of the return of a payment.

§ 1026.55 Limitations on increasing annual percentage rates, fees, and charges.

(a) *General rule.* Except as provided in paragraph (b) of this section, a card issuer must not increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on a credit card account under an open-end (not home-secured) consumer credit plan.

(b) *Exceptions.* A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to an exception set forth in this paragraph even if that increase would not be permitted under a different exception.

(1) *Temporary rate, fee, or charge exception.* A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) upon the expiration of a specified period of six months or longer, provided that:

(i) Prior to the commencement of that period, the card issuer disclosed in writing to the consumer, in a clear and conspicuous manner, the length of the period and the annual percentage rate, fee, or charge that would apply after expiration of the period; and

(ii) Upon expiration of the specified period:

(A) The card issuer must not apply an annual percentage rate, fee, or charge to transactions that occurred prior to the period that exceeds the annual percentage rate, fee, or charge that applied to those transactions prior to the period;

(B) If the disclosures required by paragraph (b)(1)(i) of this section are provided pursuant to § 1026.9(c), the card issuer must not apply an annual percentage rate, fee, or charge to transactions that occurred within 14 days after provision of the notice that exceeds the annual percentage rate, fee, or charge that applied to that category of transactions prior to provision of the notice; and

(C) The card issuer must not apply an annual percentage rate, fee, or charge to transactions that occurred during the period that exceeds the increased annual percentage rate, fee, or charge disclosed pursuant to paragraph (b)(1)(i) of this section.

(2) *Variable rate exception.* A card issuer may increase an annual percentage rate when:

(i) The annual percentage rate varies according to an index that is not under the card issuer's control and is available to the general public; and

(ii) The increase in the annual percentage rate is due to an increase in the index.

(3) *Advance notice exception.* A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) after complying with the applicable notice requirements in § 1026.9(b), (c), or (g), provided that:

(i) If a card issuer discloses an increased annual percentage rate, fee, or charge pursuant to § 1026.9(b), the card issuer must not apply that rate, fee, or charge to transactions that occurred prior to provision of the notice;

(ii) If a card issuer discloses an increased annual percentage rate, fee, or charge pursuant to § 1026.9(c) or (g), the card issuer must not apply that rate, fee, or charge to transactions that occurred prior to or within 14 days after provision of the notice; and

(iii) This exception does not permit a card issuer to increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (iii), or (xii) during the first year after the account is opened, while the account is closed, or while the card issuer does not permit the consumer to use the account for new transactions. For purposes of this paragraph, an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions.

(4) *Delinquency exception.* A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) due to the card issuer not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment, provided that:

(i) The card issuer must disclose in a clear and conspicuous manner in the notice of the increase pursuant to § 1026.9(c) or (g):

(A) A statement of the reason for the increase; and

(B) That the increased annual percentage rate, fee, or charge will cease to apply if the card issuer receives six consecutive required minimum periodic payments on or before the payment due date beginning with the first payment due following the effective date of the increase; and

(ii) If the card issuer receives six consecutive required minimum periodic payments on or before the payment due date beginning with the first payment due following the effective date of the increase, the card issuer must reduce any annual percentage rate, fee, or charge increased pursuant to this

exception to the annual percentage rate, fee, or charge that applied prior to the increase with respect to transactions that occurred prior to or within 14 days after provision of the § 1026.9(c) or (g) notice.

(5) *Workout and temporary hardship arrangement exception.* A card issuer may increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) due to the consumer's completion of a workout or temporary hardship arrangement or the consumer's failure to comply with the terms of such an arrangement, provided that:

(i) Prior to commencement of the arrangement (except as provided in § 1026.9(c)(2)(v)(D)), the card issuer has provided the consumer with a clear and conspicuous written disclosure of the terms of the arrangement (including any increases due to the completion or failure of the arrangement); and

(ii) Upon the completion or failure of the arrangement, the card issuer must not apply to any transactions that occurred prior to commencement of the arrangement an annual percentage rate, fee, or charge that exceeds the annual percentage rate, fee, or charge that applied to those transactions prior to commencement of the arrangement.

(6) *Servicemembers Civil Relief Act exception.* If an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (iii), or (xii) has been decreased pursuant to 50 U.S.C. app. 527 or a similar Federal or state statute or regulation, a card issuer may increase that annual percentage rate, fee, or charge once 50 U.S.C. app. 527 or the similar statute or regulation no longer applies, provided that the card issuer must not apply to any transactions that occurred prior to the decrease an annual percentage rate, fee, or charge that exceeds the annual percentage rate, fee, or charge that applied to those transactions prior to the decrease.

(c) *Treatment of protected balances.* (1) *Definition of protected balance.* For purposes of this paragraph, ''protected balance'' means the amount owed for a category of transactions to which an increased annual percentage rate or an increased fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) cannot be applied after the annual percentage rate, fee, or charge for that category of transactions has been increased pursuant to paragraph (b)(3) of this section.

(2) *Repayment of protected balance.* The card issuer must not require repayment of the protected balance using a method that is less beneficial to the consumer than one of the following methods:

(i) The method of repayment for the account before the effective date of the increase;

(ii) An amortization period of not less than five years, beginning no earlier than the effective date of the increase; or

(iii) A required minimum periodic payment that includes a percentage of the balance that is equal to no more than twice the percentage required before the effective date of the increase.

(d) *Continuing application.* This section continues to apply to a balance on a credit card account under an open-end (not home-secured) consumer credit plan after:

(1) The account is closed or acquired by another creditor; or

(2) The balance is transferred from a credit card account under an open-end (not home-secured) consumer credit plan issued by a creditor to another credit account issued by the same creditor or its affiliate or subsidiary (unless the account to which the balance is transferred is subject to § 1026.40).

(e) *Promotional waivers or rebates of interest, fees, and other charges.* If a card issuer promotes the waiver or rebate of finance charges due to a periodic interest rate or fees or charges required to be disclosed under § 1026.6(b)(2)(ii), (iii), or (xii) and applies the waiver or rebate to a credit card account under an open-end (not home-secured) consumer credit plan, any cessation of the waiver or rebate on that account constitutes an increase in an annual percentage rate, fee, or charge for purposes of this section.

§ 1026.56 Requirements for over-the-limit transactions.

(a) *Definition.* For purposes of this section, the term ''over-the-limit transaction'' means any extension of credit by a card issuer to complete a transaction that causes a consumer's credit card account balance to exceed the credit limit.

(b) *Opt-in requirement.* (1) *General.* A card issuer shall not assess a fee or charge on a consumer's credit card account under an open-end (not home-secured) consumer credit plan for an over-the-limit transaction unless the card issuer:

(i) Provides the consumer with an oral, written or electronic notice, segregated from all other information, describing the consumer's right to affirmatively consent, or opt in, to the card issuer's payment of an over-the-limit transaction;

(ii) Provides a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the card issuer's payment of over-the-limit transactions;

(iii) Obtains the consumer's affirmative consent, or opt-in, to the card issuer's payment of such transactions;

(iv) Provides the consumer with confirmation of the consumer's consent in writing, or if the consumer agrees, electronically; and

(v) Provides the consumer notice in writing of the right to revoke that consent following the assessment of an over-the-limit fee or charge.

(2) *Completion of over-the-limit transactions without consumer consent.* Notwithstanding the absence of a consumer's affirmative consent under paragraph (b)(1)(iii) of this section, a card issuer may pay any over-the-limit transaction on a consumer's account provided that the card issuer does not impose any fee or charge on the account for paying that over-the-limit transaction.

(c) *Method of election.* A card issuer may permit a consumer to consent to the card issuer's payment of any over-the-limit transaction in writing, orally, or electronically, at the card issuer's option. The card issuer must also permit the consumer to revoke his or her consent using the same methods available to the consumer for providing consent.

(d) *Timing and placement of notices.* (1) *Initial notice.* (i) *General.* The notice required by paragraph (b)(1)(i) of this section shall be provided prior to the assessment of any over-the-limit fee or charge on a consumer's account.

(ii) *Oral or electronic consent.* If a consumer consents to the card issuer's payment of any over-the-limit transaction by oral or electronic means, the card issuer must provide the notice required by paragraph (b)(1)(i) of this section immediately prior to obtaining that consent.

(2) *Confirmation of opt-in.* The notice required by paragraph (b)(1)(iv) of this section may be provided no later than the first periodic statement sent after the consumer has consented to the card issuer's payment of over-the-limit transactions.

(3) *Notice of right of revocation.* The notice required by paragraph (b)(1)(v) of this section shall be provided on the front of any page of each periodic statement that reflects the assessment of an over-the-limit fee or charge on a consumer's account.

(e) *Content.* (1) *Initial notice.* The notice required by paragraph (b)(1)(i) of this section shall include all applicable items in this paragraph (e)(1) and may

not contain any information not specified in or otherwise permitted by this paragraph.

(i) *Fees.* The dollar amount of any fees or charges assessed by the card issuer on a consumer's account for an over-the-limit transaction;

(ii) *APRs.* Any increased periodic rate(s) (expressed as an annual percentage rate(s)) that may be imposed on the account as a result of an over-the-limit transaction; and

(iii) *Disclosure of opt-in right.* An explanation of the consumer's right to affirmatively consent to the card issuer's payment of over-the-limit transactions, including the method(s) by which the consumer may consent.

(2) *Subsequent notice.* The notice required by paragraph (b)(1)(v) of this section shall describe the consumer's right to revoke any consent provided under paragraph (b)(1)(iii) of this section, including the method(s) by which the consumer may revoke.

(3) *Safe harbor.* Use of Model Forms G–25(A) or G–25(B) of Appendix G to this part, or substantially similar notices, constitutes compliance with the notice content requirements of paragraph (e) of this section.

(f) *Joint relationships.* If two or more consumers are jointly liable on a credit card account under an open-end (not home-secured) consumer credit plan, the card issuer shall treat the affirmative consent of any of the joint consumers as affirmative consent for that account. Similarly, the card issuer shall treat a revocation of consent by any of the joint consumers as revocation of consent for that account.

(g) *Continuing right to opt in or revoke opt-in.* A consumer may affirmatively consent to the card issuer's payment of over-the-limit transactions at any time in the manner described in the notice required by paragraph (b)(1)(i) of this section. Similarly, the consumer may revoke the consent at any time in the manner described in the notice required by paragraph (b)(1)(v) of this section.

(h) *Duration of opt-in.* A consumer's affirmative consent to the card issuer's payment of over-the-limit transactions is effective until revoked by the consumer, or until the card issuer decides for any reason to cease paying over-the-limit transactions for the consumer.

(i) *Time to comply with revocation request.* A card issuer must comply with a consumer's revocation request as soon as reasonably practicable after the card issuer receives it.

(j) *Prohibited practices.* Notwithstanding a consumer's affirmative consent to a card issuer's payment of over-the-limit transactions, a card issuer is prohibited from engaging in the following practices:

(1) *Fees or charges imposed per cycle.* (i) *General rule.* A card issuer may not impose more than one over-the-limit fee or charge on a consumer's credit card account per billing cycle, and, in any event, only if the credit limit was exceeded during the billing cycle. In addition, except as provided in paragraph (j)(1)(ii) of this section, a card issuer may not impose an over-the-limit fee or charge on the consumer's credit card account for more than three billing cycles for the same over-the-limit transaction where the consumer has not reduced the account balance below the credit limit by the payment due date for either of the last two billing cycles.

(ii) *Exception.* The prohibition in paragraph (j)(1)(i) of this section on imposing an over-the-limit fee or charge in more than three billing cycles for the same over-the-limit transaction(s) does not apply if another over-the-limit transaction occurs during either of the last two billing cycles.

(2) *Failure to promptly replenish.* A card issuer may not impose an over-the-limit fee or charge solely because of the card issuer's failure to promptly replenish the consumer's available credit following the crediting of the consumer's payment under § 1026.10.

(3) *Conditioning.* A card issuer may not condition the amount of a consumer's credit limit on the consumer affirmatively consenting to the card issuer's payment of over-the-limit transactions if the card issuer assesses a fee or charge for such service.

(4) *Over-the-limit fees attributed to fees or interest.* A card issuer may not impose an over-the-limit fee or charge for a billing cycle if a consumer exceeds a credit limit solely because of fees or interest charged by the card issuer to the consumer's account during that billing cycle. For purposes of this paragraph (j)(4), the relevant fees or interest charges are charges imposed as part of the plan under § 1026.6(b)(3).

§ 1026.57 Reporting and marketing rules for college student open-end credit.

(a) *Definitions.* (1) *College student credit card.* The term ''college student credit card'' as used in this section means a credit card issued under a credit card account under an open-end (not home-secured) consumer credit plan to any college student.

(2) *College student.* The term ''college student'' as used in this section means a consumer who is a full-time or part-time student of an institution of higher education.

(3) *Institution of higher education.* The term ''institution of higher education'' as used in this section has the same meaning as in sections 101 and 102 of the Higher Education Act of 1965 (20 U.S.C. 1001 and 1002).

(4) *Affiliated organization.* The term ''affiliated organization'' as used in this section means an alumni organization or foundation affiliated with or related to an institution of higher education.

(5) *College credit card agreement.* The term ''college credit card agreement'' as used in this section means any business, marketing or promotional agreement between a card issuer and an institution of higher education or an affiliated organization in connection with which college student credit cards are issued to college students currently enrolled at that institution.

(b) *Public disclosure of agreements.* An institution of higher education shall publicly disclose any contract or other agreement made with a card issuer or creditor for the purpose of marketing a credit card.

(c) *Prohibited inducements.* No card issuer or creditor may offer a college student any tangible item to induce such student to apply for or open an open-end consumer credit plan offered by such card issuer or creditor, if such offer is made:

(1) On the campus of an institution of higher education;

(2) Near the campus of an institution of higher education; or

(3) At an event sponsored by or related to an institution of higher education.

(d) *Annual report to the Bureau.* (1) *Requirement to report.* Any card issuer that was a party to one or more college credit card agreements in effect at any time during a calendar year must submit to the Bureau an annual report regarding those agreements in the form and manner prescribed by the Bureau.

(2) *Contents of report.* The annual report to the Bureau must include the following:

(i) Identifying information about the card issuer and the agreements submitted, including the issuer's name, address, and identifying number (such as an RSSD ID number or tax identification number);

(ii) A copy of any college credit card agreement to which the card issuer was a party that was in effect at any time during the period covered by the report;

(iii) A copy of any memorandum of understanding in effect at any time during the period covered by the report between the card issuer and an institution of higher education or affiliated organization that directly or indirectly relates to the college credit card agreement or that controls or

directs any obligations or distribution of benefits between any such entities;

(iv) The total dollar amount of any payments pursuant to a college credit card agreement from the card issuer to an institution of higher education or affiliated organization during the period covered by the report, and the method or formula used to determine such amounts;

(v) The total number of credit card accounts opened pursuant to any college credit card agreement during the period covered by the report; and

(vi) The total number of credit card accounts opened pursuant to any such agreement that were open at the end of the period covered by the report.

(3) *Timing of reports.* Except for the initial report described in this paragraph (d)(3), a card issuer must submit its annual report for each calendar year to the Bureau by the first business day on or after March 31 of the following calendar year.

§ 1026.58 Internet posting of credit card agreements.

(a) *Applicability.* The requirements of this section apply to any card issuer that issues credit cards under a credit card account under an open-end (not home-secured) consumer credit plan.

(b) *Definitions.* (1) *Agreement.* For purposes of this section, ''agreement'' or ''credit card agreement'' means the written document or documents evidencing the terms of the legal obligation, or the prospective legal obligation, between a card issuer and a consumer for a credit card account under an open-end (not home-secured) consumer credit plan. ''Agreement'' or ''credit card agreement'' also includes the pricing information, as defined in § 1026.58(b)(7).

(2) *Amends.* For purposes of this section, an issuer ''amends'' an agreement if it makes a substantive change (an ''amendment'') to the agreement. A change is substantive if it alters the rights or obligations of the card issuer or the consumer under the agreement. Any change in the pricing information, as defined in § 1026.58(b)(7), is deemed to be substantive.

(3) *Business day.* For purposes of this section, ''business day'' means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions.

(4) *Card issuer.* For purposes of this section, ''card issuer'' or ''issuer'' means the entity to which a consumer is legally obligated, or would be legally obligated, under the terms of a credit card agreement.

(5) *Offers.* For purposes of this section, an issuer ''offers'' or ''offers to the public'' an agreement if the issuer is soliciting or accepting applications for accounts that would be subject to that agreement.

(6) *Open account.* For purposes of this section, an account is an ''open account'' or ''open credit card account'' if it is a credit card account under an open-end (not home-secured) consumer credit plan and either:

(i) The cardholder can obtain extensions of credit on the account; or

(ii) There is an outstanding balance on the account that has not been charged off. An account that has been suspended temporarily (for example, due to a report by the cardholder of unauthorized use of the card) is considered an ''open account'' or ''open credit card account.''

(7) *Pricing information.* For purposes of this section, ''pricing information'' means the information listed in § 1026.6(b)(2)(i) through (b)(2)(xii). Pricing information does not include temporary or promotional rates and terms or rates and terms that apply only to protected balances.

(8) *Private label credit card account and private label credit card plan.* For purposes of this section:

(i) ''private label credit card account'' means a credit card account under an open-end (not home-secured) consumer credit plan with a credit card that can be used to make purchases only at a single merchant or an affiliated group of merchants; and

(ii) ''private label credit card plan'' means all of the private label credit card accounts issued by a particular issuer with credit cards usable at the same single merchant or affiliated group of merchants.

(c) *Submission of agreements to Bureau.* (1) *Quarterly submissions.* A card issuer must make quarterly submissions to the Bureau, in the form and manner specified by the Bureau. Quarterly submissions must be sent to the Bureau no later than the first business day on or after January 31, April 30, July 31, and October 31 of each year. Each submission must contain:

(i) Identifying information about the card issuer and the agreements submitted, including the issuer's name, address, and identifying number (such as an RSSD ID number or tax identification number);

(ii) The credit card agreements that the card issuer offered to the public as of the last business day of the preceding calendar quarter that the card issuer has not previously submitted to the Bureau;

(iii) Any credit card agreement previously submitted to the Bureau that was amended during the preceding calendar quarter and that the card issuer offered to the public as of the last business day of the preceding calendar quarter, as described in § 1026.58(c)(3); and

(iv) Notification regarding any credit card agreement previously submitted to the Bureau that the issuer is withdrawing, as described in § 1026.58(c)(4), (c)(5), (c)(6), and (c)(7).

(2) [Reserved]

(3) *Amended agreements.* If a credit card agreement has been submitted to the Bureau, the agreement has not been amended and the card issuer continues to offer the agreement to the public, no additional submission regarding that agreement is required. If a credit card agreement that previously has been submitted to the Bureau is amended and the card issuer offered the amended agreement to the public as of the last business day of the calendar quarter in which the change became effective, the card issuer must submit the entire amended agreement to the Bureau, in the form and manner specified by the Bureau, by the first quarterly submission deadline after the last day of the calendar quarter in which the change became effective.

(4) *Withdrawal of agreements.* If a card issuer no longer offers to the public a credit card agreement that previously has been submitted to the Bureau, the card issuer must notify the Bureau, in the form and manner specified by the Bureau, by the first quarterly submission deadline after the last day of the calendar quarter in which the issuer ceased to offer the agreement.

(5) *De minimis exception.* (i) A card issuer is not required to submit any credit card agreements to the Bureau if the card issuer had fewer than 10,000 open credit card accounts as of the last business day of the calendar quarter.

(ii) If an issuer that previously qualified for the de minimis exception ceases to qualify, the card issuer must begin making quarterly submissions to the Bureau no later than the first quarterly submission deadline after the date as of which the issuer ceased to qualify.

(iii) If a card issuer that did not previously qualify for the de minimis exception qualifies for the de minimis exception, the card issuer must continue to make quarterly submissions to the Bureau until the issuer notifies the Bureau that the card issuer is withdrawing all agreements it previously submitted to the Bureau.

(6) *Private label credit card exception.* (i) A card issuer is not required to

submit to the Bureau a credit card agreement if, as of the last business day of the calendar quarter, the agreement:

(A) Is offered for accounts under one or more private label credit card plans each of which has fewer than 10,000 open accounts; and

(B) Is not offered to the public other than for accounts under such a plan.

(ii) If an agreement that previously qualified for the private label credit card exception ceases to qualify, the card issuer must submit the agreement to the Bureau no later than the first quarterly submission deadline after the date as of which the agreement ceased to qualify.

(iii) If an agreement that did not previously qualify for the private label credit card exception qualifies for the exception, the card issuer must continue to make quarterly submissions to the Bureau with respect to that agreement until the issuer notifies the Bureau that the agreement is being withdrawn.

(7) *Product testing exception.* (i) A card issuer is not required to submit to the Bureau a credit card agreement if, as of the last business day of the calendar quarter, the agreement:

(A) Is offered as part of a product test offered to only a limited group of consumers for a limited period of time;

(B) Is used for fewer than 10,000 open accounts; and

(C) Is not offered to the public other than in connection with such a product test.

(ii) If an agreement that previously qualified for the product testing exception ceases to qualify, the card issuer must submit the agreement to the Bureau no later than the first quarterly submission deadline after the date as of which the agreement ceased to qualify.

(iii) If an agreement that did not previously qualify for the product testing exception qualifies for the exception, the card issuer must continue to make quarterly submissions to the Bureau with respect to that agreement until the issuer notifies the Bureau that the agreement is being withdrawn.

(8) *Form and content of agreements submitted to the Bureau.* (i) *Form and content generally.* (A) Each agreement must contain the provisions of the agreement and the pricing information in effect as of the last business day of the preceding calendar quarter.

(B) Agreements must not include any personally identifiable information relating to any cardholder, such as name, address, telephone number, or account number.

(C) The following are not deemed to be part of the agreement for purposes of § 1026.58, and therefore are not required to be included in submissions to the Bureau:

(*1*) Disclosures required by state or Federal law, such as affiliate marketing notices, privacy policies, billing rights notices, or disclosures under the E-Sign Act;

(*2*) Solicitation materials;

(*3*) Periodic statements;

(*4*) Ancillary agreements between the issuer and the consumer, such as debt cancellation contracts or debt suspension agreements;

(*5*) Offers for credit insurance or other optional products and other similar advertisements; and

(*6*) Documents that may be sent to the consumer along with the credit card or credit card agreement such as a cover letter, a validation sticker on the card, or other information about card security.

(D) Agreements must be presented in a clear and legible font.

(ii) *Pricing information.* (A) Pricing information must be set forth in a single addendum to the agreement. The addendum must contain all of the pricing information, as defined by § 1026.58(b)(7). The addendum may, but is not required to, contain any other information listed in § 1026.6(b), provided that information is complete and accurate as of the applicable date under § 1026.58. The addendum may not contain any other information.

(B) Pricing information that may vary from one cardholder to another depending on the cardholder's creditworthiness or state of residence or other factors must be disclosed either by setting forth all the possible variations (such as purchase APRs of 13 percent, 15 percent, 17 percent, and 19 percent) or by providing a range of possible variations (such as purchase APRs ranging from 13 percent to 19 percent).

(C) If a rate included in the pricing information is a variable rate, the issuer must identify the index or formula used in setting the rate and the margin. Rates that may vary from one cardholder to another must be disclosed by providing the index and the possible margins (such as the prime rate plus 5 percent, 8 percent, 10 percent, or 12 percent) or range of margins (such as the prime rate plus from 5 to 12 percent). The value of the rate and the value of the index are not required to be disclosed.

(iii) *Optional variable terms addendum.* Provisions of the agreement other than the pricing information that may vary from one cardholder to another depending on the cardholder's creditworthiness or state of residence or other factors may be set forth in a single addendum to the agreement separate from the pricing information addendum.

(iv) *Integrated agreement.* Issuers may not provide provisions of the agreement or pricing information in the form of change-in-terms notices or riders (other than the pricing information addendum and the optional variable terms addendum). Changes in provisions or pricing information must be integrated into the text of the agreement, the pricing information addendum or the optional variable terms addendum, as appropriate.

(d) *Posting of agreements offered to the public.* (1) Except as provided below, a card issuer must post and maintain on its publicly available Web site the credit card agreements that the issuer is required to submit to the Bureau under § 1026.58(c). With respect to an agreement offered solely for accounts under one or more private label credit card plans, an issuer may fulfill this requirement by posting and maintaining the agreement in accordance with the requirements of this section on the publicly available Web site of at least one of the merchants at which credit cards issued under each private label credit card plan with 10,000 or more open accounts may be used.

(2) Except as provided in § 1026.58(d), agreements posted pursuant to § 1026.58(d) must conform to the form and content requirements for agreements submitted to the Bureau specified in § 1026.58(c)(8).

(3) Agreements posted pursuant to § 1026.58(d) may be posted in any electronic format that is readily usable by the general public. Agreements must be placed in a location that is prominent and readily accessible by the public and must be accessible without submission of personally identifiable information.

(4) The card issuer must update the agreements posted on its Web site pursuant to § 1026.58(d) at least as frequently as the quarterly schedule required for submission of agreements to the Bureau under § 1026.58(c). If the issuer chooses to update the agreements on its Web site more frequently, the agreements posted on the issuer's Web site may contain the provisions of the agreement and the pricing information in effect as of a date other than the last business day of the preceding calendar quarter.

(e) *Agreements for all open accounts.* *(1) Availability of individual cardholder's agreement.* With respect to any open credit card account, a card issuer must either:

(i) Post and maintain the cardholder's agreement on its Web site; or

(ii) Promptly provide a copy of the cardholder's agreement to the cardholder upon the cardholder's request. If the card issuer makes an agreement available upon request, the issuer must provide the cardholder with

the ability to request a copy of the agreement both by using the issuer's Web site (such as by clicking on a clearly identified box to make the request) and by calling a readily available telephone line the number for which is displayed on the issuer's Web site and clearly identified as to purpose. The card issuer must send to the cardholder or otherwise make available to the cardholder a copy of the cardholder's agreement in electronic or paper form no later than 30 days after the issuer receives the cardholder's request.

(2) *Special rule for issuers without interactive Web sites.* An issuer that does not maintain a Web site from which cardholders can access specific information about their individual accounts, instead of complying with § 1026.58(e)(1), may make agreements available upon request by providing the cardholder with the ability to request a copy of the agreement by calling a readily available telephone line, the number for which is displayed on the issuer's Web site and clearly identified as to purpose or included on each periodic statement sent to the cardholder and clearly identified as to purpose. The issuer must send to the cardholder or otherwise make available to the cardholder a copy of the cardholder's agreement in electronic or paper form no later than 30 days after the issuer receives the cardholder's request.

(3) *Form and content of agreements.* (i) Except as provided in § 1026.58(e), agreements posted on the card issuer's Web site pursuant to § 1026.58(e)(1)(i) or made available upon the cardholder's request pursuant to § 1026.58(e)(1)(ii) or (e)(2) must conform to the form and content requirements for agreements submitted to the Bureau specified in § 1026.58(c)(8).

(ii) If the card issuer posts an agreement on its Web site or otherwise provides an agreement to a cardholder electronically under § 1026.58(e), the agreement may be posted or provided in any electronic format that is readily usable by the general public and must be placed in a location that is prominent and readily accessible to the cardholder.

(iii) Agreements posted or otherwise provided pursuant to § 1026.58(e) may contain personally identifiable information relating to the cardholder, such as name, address, telephone number, or account number, provided that the issuer takes appropriate measures to make the agreement accessible only to the cardholder or other authorized persons.

(iv) Agreements posted or otherwise provided pursuant to § 1026.58(e) must set forth the specific provisions and pricing information applicable to the particular cardholder. Provisions and pricing information must be complete and accurate as of a date no more than 60 days prior to:

(A) The date on which the agreement is posted on the card issuer's Web site under § 1026.58(e)(1)(i); or

(B) The date the cardholder's request is received under § 1026.58(e)(1)(ii) or (e)(2).

(v) Agreements provided upon cardholder request pursuant to § 1026.58(e)(1)(ii) or (e)(2) may be provided by the issuer in either electronic or paper form, regardless of the form of the cardholder's request.

(f) *E-Sign Act requirements.* Card issuers may provide credit card agreements in electronic form under § 1026.58(d) and (e) without regard to the consumer notice and consent requirements of section 101(c) of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

§ 1026.59 Reevaluation of rate increases.

(a) General rule.(1) Evaluation of increased rate. If a card issuer increases an annual percentage rate that applies to a credit card account under an open-end (not home-secured) consumer credit plan, based on the credit risk of the consumer, market conditions, or other factors, or increased such a rate on or after January 1, 2009, and 45 days' advance notice of the rate increase is required pursuant to § 1026.9(c)(2) or (g), the card issuer must:

(i) Evaluate the factors described in paragraph (d) of this section; and

(ii) Based on its review of such factors, reduce the annual percentage rate applicable to the consumer's account, as appropriate.

(2) *Rate reductions.* (i) *Timing.* If a card issuer is required to reduce the rate applicable to an account pursuant to paragraph (a)(1) of this section, the card issuer must reduce the rate not later than 45 days after completion of the evaluation described in paragraph (a)(1).

(ii) *Applicability of rate reduction.* Any reduction in an annual percentage rate required pursuant to paragraph (a)(1) of this section shall apply to:

(A) Any outstanding balances to which the increased rate described in paragraph (a)(1) of this section has been applied; and

(B) New transactions that occur after the effective date of the rate reduction that would otherwise have been subject to the increased rate.

(b) *Policies and procedures.* A card issuer must have reasonable written policies and procedures in place to conduct the review described in paragraph (a) of this section.

(c) *Timing.* A card issuer that is subject to paragraph (a) of this section must conduct the review described in paragraph (a)(1) of this section not less frequently than once every six months after the rate increase.

(d) *Factors.* (1) *In general.* Except as provided in paragraph (d)(2) of this section, a card issuer must review either:

(i) The factors on which the increase in an annual percentage rate was originally based; or

(ii) The factors that the card issuer currently considers when determining the annual percentage rates applicable to similar new credit card accounts under an open-end (not home-secured) consumer credit plan.

(2) *Rate increases imposed between January 1, 2009 and February 21, 2010.* For rate increases imposed between January 1, 2009 and February 21, 2010, an issuer must consider the factors described in paragraph (d)(1)(ii) when conducting the first two reviews required under paragraph (a) of this section, unless the rate increase subject to paragraph (a) of this section was based solely upon factors specific to the consumer, such as a decline in the consumer's credit risk, the consumer's delinquency or default, or a violation of the terms of the account.

(e) *Rate increases due to delinquency.* If an issuer increases a rate applicable to a consumer's account pursuant to § 1026.55(b)(4) based on the card issuer not receiving the consumer's required minimum periodic payment within 60 days after the due date, the issuer is not required to perform the review described in paragraph (a) of this section prior to the sixth payment due date after the effective date of the increase. However, if the annual percentage rate applicable to the consumer's account is not reduced pursuant to § 1026.55(b)(4)(ii), the card issuer must perform the review described in paragraph (a) of this section. The first such review must occur no later than six months after the sixth payment due following the effective date of the rate increase.

(f) *Termination of obligation to review factors.* The obligation to review factors described in paragraph (a) and (d) of this section ceases to apply:

(1) If the issuer reduces the annual percentage rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan to the rate applicable immediately prior to the increase, or, if the rate applicable immediately prior to the increase was a variable rate, to a variable rate

determined by the same formula (index and margin) that was used to calculate the rate applicable immediately prior to the increase; or

(2) If the issuer reduces the annual percentage rate to a rate that is lower than the rate described in paragraph (f)(1) of this section.

(g) *Acquired accounts.* (1) *General.* Except as provided in paragraph (g)(2) of this section, this section applies to credit card accounts that have been acquired by the card issuer from another card issuer. A card issuer that complies with this section by reviewing the factors described in paragraph (d)(1)(i) must review the factors considered by the card issuer from which it acquired the accounts in connection with the rate increase.

(2) *Review of acquired portfolio.* If, not later than six months after the acquisition of such accounts, a card issuer reviews all of the credit card accounts it acquires in accordance with the factors that it currently considers in determining the rates applicable to its similar new credit card accounts:

(i) Except as provided in paragraph (g)(2)(iii), the card issuer is required to conduct reviews described in paragraph (a) of this section only for rate increases that are imposed as a result of its review under this paragraph. See §§ 1026.9 and 1026.55 for additional requirements regarding rate increases on acquired accounts.

(ii) Except as provided in paragraph (g)(2)(iii) of this section, the card issuer is not required to conduct reviews in accordance with paragraph (a) of this section for any rate increases made prior to the card issuer's acquisition of such accounts.

(iii) If as a result of the card issuer's review, an account is subject to, or continues to be subject to, an increased rate as a penalty, or due to the consumer's delinquency or default, the requirements of paragraph (a) of this section apply.

(h) *Exceptions.* (1) *Servicemembers Civil Relief Act exception.* The requirements of this section do not apply to increases in an annual percentage rate that was previously decreased pursuant to 50 U.S.C. app. 527, provided that such a rate increase is made in accordance with § 1026.55(b)(6).

(2) *Charged off accounts.* The requirements of this section do not apply to accounts that the card issuer has charged off in accordance with loan-loss provisions.

§ 1026.60 Credit and charge card applications and solicitations.

(a) *General rules.* The card issuer shall provide the disclosures required under this section on or with a solicitation or an application to open a credit or charge card account.

(1) *Definition of solicitation.* For purposes of this section, the term *solicitation* means an offer by the card issuer to open a credit or charge card account that does not require the consumer to complete an application. A ''firm offer of credit'' as defined in section 603(l) of the Fair Credit Reporting Act (15 U.S.C. 1681a(l)) for a credit or charge card is a solicitation for purposes of this section.

(2) *Form of disclosures; tabular format.* (i) The disclosures in paragraphs (b)(1) through (5) (except for (b)(1)(iv)(B)) and (b)(7) through (15) of this section made pursuant to paragraph (c), (d)(2), (e)(1) or (f) of this section generally shall be in the form of a table with headings, content, and format substantially similar to any of the applicable tables found in G–10 in Appendix G to this part.

(ii) The table described in paragraph (a)(2)(i) of this section shall contain only the information required or permitted by this section. Other information may be presented on or with an application or solicitation, provided such information appears outside the required table.

(iii) Disclosures required by paragraphs (b)(1)(iv)(B), (b)(1)(iv)(C) and (b)(6) of this section must be placed directly beneath the table.

(iv) When a tabular format is required, any annual percentage rate required to be disclosed pursuant to paragraph (b)(1) of this section, any introductory rate required to be disclosed pursuant to paragraph (b)(1)(ii) of this section, any rate that will apply after a premium initial rate expires required to be disclosed under paragraph (b)(1)(iii) of this section, and any fee or percentage amounts or maximum limits on fee amounts disclosed pursuant to paragraphs (b)(2), (b)(4), (b)(8) through (b)(13) of this section must be disclosed in bold text. However, bold text shall not be used for: The amount of any periodic fee disclosed pursuant to paragraph (b)(2) of this section that is not an annualized amount; and other annual percentage rates or fee amounts disclosed in the table.

(v) For an application or a solicitation that is accessed by the consumer in electronic form, the disclosures required under this section may be provided to the consumer in electronic form on or with the application or solicitation.

(vi)(A) Except as provided in paragraph (a)(2)(vi)(B) of this section, the table described in paragraph (a)(2)(i) of this section must be provided in a prominent location on or with an application or a solicitation.

(B) If the table described in paragraph (a)(2)(i) of this section is provided electronically, it must be provided in close proximity to the application or solicitation.

(3) *Fees based on a percentage.* If the amount of any fee required to be disclosed under this section is determined on the basis of a percentage of another amount, the percentage used and the identification of the amount against which the percentage is applied may be disclosed instead of the amount of the fee.

(4) *Fees that vary by state.* Card issuers that impose fees referred to in paragraphs (b)(8) through (12) of this section that vary by state may, at the issuer's option, disclose in the table required by paragraph (a)(2)(i) of this section: The specific fee applicable to the consumer's account; or the range of the fees, if the disclosure includes a statement that the amount of the fee varies by state and refers the consumer to a disclosure provided with the table where the amount of the fee applicable to the consumer's account is disclosed. A card issuer may not list fees for multiple states in the table.

(5) *Exceptions.* This section does not apply to:

(i) Home-equity plans accessible by a credit or charge card that are subject to the requirements of § 1026.40;

(ii) Overdraft lines of credit tied to asset accounts accessed by check-guarantee cards or by debit cards;

(iii) Lines of credit accessed by check-guarantee cards or by debit cards that can be used only at automated teller machines;

(iv) Lines of credit accessed solely by account numbers;

(v) Additions of a credit or charge card to an existing open-end plan;

(vi) General purpose applications unless the application, or material accompanying it, indicates that it can be used to open a credit or charge card account; or

(vii) Consumer-initiated requests for applications.

(b) *Required disclosures.* The card issuer shall disclose the items in this paragraph on or with an application or a solicitation in accordance with the requirements of paragraphs (c), (d), (e)(1) or (f) of this section. A credit card issuer shall disclose all applicable items in this paragraph except for paragraph (b)(7) of this section. A charge card issuer shall disclose the applicable

items in paragraphs (b)(2), (4), (7) through (12), and (15) of this section.

(1) *Annual percentage rate.* Each periodic rate that may be used to compute the finance charge on an outstanding balance for purchases, a cash advance, or a balance transfer, expressed as an annual percentage rate (as determined by § 1026.14(b)). When more than one rate applies for a category of transactions, the range of balances to which each rate is applicable shall also be disclosed. The annual percentage rate for purchases disclosed pursuant to this paragraph shall be in at least 16-point type, except for the following: Oral disclosures of the annual percentage rate for purchases; or a penalty rate that may apply upon the occurrence of one or more specific events.

(i) *Variable rate information.* If a rate disclosed under paragraph (b)(1) of this section is a variable rate, the card issuer shall also disclose the fact that the rate may vary and how the rate is determined. In describing how the applicable rate will be determined, the card issuer must identify the type of index or formula that is used in setting the rate. The value of the index and the amount of the margin that are used to calculate the variable rate shall not be disclosed in the table. A disclosure of any applicable limitations on rate increases shall not be included in the table.

(ii) *Discounted initial rate.* If the initial rate is an introductory rate, as that term is defined in § 1026.16(g)(2)(ii), the card issuer must disclose in the table the introductory rate, the time period during which the introductory rate will remain in effect, and must use the term ''introductory'' or ''intro'' in immediate proximity to the introductory rate. The card issuer also must disclose the rate that would otherwise apply to the account pursuant to paragraph (b)(1) of this section. Where the rate is not tied to an index or formula, the card issuer must disclose the rate that will apply after the introductory rate expires. In a variable-rate account, the card issuer must disclose a rate based on the applicable index or formula in accordance with the accuracy requirements set forth in paragraphs (c)(2), (d)(3), or (e)(4) of this section, as applicable.

(iii) *Premium initial rate.* If the initial rate is temporary and is higher than the rate that will apply after the temporary rate expires, the card issuer must disclose the premium initial rate pursuant to paragraph (b)(1) of this section and the time period during which the premium initial rate will remain in effect. Consistent with paragraph (b)(1) of this section, the premium initial rate for purchases must be in at least 16-point type. The issuer must also disclose in the table the rate that will apply after the premium initial rate expires, in at least 16-point type.

(iv) *Penalty rates.* (A) *In general.* Except as provided in paragraph (b)(1)(iv)(B) and (C) of this section, if a rate may increase as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit, the card issuer must disclose pursuant to this paragraph (b)(1) the increased rate that may apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect.

(B) *Introductory rates.* If the issuer discloses an introductory rate, as that term is defined in § 1026.16(g)(2)(ii), in the table or in any written or electronic promotional materials accompanying applications or solicitations subject to paragraph (c) or (e) of this section, the issuer must briefly disclose directly beneath the table the circumstances, if any, under which the introductory rate may be revoked, and the type of rate that will apply after the introductory rate is revoked.

(C) *Employee preferential rates.* If a card issuer discloses in the table a preferential annual percentage rate for which only employees of the card issuer, employees of a third party, or other individuals with similar affiliations with the card issuer or third party, such as executive officers, directors, or principal shareholders are eligible, the card issuer must briefly disclose directly beneath the table the circumstances under which such preferential rate may be revoked, and the rate that will apply after such preferential rate is revoked.

(v) *Rates that depend on consumer's creditworthiness.* If a rate cannot be determined at the time disclosures are given because the rate depends, at least in part, on a later determination of the consumer's creditworthiness, the card issuer must disclose the specific rates or the range of rates that could apply and a statement that the rate for which the consumer may qualify at account opening will depend on the consumer's creditworthiness, and other factors if applicable. If the rate that depends, at least in part, on a later determination of the consumer's creditworthiness is a penalty rate, as described in paragraph (b)(1)(iv) of this section, the card issuer at its option may disclose the highest rate that could apply, instead of disclosing the specific rates or the range of rates that could apply.

(vi) *APRs that vary by state.* Issuers imposing annual percentage rates that vary by state may, at the issuer's option, disclose in the table: the specific annual percentage rate applicable to the consumer's account; or the range of the annual percentage rates, if the disclosure includes a statement that the annual percentage rate varies by state and refers the consumer to a disclosure provided with the table where the annual percentage rate applicable to the consumer's account is disclosed. A card issuer may not list annual percentage rates for multiple states in the table.

(2) *Fees for issuance or availability.* (i) Any annual or other periodic fee that may be imposed for the issuance or availability of a credit or charge card, including any fee based on account activity or inactivity; how frequently it will be imposed; and the annualized amount of the fee.

(ii) Any non-periodic fee that relates to opening an account. A card issuer must disclose that the fee is a one-time fee.

(3) *Fixed finance charge; minimum interest charge.* Any fixed finance charge and a brief description of the charge. Any minimum interest charge if it exceeds $1.00 that could be imposed during a billing cycle, and a brief description of the charge. The $1.00 threshold amount shall be adjusted periodically by the Bureau to reflect changes in the Consumer Price Index. The Bureau shall calculate each year a price level adjusted minimum interest charge using the Consumer Price Index in effect on June 1 of that year. When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current minimum interest charge threshold has risen by a whole dollar, the minimum interest charge will be increased by $1.00. The issuer may, at its option, disclose in the table minimum interest charges below this threshold.

(4) *Transaction charges.* Any transaction charge imposed by the card issuer for the use of the card for purchases.

(5) *Grace period.* The date by which or the period within which any credit extended for purchases may be repaid without incurring a finance charge due to a periodic interest rate and any conditions on the availability of the grace period. If no grace period is provided, that fact must be disclosed. If the length of the grace period varies, the card issuer may disclose the range of days, the minimum number of days, or the average number of days in the grace period, if the disclosure is identified as a range, minimum, or average. In

disclosing in the tabular format a grace period that applies to all types of purchases, the phrase ''How to Avoid Paying Interest on Purchases'' shall be used as the heading for the row describing the grace period. If a grace period is not offered on all types of purchases, in disclosing this fact in the tabular format, the phrase ''Paying Interest'' shall be used as the heading for the row describing this fact.

(6) *Balance computation method.* The name of the balance computation method listed in paragraph (g) of this section that is used to determine the balance for purchases on which the finance charge is computed, or an explanation of the method used if it is not listed. In determining which balance computation method to disclose, the card issuer shall assume that credit extended for purchases will not be repaid within the grace period, if any.

(7) *Statement on charge card payments.* A statement that charges incurred by use of the charge card are due when the periodic statement is received.

(8) *Cash advance fee.* Any fee imposed for an extension of credit in the form of cash or its equivalent.

(9) *Late payment fee.* Any fee imposed for a late payment.

(10) *Over-the-limit fee.* Any fee imposed for exceeding a credit limit.

(11) *Balance transfer fee.* Any fee imposed to transfer an outstanding balance.

(12) *Returned-payment fee.* Any fee imposed by the card issuer for a returned payment.

(13) *Required insurance, debt cancellation or debt suspension coverage.* (i) A fee for insurance described in § 1026.4(b)(7) or debt cancellation or suspension coverage described in § 1026.4(b)(10), if the insurance or debt cancellation or suspension coverage is required as part of the plan; and

(ii) A cross reference to any additional information provided about the insurance or coverage accompanying the application or solicitation, as applicable.

(14) *Available credit.* If a card issuer requires fees for the issuance or availability of credit described in paragraph (b)(2) of this section, or requires a security deposit for such credit, and the total amount of those required fees and/or security deposit that will be imposed and charged to the account when the account is opened is 15 percent or more of the minimum credit limit for the card, a card issuer must disclose the available credit remaining after these fees or security deposit are debited to the account, assuming that the consumer receives the minimum credit limit. In determining whether the 15 percent threshold test is met, the issuer must only consider fees for issuance or availability of credit, or a security deposit, that are required. If fees for issuance or availability are optional, these fees should not be considered in determining whether the disclosure must be given. Nonetheless, if the 15 percent threshold test is met, the issuer in providing the disclosure must disclose the amount of available credit calculated by excluding those optional fees, and the available credit including those optional fees. This paragraph does not apply with respect to fees or security deposits that are not debited to the account.

(15) *Web site reference.* A reference to the Web site established by the Bureau and a statement that consumers may obtain on the Web site information about shopping for and using credit cards. Until January 1, 2013, issuers may substitute for this reference a reference to the Web site established by the Board of Governors of the Federal Reserve System.

(c) *Direct mail and electronic applications and solicitations.* (1) *General.* The card issuer shall disclose the applicable items in paragraph (b) of this section on or with an application or solicitation that is mailed to consumers or provided to consumers in electronic form.

(2) *Accuracy.* (i) Disclosures in direct mail applications and solicitations must be accurate as of the time the disclosures are mailed. An accurate variable annual percentage rate is one in effect within 60 days before mailing.

(ii) Disclosures provided in electronic form must be accurate as of the time they are sent, in the case of disclosures sent to a consumer's email address, or as of the time they are viewed by the public, in the case of disclosures made available at a location such as a card issuer's Web site. An accurate variable annual percentage rate provided in electronic form is one in effect within 30 days before it is sent to a consumer's email address, or viewed by the public, as applicable.

(d) *Telephone applications and solicitations.* (1) *Oral disclosure.* The card issuer shall disclose orally the information in paragraphs (b)(1) through (7) and (b)(14) of this section, to the extent applicable, in a telephone application or solicitation initiated by the card issuer.

(2) *Alternative disclosure.* The oral disclosure under paragraph (d)(1) of this section need not be given if the card issuer either:

(i)(A) Does not impose a fee described in paragraph (b)(2) of this section; or

(B) Imposes such a fee but provides the consumer with a right to reject the plan consistent with § 1026.5(b)(1)(iv); and

(ii) The card issuer discloses in writing within 30 days after the consumer requests the card (but in no event later than the delivery of the card) the following:

(A) The applicable information in paragraph (b) of this section; and

(B) As applicable, the fact that the consumer has the right to reject the plan and not be obligated to pay fees described in paragraph (b)(2) or any other fees or charges until the consumer has used the account or made a payment on the account after receiving a billing statement.

(3) *Accuracy.* (i) The oral disclosures under paragraph (d)(1) of this section must be accurate as of the time they are given.

(ii) The alternative disclosures under paragraph (d)(2) of this section generally must be accurate as of the time they are mailed or delivered. A variable annual percentage rate is one that is accurate if it was:

(A) In effect at the time the disclosures are mailed or delivered; or

(B) In effect as of a specified date (which rate is then updated from time to time, but no less frequently than each calendar month).

(e) *Applications and solicitations made available to general public.* The card issuer shall provide disclosures, to the extent applicable, on or with an application or solicitation that is made available to the general public, including one contained in a catalog, magazine, or other generally available publication. The disclosures shall be provided in accordance with paragraph (e)(1) or (e)(2) of this section.

(1) *Disclosure of required credit information.* The card issuer may disclose in a prominent location on the application or solicitation the following:

(i) The applicable information in paragraph (b) of this section;

(ii) The date the required information was printed, including a statement that the required information was accurate as of that date and is subject to change after that date; and

(iii) A statement that the consumer should contact the card issuer for any change in the required information since it was printed, and a toll-free telephone number or a mailing address for that purpose.

(2) *No disclosure of credit information.* If none of the items in paragraph (b) of this section is provided on or with the application or

solicitation, the card issuer may state in a prominent location on the application or solicitation the following:

(i) There are costs associated with the use of the card; and

(ii) The consumer may contact the card issuer to request specific information about the costs, along with a toll-free telephone number and a mailing address for that purpose.

(3) *Prompt response to requests for information.* Upon receiving a request for any of the information referred to in this paragraph, the card issuer shall promptly and fully disclose the information requested.

(4) *Accuracy.* The disclosures given pursuant to paragraph (e)(1) of this section must be accurate as of the date of printing. A variable annual percentage rate is accurate if it was in effect within 30 days before printing.

(f) *In-person applications and solicitations.* A card issuer shall disclose the information in paragraph (b) of this section, to the extent applicable, on or with an application or solicitation that is initiated by the card issuer and given to the consumer in person. A card issuer complies with the requirements of this paragraph if the issuer provides disclosures in accordance with paragraph (c)(1) or (e)(1) of this section.

(g) *Balance computation methods defined.* The following methods may be described by name. Methods that differ due to variations such as the allocation of payments, whether the finance charge begins to accrue on the transaction date or the date of posting the transaction, the existence or length of a grace period, and whether the balance is adjusted by charges such as late payment fees, annual fees and unpaid finance charges do not constitute separate balance computation methods.

(1)(i) *Average daily balance (including new purchases).* This balance is figured by adding the outstanding balance (including new purchases and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle.

(ii) *Average daily balance (excluding new purchases).* This balance is figured by adding the outstanding balance (excluding new purchases and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle.

(2) *Adjusted balance.* This balance is figured by deducting payments and credits made during the billing cycle from the outstanding balance at the beginning of the billing cycle.

(3) *Previous balance.* This balance is the outstanding balance at the beginning of the billing cycle.

(4) *Daily balance.* For each day in the billing cycle, this balance is figured by taking the beginning balance each day, adding any new purchases, and subtracting any payment and credits.

Appendix A to Part 1026—Effect on State Laws

Request for Determination

A request for a determination that a state law is inconsistent or that a state law is substantially the same as the Act and regulation shall be in writing and addressed to the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006. The request shall be made pursuant to the procedures herein.

Supporting Documents

A request for a determination shall include the following items:

(1) The text of the state statute, regulation, or other document that is the subject of the request.

(2) Any other statute, regulation, or judicial or administrative opinion that implements, interprets, or applies the relevant provision.

(3) A comparison of the state law with the corresponding provision of the Federal law, including a full discussion of the basis for the requesting party's belief that the state provision is either inconsistent or substantially the same.

(4) Any other information that the requesting party believes may assist the Bureau in its determination.

Public Notice of Determination

Notice that the Bureau intends to make a determination (either on request or on its own motion) will be published in the **Federal Register**, with an opportunity for public comment, unless the Bureau finds that notice and opportunity for comment would be impracticable, unnecessary, or contrary to the public interest and publishes its reasons for such decision.

Subject to the Bureau's rules on Disclosure of Records and Information (12 CFR Part 1070), all requests made, including any documents and other material submitted in support of the requests, will be made available for public inspection and copying.

Notice After Determination

Notice of a final determination will be published in the **Federal Register**, and the Bureau will furnish a copy of such notice to the party who made the request and to the appropriate state official.

Reversal of Determination

The Bureau reserves the right to reverse a determination for any reason bearing on the coverage or effect of state or Federal law.

Notice of reversal of a determination will be published in the **Federal Register** and a copy furnished to the appropriate state official.

Appendix B to Part 1026—State Exemptions

Application

Any state may apply to the Bureau for a determination that a class of transactions subject to state law is exempt from the requirements of the Act and this part. An application shall be in writing and addressed to the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street, NW., Washington, DC 20006, and shall be signed by the appropriate state official. The application shall be made pursuant to the procedures herein.

Supporting Documents

An application shall be accompanied by:

(1) The text of the state statute or regulation that is the subject of the application, and any other statute, regulation, or judicial or administrative opinion that implements, interprets, or applies it.

(2) A comparison of the state law with the corresponding provisions of the Federal law.

(3) The text of the state statute or regulation that provides for civil and criminal liability and administrative enforcement of the state law.

(4) A statement of the provisions for enforcement, including an identification of the state office that administers the relevant law, information on the funding and the number and qualifications of personnel engaged in enforcement, and a description of the enforcement procedures to be followed, including information on examination procedures, practices, and policies. If an exemption application extends to federally chartered institutions, the applicant must furnish evidence that arrangements have been made with the appropriate Federal agencies to ensure adequate enforcement of state law in regard to such creditors.

(5) A statement of reasons to support the applicant's claim that an exemption should be granted.

Public Notice of Application

Notice of an application will be published, with an opportunity for public comment, in the **Federal Register**, unless the Bureau finds that notice and opportunity for comment would be impracticable, unnecessary, or contrary to the public interest and publishes its reasons for such decision.

Subject to the Bureau's rules on Disclosure of Records and Information (12 CFR Part 1070), all applications made, including any documents and other material submitted in support of the applications, will be made available for public inspection and copying.

Favorable Determination

If the Bureau determines on the basis of the information before it that an exemption should be granted, notice of the exemption will be published in the **Federal Register**, and a copy furnished to the applicant and to each Federal official responsible for administrative enforcement.

The appropriate state official shall inform the Bureau within 30 days of any change in its relevant law or regulations. The official shall file with the Bureau such periodic reports as the Bureau may require.

The Bureau will inform the appropriate state official of any subsequent amendments to the Federal law, regulation, interpretations, or enforcement policies that might require an amendment to state law, regulation, interpretations, or enforcement procedures.

Adverse Determination

If the Bureau makes an initial determination that an exemption should not be granted, the Bureau will afford the applicant a reasonable opportunity to demonstrate further that an exemption is proper. If the Bureau ultimately finds that an exemption should not be granted, notice of an adverse determination will be published in the **Federal Register** and a copy furnished to the applicant.

Revocation of Exemption

The Bureau reserves the right to revoke an exemption if at any time it determines that the standards required for an exemption are not met.

Before taking such action, the Bureau will notify the appropriate state official of its intent, and will afford the official such opportunity as it deems appropriate in the circumstances to demonstrate that revocation is improper. If the Bureau ultimately finds that revocation is proper, notice of the Bureau's intention to revoke such exemption will be published in the **Federal Register** with a reasonable period of time for interested persons to comment.

Notice of revocation of an exemption will be published in the **Federal Register**. A copy of such notice will be furnished to the appropriate state official and to the Federal officials responsible for enforcement. Upon revocation of an exemption, creditors in that state shall then be subject to the requirements of the Federal law.

Appendix C to Part 1026—Issuance of Official Interpretations

Official Interpretations

Interpretations of this part issued by officials of the Bureau provide the protection afforded under section 130(f) of the Act. Except in unusual circumstances, such interpretations will not be issued separately but will be incorporated in an official commentary to the regulation which will be amended periodically.

Requests for Issuance of Official Interpretations

A request for an official interpretation shall be in writing and addressed to the Assistant Director, Office of Regulations, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street, NW., Washington, DC 20006. The request shall contain a complete statement of all relevant facts concerning the issue, including copies of all pertinent documents.

Scope of Interpretations

No interpretations will be issued approving creditors' forms, statements, or calculation tools or methods. This restriction does not apply to forms, statements, tools, or methods whose use is required or sanctioned by a government agency.

Appendix D to Part 1026—Multiple Advance Construction Loans

Section 1026.17(c)(6) permits creditors to treat multiple advance loans to finance construction of a dwelling that may be permanently financed by the same creditor either as a single transaction or as more than one transaction. If the actual schedule of advances is not known, the following methods may be used to estimate the interest portion of the finance charge and the annual percentage rate and to make disclosures. If the creditor chooses to disclose the construction phase separately, whether interest is payable periodically or at the end of construction, part I may be used. If the creditor chooses to disclose the construction and the permanent financing as one transaction, part II may be used.

Part I—Construction Period Disclosed Separately

A. If interest is payable only on the amount actually advanced for the time it is outstanding:

1. Estimated interest—Assume that one-half of the commitment amount is outstanding at the contract interest rate for the entire construction period.

2. Estimated annual percentage rate—Assume a single payment loan that matures at the end of the construction period. The finance charge is the sum of the estimated interest and any prepaid finance charge. The amount financed for computation purposes is determined by subtracting any prepaid finance charge from one-half of the commitment amount.

3. Repayment schedule—The number and amounts of any interest payments may be omitted in disclosing the payment schedule under § 1026.18(g). The fact that interest payments are required and the timing of such payments shall be disclosed.

4. Amount financed—The amount financed for disclosure purposes is the entire commitment amount less any prepaid finance charge.

B. If interest is payable on the entire commitment amount without regard to the dates or amounts of actual disbursement:

1. Estimated interest—Assume that the entire commitment amount is outstanding at the contract interest rate for the entire construction period.

2. Estimated annual percentage rate—Assume a single payment loan that matures at the end of the construction period. The finance charge is the sum of the estimated interest and any prepaid finance charge. The amount financed for computation purposes is determined by subtracting any prepaid finance charge from one-half of the commitment amount.

3. Repayment schedule—Interest payments shall be disclosed in making the repayment schedule disclosure under § 1026.18(g).

4. Amount financed—The amount financed for disclosure purposes is the entire commitment amount less any prepaid finance charge.

Example:

Assume a $50,000 loan commitment at 10.5% interest with a 5-month construction period and a prepaid finance charge of 2 points.

(A)	(B)
Estimated Interest:	
$25,000 x .105 ÷ 12 x 5 = $1,093.75	$50,000 x .105 ÷ 12 x 5 = $2,187.50
Estimated APR:	
$\frac{(1{,}093.75 + 1{,}000) \times 100}{(25{,}000 - 1{,}000)} \div 5 \times 12 =$ 20.94%	$\frac{(2{,}187.50 + 1{,}000) \times 100}{(25{,}000 - 1{,}000)} \div 5 \times 12 =$ 31.88%
Disclosures:	
Amount financed $49,000.00	$49,000.00
Prepaid finance charge 1,000.00	1,000.00
FINANCE CHARGE (Estimate) 2,093.75	3,187.50
ANNUAL PERCENTAGE RATE (Estimate) 20.94%	31.88%
Repayment: One payment of principal of $50,000 on 12-12-80. Interest on the amount of credit outstanding will be paid monthly.	4 monthly payments of $437.50, beginning 8-12-80, and a final payment of $50,437.50 on 12-12-80.
Total of payments (Estimate) $51,093.75	$52,187.50

Part II—Construction and Permanent Financing Disclosed as One Transaction

A. The creditor shall estimate the interest payable during the construction period to be included in the total finance charge as follows:

1. If interest is payable only on the amount actually advanced for the time it is outstanding, assume that one-half of the commitment amount is outstanding at the contract interest rate for the entire construction period.

2. If interest is payable on the entire commitment amount without regard to the dates or amounts of actual disbursements, assume that the entire commitment amount is outstanding at the contract rate for the entire construction period.

B. The creditor shall compute the estimated annual percentage rate as follows:

1. Estimated interest payable during the construction period shall be treated for computation purposes as a prepaid finance charge (although it shall not be treated as a prepaid finance charge for disclosure purposes).

2. The number of payment shall not include any payments of interest only that are made during the construction period.

3. The first payment period shall consist of one-half of the construction period plus the period between the end of the construction period and the amortization payment.

C. The creditor shall disclose the repayment schedule as follows:

1. For loans under paragraph A.1. of Part II, without reflecting the number or amounts of payments of interest only that are made during the construction period. The fact that interest payments must be made and the timing of such payments shall be disclosed.

2. For loans under paragraph A.2. of Part II, including any payments of interest only that are made during the construction period.

D. The creditor shall disclose the amount financed as the entire commitment amount less any prepaid finance charge.

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Example:

Assume a $50,000 loan commitment at 10.5% interest with a 5-month construction period and a prepaid finance charge of 2 points, followed by 30-year permanent financing at the same rate with monthly amortization payments of $457.37.

Computation of Estimated APR

		Interest on Amount Advanced		Interest on Entire Commitment	
Estimated construction interest:					
$25,000 x .105 ÷ 12 x 5	=	$1,093.75	$50,000 x .105 ÷ 12 x 5 =	$2,187.50	
Estimated total finance charge:					
360 x $457.37 =	$164,653.20			$164,653.20	
Principal	- 50,000.00			- 50,000.00	
Interest on Permanent Fin.	114,653.20			114,653.20	
Construction Interest	+ 1,093.75			+ 2,187.50	
Points	+ 1,000.00	$116,746.95		+ 1,000.00	$117,840.70
Estimated amount financed:					
Principal	$ 50,000.00			$ 50,000.00	
Construction Interest	- 1,093.75			- 2,187.50	
Points	- 1,000.00	$ 47,906.25		- 1,000.00	$ 46,812.50
Number of payments		360			360
Payment amount		$ 457.37			$ 457.37
First payment period (5 + 2) + 1		3 1/2 months		(5 + 2) + 1	3 1/2 months
Estimated APR (Actuarial)		10.75%			11.03%
Estimated APR (Volume I):					
11,674,695 / 47,906.25 = 243.70 = FC/$100				11,784,070 / 46,812.50 = 251.73 = FC/$100	
First period adjustment = 3 mo., 15 days = +5.0				First period adjustment = 3 mo., 15 days = +5.0	
Using 365 payment line, the figure closest to 243.70 is 247.00, which corresponds to an APR of		11%		Using 365 payment line, the figure closest to 25i.73 is 253.93, which corresponds to an APR of	11.25%

Disclosures

Amount financed	$ 49,000.00	$ 49,000.00
Prepaid finance charge	1,000.00	1,000.00
FINANCE CHARGE (Estimate)	116,746.95	117,840.70
ANNUAL PERCENTAGE RATE (Estimate)	11%	11.25%
Repayment: Interest on the amount of credit outstanding during the construction period will be paid monthly, followed by 360 monthly payments of $457.37, beginning 1-12-81.		5 monthly payments of $437.50 beginning 8-12-80, followed by 360 monthly payments of $457.37 beginning 1-12-81.
Total of payments (Estimate)	$165,746.95	$166,840.70

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Appendix E to Part 1026—Rules for Card Issuers That Bill on a Transaction-by-Transaction Basis

The following provisions of Subpart B apply if credit cards are issued and the card issuer and the seller are the same or related persons; no finance charge is imposed; consumers are billed in full for each use of the card on a transaction-by-transaction basis, by means of an invoice or other statement reflecting each use of the card; and no cumulative account is maintained which reflects the transactions by each consumer during a period of time, such as a month. The term ''related person'' refers to, for example, a franchised or licensed seller of a creditor's product or service or a seller who assigns or sells sales accounts to a creditor or arranges for credit under a plan that allows the consumer to use the credit only in transactions with that seller. A seller is not related to the creditor merely because the seller and the creditor have an agreement authorizing the seller to honor the creditor's credit card.

1. *Section 1026.6(a)(5) or § 1026.6(b)(5)(iii).*

2. *Section 1026.6(a)(2) or § 1026.6(b)(3)(ii)(B), as applicable.* The disclosure required by § 1026.6(a)(2) or § 1026.6(b)(3)(ii)(B) shall be limited to those charges that are or may be imposed as a result of the deferral of payment by use of the card, such as late payment or delinquency charges. A tabular format is not required.

3. *Section 1026.6(a)(4) or § 1026.6(b)(5)(ii).*

4. *Section 1026.7(a)(2) or § 1026.7(b)(2), as applicable; § 1026.7(a)(9) or § 1026.7(b)(9), as applicable.* Creditors may comply by placing the required disclosures on the invoice or statement sent to the consumer for each transaction.

5. *Section 1026.9(a).* Creditors may comply by mailing or delivering the statement required by § 1026.6(a)(5) or § 1026.6(b)(5)(iii) (see Appendix G–3 and G–3(A) to this part) to each consumer receiving a transaction invoice during a one-month period chosen by the card issuer or by sending either the statement prescribed by § 1026.6(a)(5) or § 1026.6(b)(5)(iii), or an alternative billing error rights statement substantially similar to that in Appendix G–4 and G–4(A) to this part, with each invoice sent to a consumer.

6. *Section 1026.9(c).* A tabular format is not required.

7. *Section 1026.10.*

8. *Section 1026.11(a).* This section applies when a card issuer receives a payment or other credit that exceeds by more than $1 the amount due, as shown on the transaction invoice. The requirement to credit amounts to an account may be complied with by other reasonable means, such as by a credit memorandum. Since no periodic statement is provided, a notice of the credit balance shall be sent to the consumer within a reasonable period of time following its occurrence unless a refund of the credit balance is mailed or delivered to the consumer within seven business days of its receipt by the card issuer.

9. *Section 1026.12 including § 1026.12(c) and (d), as applicable.* Section 1026.12(e) is inapplicable.

10. *Section 1026.13, as applicable.* All references to ''periodic statement'' shall be read to indicate the invoice or other statement for the relevant transaction. All actions with regard to correcting and adjusting a consumer's account may be taken by issuing a refund or a new invoice, or by other appropriate means consistent with the purposes of the section.

11. *Section 1026.15, as applicable.*

Appendix F to Part 1026—Optional Annual Percentage Rate Computations for Creditors Offering Open-End Credit Plans Secured by a Consumer's Dwelling

In determining the denominator of the fraction under § 1026.14(c)(3), no amount will be used more than once when adding the sum of the balances subject to periodic rates to the sum of the amounts subject to specific transaction charges. (Where a portion of the finance charge is determined by application of one or more daily periodic rates, the phrase ''sum of the balances'' shall also mean the ''average of daily balances.'') In every case, the full amount of transactions subject to specific transaction charges shall be included in the denominator. Other balances or parts of balances shall be included according to the manner of determining the balance subject to a periodic rate, as illustrated in the following examples of accounts on monthly billing cycles:

1. Previous balance—none.

A specific transaction of $100 occurs on the first day of the billing cycle. The average daily balance is $100. A specific transaction charge of 3% is applicable to the specific transaction. The periodic rate is 1½% applicable to the average daily balance. The numerator is the amount of the finance charge, which is $4.50. The denominator is the amount of the transaction (which is $100), plus the amount by which the balance subject to the periodic rate exceeds the amount of the specific transactions (such excess in this case is 0), totaling $100.

The annual percentage rate is the quotient (which is 4½%) multiplied by 12 (the number of months in a year), i.e., 54%.

2. Previous balance—$100.

A specific transaction of $100 occurs at the midpoint of the billing cycle. The average daily balance is $150. A specific transaction charge of 3% is applicable to the specific transaction. The periodic rate is 1½% applicable to the average daily balance. The numerator is the amount of the finance charge which is $5.25. The denominator is the amount of the transaction (which is $100), plus the amount by which the balance subject to the periodic rate exceeds the amount of the specific transaction (such excess in this case is $50), totaling $150. As explained in example 1, the annual percentage rate is 3½% × 12 = 42%.

3. If, in example 2, the periodic rate applies only to the previous balance, the numerator is $4.50 and the denominator is $200 (the amount of the transaction, $100, plus the balance subject only to the periodic rate, the $100 previous balance). As explained in example 1, the annual percentage rate is 2¼% × 12 = 27%.

4. If, in example 2, the periodic rate applies only to an adjusted balance (previous balance less payments and credits) and the consumer made a payment of $50 at the midpoint of the billing cycle, the numerator is $3.75 and the denominator is $150 (the amount of the transaction, $100, plus the balance subject to the periodic rate, the $50 adjusted balance). As explained in example 1, the annual percentage rate is 2½% × 12 = 30%.

5. Previous balance—$100.

A specific transaction (check) of $100 occurs at the midpoint of the billing cycle. The average daily balance is $150. The specific transaction charge is $.25 per check. The periodic rate is 1½% applied to the average daily balance. The numerator is the amount of the finance charge, which is $2.50 and includes the $.25 check charge and the $2.25 resulting from the application of the periodic rate. The denominator is the full amount of the specific transaction (which is $100) plus the amount by which the average daily balance exceeds the amount of the specific transaction (which in this case is $50), totaling $150. As explained in example 1, the annual percentage rate would be 1–2/3% × 12 = 20%.

6. Previous balance—none.

A specific transaction of $100 occurs at the midpoint of the billing cycle. The average daily balance is $50. The specific transaction charge is 3% of the transaction amount or $3.00. The periodic rate is 1½% per month applied to the average daily balance. The numerator is the amount of the finance charge, which is $3.75, including the $3.00 transaction charge and $.75 resulting from application of the periodic rate. The denominator is the full amount of the specific transaction ($100) plus the amount by which the balance subject to the periodic rate exceeds the amount of the transaction ($0). Where the specific transaction amount exceeds the balance subject to the periodic rate, the resulting number is considered to be zero rather than a negative number ($50 − $100 = −$50). The denominator, in this case, is $100. As explained in example 1, the annual percentage rate is 3¾% × 12 = 45%.

Appendix G to Part 1026—Open-End Model Forms and Clauses

G–1 Balance Computation Methods Model Clauses (Home-equity Plans) (§§ 1026.6 and 1026.7)

G–1(A) Balance Computation Methods Model Clauses (Plans other than Home-equity Plans) (§§ 1026.6 and 1026.7)

G–2 Liability for Unauthorized Use Model Clause (Home-equity Plans) (§ 1026.12)

G–2(A) Liability for Unauthorized Use Model Clause (Plans Other Than Home-equity Plans) (§ 1026.12)

G–3 Long-Form Billing-Error Rights Model Form (Home-equity Plans) (§§ 1026.6 and 1026.9)

G–3(A Long-Form Billing-Error Rights Model Form (Plans Other Than Home-equity Plans) (§§ 1026.6 and 1026.9)

G–4 Alternative Billing-Error Rights Model Form (Home-equity Plans) (§ 1026.9)

G–4(A Alternative Billing-Error Rights Model Form (Plans Other Than Home-equity Plans) (§ 1026.9)

G–5 Rescission Model Form (When Opening an Account) (§ 1026.15)

G–6 Rescission Model Form (For Each Transaction) (§ 1026.15)
G–7 Rescission Model Form (When Increasing the Credit Limit) (§ 1026.15)
G–8 Rescission Model Form (When Adding a Security Interest) (§ 1026.15)
G–9 Rescission Model Form (When Increasing the Security) (§ 1026.15)
G–10(A) Applications and Solicitations Model Form (Credit Cards) (§ 1026.60(b))
G–10(B) Applications and Solicitations Sample (Credit Cards) (§ 1026.60(b))
G–10(C) Applications and Solicitations Sample (Credit Cards) (§ 1026.60(b))
G–10(D) Applications and Solicitations Model Form (Charge Cards) (§ 1026.60(b))
G–10(E) Applications and Solicitations Sample (Charge Cards) (§ 1026.60(b))
G–11 Applications and Solicitations Made Available to General Public Model Clauses (§ 1026.60(e))
G–12 Reserved
G–13(A) Change in Insurance Provider Model Form (Combined Notice) (§ 1026.9(f))
G–13(B) Change in Insurance Provider Model Form (§ 1026.9(f)(2))
G–14A Home-equity Sample
G–14B Home-equity Sample
G–1 Home-equity Model Clauses
G–16(A) Debt Suspension Model Clause (§ 1026.4(d)(3))
G–16(B) Debt Suspension Sample (§ 1026.4(d)(3))
G–17(A) Account-opening Model Form (§ 1026.6(b)(2))
G–17(B) Account-opening Sample (§ 1026.6(b)(2))
G–17(C) Account-opening Sample (§ 1026.6(b)(2))
G–17(D) Account-opening Sample (§ 1026.6(b)(2))
G–18(A) Transactions; Interest Charges; Fees Sample (§ 1026.7(b))
G–18(B) Late Payment Fee Sample (§ 1026.7(b))
G–18(C)(1) Minimum Payment Warning (When Amortization Occurs and the 36–Month Disclosures Are Required) (§ 1026.7(b))
G–18(C)(2) Minimum Payment Warning (When Amortization Occurs and the 36–Month Disclosures Are Not Required) (§ 1026.7(b))
G–18(C)(3) Minimum Payment Warning (When Negative or No Amortization Occurs) (§ 1026.7(b))
G–18(D) Periodic Statement New Balance, Due Date, Late Payment and Minimum Payment Sample (Credit cards) (§ 1026.7(b))
G–18(E) [Reserved]
G–18(F) Periodic Statement Form
G–18(G) Periodic Statement Form
G–18(H) Deferred Interest Periodic Statement Clause
G–19 Checks Accessing a Credit Card Account Sample (§ 1026.9(b)(3))
G–20 Change-in-Terms Sample (Increase in Annual Percentage Rate) (§ 1026.9(c)(2))
G–21 Change-in-Terms Sample (Increase in Fees) (§ 1026.9(c)(2))
G–22 Penalty Rate Increase Sample (Payment 60 or Fewer Days Late) (§ 1026.9(g)(3))
G–23 Penalty Rate Increase Sample (Payment More Than 60 Days Late) (§ 1026.9(g)(3))
G–24 Deferred Interest Offer Clauses (§ 1026.16(h))
G–25(A) Consent Form for Over-the-Limit Transactions (§ 1026.56)
G–25(B) Revocation Notice for Periodic Statement Regarding Over-the-Limit Transactions (§ 1026.56)

G–1—Balance Computation Methods Model Clauses (Home-Equity Plans)

(a) Adjusted Balance Method

We figure [a portion of] the finance charge on your account by applying the periodic rate to the ''adjusted balance'' of your account. We get the ''adjusted balance'' by taking the balance you owed at the end of the previous billing cycle and subtracting [any unpaid finance charges and] any payments and credits received during the present billing cycle.

(b) Previous Balance Method

We figure [a portion of] the finance charge on your account by applying the periodic rate to the amount you owe at the beginning of each billing cycle [minus any unpaid finance charges]. We do not subtract any payments or credits received during the billing cycle. [The amount of payments and credits to your account this billing cycle was $ _____.]

(c) Average Daily Balance Method (Excluding Current Transactions)

We figure [a portion of] the finance charge on your account by applying the periodic rate to the ''average daily balance'' of your account (excluding current transactions). To get the ''average daily balance'' we take the beginning balance of your account each day and subtract any payments or credits [and any unpaid finance charges]. We do not add in any new [purchases/advances/loans]. This gives us the daily balance. Then, we add all the daily balances for the billing cycle together and divide the total by the number of days in the billing cycle. This gives us the ''average daily balance.''

(d) Average Daily Balance Method (Including Current Transactions)

We figure [a portion of] the finance charge on your account by applying the periodic rate to the ''average daily balance'' of your account (including current transactions). To get the ''average daily balance'' we take the beginning balance of your account each day, add any new [purchases/advances/loans], and subtract any payments or credits, [and unpaid finance charges]. This gives us the daily balance. Then, we add up all the daily balances for the billing cycle and divide the total by the number of days in the billing cycle. This gives us the ''average daily balance.''

(e) Ending Balance Method

We figure [a portion of] the finance charge on your account by applying the periodic rate to the amount you owe at the end of each billing cycle (including new purchases and deducting payments and credits made during the billing cycle).

(f) Daily Balance Method (Including Current Transactions)

We figure [a portion of] the finance charge on your account by applying the periodic rate to the ''daily balance'' of your account for each day in the billing cycle. To get the ''daily balance'' we take the beginning balance of your account each day, add any new [purchases/advances/fees], and subtract [any unpaid finance charges and] any payments or credits. This gives us the daily balance.

G–1(A)—Balance Computation Methods Model Clauses (Plans Other Than Home-Equity Plans)

(a) Adjusted Balance Method

We figure the interest charge on your account by applying the periodic rate to the ''adjusted balance'' of your account. We get the ''adjusted balance'' by taking the balance you owed at the end of the previous billing cycle and subtracting [any unpaid interest or other finance charges and] any payments and credits received during the present billing cycle.

(b) Previous Balance Method

We figure the interest charge on your account by applying the periodic rate to the amount you owe at the beginning of each billing cycle. We do not subtract any payments or credits received during the billing cycle.

(c) Average Daily Balance Method (Excluding Current Transactions)

We figure the interest charge on your account by applying the periodic rate to the ''average daily balance'' of your account. To get the ''average daily balance'' we take the beginning balance of your account each day and subtract [any unpaid interest or other finance charges and] any payments or credits. We do not add in any new [purchases/advances/fees]. This gives us the daily balance. Then, we add all the daily balances for the billing cycle together and divide the total by the number of days in the billing cycle. This gives us the ''average daily balance.''

(d) Average Daily Balance Method (Including Current Transactions)

We figure the interest charge on your account by applying the periodic rate to the ''average daily balance'' of your account. To get the ''average daily balance'' we take the beginning balance of your account each day, add any new [purchases/advances/fees], and subtract [any unpaid interest or other finance charges and] any payments or credits. This gives us the daily balance. Then, we add up all the daily balances for the billing cycle and divide the total by the number of days in the billing cycle. This gives us the ''average daily balance.''

(e) Ending Balance Method

We figure the interest charge on your account by applying the periodic rate to the amount you owe at the end of each billing cycle (including new [purchases/advances/fees] and deducting payments and credits made during the billing cycle).

(f) Daily Balance Method (Including Current Transactions)

We figure the interest charge on your account by applying the periodic rate to the ''daily balance'' of your account for each day in the billing cycle. To get the ''daily balance'' we take the beginning balance of your account each day, add any new [purchases/advances/fees], and subtract [any unpaid interest or other finance charges and] any payments or credits. This gives us the daily balance.

G–2—Liability for Unauthorized Use Model Clause (Home-Equity Plans)

You may be liable for the unauthorized use of your credit card [or other term that describes the credit card]. You will not be liable for unauthorized use that occurs after you notify [name of card issuer or its designee] at [address], orally or in writing, of the loss, theft, or possible unauthorized use. [You may also contact us on the Web: [Creditor Web or email address]] In any case, your liability will not exceed [insert $50 or any lesser amount under agreement with the cardholder].

G–2(A)—Liability for Unauthorized Use Model Clause (Plans Other Than Home-Equity Plans)

If you notice the loss or theft of your credit card or a possible unauthorized use of your card, you should write to us immediately at: [address] [address listed on your bill],

or call us at [telephone number].

[You may also contact us on the Web: [Creditor Web or email address]]

You will not be liable for any unauthorized use that occurs after you notify us. You may, however, be liable for unauthorized use that occurs before your notice to us. In any case, your liability will not exceed [insert $50 or any lesser amount under agreement with the cardholder].

G–3—Long-Form Billing-Error Rights Model Form (Home-Equity Plans)

YOUR BILLING RIGHTS

KEEP THIS NOTICE FOR FUTURE USE

This notice contains important information about your rights and our responsibilities under the Fair Credit Billing Act.

Notify Us in Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us [on a separate sheet] at [address] [the address listed on your bill]. Write to us as soon as possible. We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. [You may also contact us on the Web: [Creditor Web or email address]] You can telephone us, but doing so will not preserve your rights.

In your letter, give us the following information:

- Your name and account number.
- The dollar amount of the suspected error.
- Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are not sure about.

If you have authorized us to pay your credit card bill automatically from your savings or checking account, you can stop the payment on any amount you think is wrong. To stop the payment your letter must reach us three business days before the automatic payment is scheduled to occur.

Your Rights and Our Responsibilities After We Receive Your Written Notice

We must acknowledge your letter within 30 days, unless we have corrected the error by then. Within 90 days, we must either correct the error or explain why we believe the bill was correct.

After we receive your letter, we cannot try to collect any amount you question, or report you as delinquent. We can continue to bill you for the amount you question, including finance charges, and we can apply any unpaid amount against your credit limit. You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question.

If we find that we made a mistake on your bill, you will not have to pay any finance charges related to any questioned amount. If we didn't make a mistake, you may have to pay finance charges, and you will have to make up any missed payments on the questioned amount. In either case, we will send you a statement of the amount you owe and the date that it is due.

If you fail to pay the amount that we think you owe, we may report you as delinquent. However, if our explanation does not satisfy you and you write to us within ten days telling us that you still refuse to pay, we must tell anyone we report you to that you have a question about your bill. And, we must tell you the name of anyone we reported you to. We must tell anyone we report you to that the matter has been settled between us when it finally is.

If we don't follow these rules, we can't collect the first $50 of the questioned amount, even if your bill was correct.

Special Rule for Credit Card Purchases

If you have a problem with the quality of property or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the property or services.

There are two limitations on this right:

(a) You must have made the purchase in your home state or, if not within your home state within 100 miles of your current mailing address; and

(b) The purchase price must have been more than $50.

These limitations do not apply if we own or operate the merchant, or if we mailed you the advertisement for the property or services.

G–3(A)—Long-Form Billing-Error Rights Model Form (Plans Other Than Home-Equity Plans)

Your Billing Rights: Keep This Document For Future Use

This notice tells you about your rights and our responsibilities under the Fair Credit Billing Act.

What To Do If You Find A Mistake On Your Statement

If you think there is an error on your statement, write to us at:

[Creditor Name]

[Creditor Address]

[You may also contact us on the Web: [Creditor Web or email address]]

In your letter, give us the following information:

- *Account information:* Your name and account number.
- *Dollar amount:* The dollar amount of the suspected error.
- *Description of problem:* If you think there is an error on your bill, describe what you believe is wrong and why you believe it is a mistake.

You must contact us:

- Within 60 days after the error appeared on your statement.
- At least 3 business days before an automated payment is scheduled, if you want to stop payment on the amount you think is wrong.

You must notify us of any potential errors *in writing* [or electronically]. You may call us, but if you do we are not required to investigate any potential errors and you may have to pay the amount in question.

What Will Happen After We Receive Your Letter

When we receive your letter, we must do two things:

1. Within 30 days of receiving your letter, we must tell you that we received your letter. We will also tell you if we have already corrected the error.

2. Within 90 days of receiving your letter, we must either correct the error or explain to you why we believe the bill is correct.

While we investigate whether or not there has been an error:

- We cannot try to collect the amount in question, or report you as delinquent on that amount.
- The charge in question may remain on your statement, and we may continue to charge you interest on that amount.
- While you do not have to pay the amount in question, you are responsible for the remainder of your balance.
- We can apply any unpaid amount against your credit limit.

After we finish our investigation, one of two things will happen:

- *If we made a mistake:* You will not have to pay the amount in question or any interest or other fees related to that amount.
- *If we do not believe there was a mistake:* You will have to pay the amount in question, along with applicable interest and fees. We will send you a statement of the amount you owe and the date payment is due. We may then report you as delinquent if you do not pay the amount we think you owe.

If you receive our explanation but still believe your bill is wrong, you must write to us within *10 days* telling us that you still refuse to pay. If you do so, we cannot report you as delinquent without also reporting that you are questioning your bill. We must tell you the name of anyone to whom we reported you as delinquent, and we must let those organizations know when the matter has been settled between us.

If we do not follow all of the rules above, you do not have to pay the first $50 of the amount you question even if your bill is correct.

Your Rights If You Are Dissatisfied With Your Credit Card Purchases

If you are dissatisfied with the goods or services that you have purchased with your credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the purchase.

To use this right, all of the following must be true:

1. The purchase must have been made in your home state or within 100 miles of your current mailing address, and the purchase price must have been more than $50. (**Note:** Neither of these are necessary if your purchase was based on an advertisement we mailed to you, or if we own the company that sold you the goods or services.)

2. You must have used your credit card for the purchase. Purchases made with cash advances from an ATM or with a check that accesses your credit card account do not qualify.

3. You must not yet have fully paid for the purchase.

If all of the criteria above are met and you are still dissatisfied with the purchase, contact us *in writing* [or electronically] at:

[Creditor Name]

[Creditor Address]

[[Creditor Web or email address]]

While we investigate, the same rules apply to the disputed amount as discussed above. After we finish our investigation, we will tell you our decision. At that point, if we think you owe an amount and you do not pay, we may report you as delinquent.

G–4—Alternative Billing-Error Rights Model Form (Home-Equity Plans)

BILLING RIGHTS SUMMARY

In Case of Errors or Questions About Your Bill

If you think your bill is wrong, or if you need more information about a transaction on your bill, write us [on a separate sheet] at [address] [the address shown on your bill] as soon as possible. [You may also contact us on the Web: [Creditor Web or email address].] We must hear from you no later than 60 days after we sent you the first bill on which the error or problem appeared. You can telephone us, but doing so will not preserve your rights.

In your letter, give us the following information:

- Your name and account number.
- The dollar amount of the suspected error.
- Describe the error and explain, if you can, why you believe there is an error. If you need more information, describe the item you are unsure about.

You do not have to pay any amount in question while we are investigating, but you are still obligated to pay the parts of your bill that are not in question. While we investigate your question, we cannot report you as delinquent or take any action to collect the amount you question.

Special Rule for Credit Card Purchases

If you have a problem with the quality of goods or services that you purchased with a credit card, and you have tried in good faith to correct the problem with the merchant, you may not have to pay the remaining amount due on the goods or services. You have this protection only when the purchase price was more than $50 and the purchase was made in your home state or within 100 miles of your mailing address. (If we own or operate the merchant, or if we mailed you the advertisement for the property or services, all purchases are covered regardless of amount or location of purchase.)

G–4(A)—Alternative Billing-Error Rights Model Form (Plans Other Than Home-Equity Plans)

What To Do If You Think You Find A Mistake On Your Statement

If you think there is an error on your statement, write to us at:

[Creditor Name]

[Creditor Address]

[You may also contact us on the Web: [Creditor Web or email address]]

In your letter, give us the following information:

- *Account information:* Your name and account number.
- *Dollar amount:* The dollar amount of the suspected error.
- *Description of Problem:* If you think there is an error on your bill, describe what you believe is wrong and why you believe it is a mistake.

You must contact us within 60 days after the error appeared on your statement.

You must notify us of any potential errors *in writing* [or electronically]. You may call us, but if you do we are not required to investigate any potential errors and you may have to pay the amount in question.

While we investigate whether or not there has been an error, the following are true:

- We cannot try to collect the amount in question, or report you as delinquent on that amount.
- The charge in question may remain on your statement, and we may continue to charge you interest on that amount. But, if we determine that we made a mistake, you will not have to pay the amount in question or any interest or other fees related to that amount.
- While you do not have to pay the amount in question, you are responsible for the remainder of your balance.
- We can apply any unpaid amount against your credit limit.

Your Rights If You Are Dissatisfied With Your Credit Card Purchases

If you are dissatisfied with the goods or services that you have purchased with your credit card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the purchase.

To use this right, all of the following must be true:

1. The purchase must have been made in your home state or within 100 miles of your current mailing address, and the purchase price must have been more than $50. (**Note:** Neither of these is necessary if your purchase was based on an advertisement we mailed to you, or if we own the company that sold you the goods or services.)

2. You must have used your credit card for the purchase. Purchases made with cash advances from an ATM or with a check that accesses your credit card account do not qualify.

3. You must not yet have fully paid for the purchase.

If all of the criteria above are met and you are still dissatisfied with the purchase, contact us *in writing* [or electronically] at:

[Creditor Name]

[Creditor Address]

[[Creditor Web address]]

While we investigate, the same rules apply to the disputed amount as discussed above. After we finish our investigation, we will tell you our decision. At that point, if we think you owe an amount and you do not pay we may report you as delinquent.

BILLING CODE 4810–AM–P

G-5—Rescission Model Form (When Opening An Account)

NOTICE OF RIGHT TO CANCEL

1. Your Right to Cancel.
We have agreed to establish an open-end credit account for you, and you have agreed to give us a [mortgage/lien/security interest] [on/in] your home as security for the account. You have a legal right under federal law to cancel the account, without cost, within three business days after the latest of the following events:

(1) the opening date of your account which is

_____; or
(2) the date you received your Truth-in-Lending disclosures; or
(3) the date you received this notice of your right to cancel the account.

If you cancel the account, the [mortgage/lien/security interest] [on/in] your home is also cancelled. Within 20 days of receiving your notice, we must take the necessary steps to reflect the fact that the [mortgage/lien/security interest] [on/in] your home has been cancelled. We must return to you any money or property you have given to us or to anyone else in connection with the account.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address shown below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

2. How to Cancel.
If you decide to cancel the account, you may do so by notifying us, in writing, at

(creditor's name and business address).

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice no matter how you notify us because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of (date)
(or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL.

_____ _____
Consumer's Signature Date

G-6—Rescission Model Form (For Each Transaction)

NOTICE OF RIGHT TO CANCEL

1. Your Right to Cancel.
We have extended credit to you under your open-end credit account. This extension of credit will increase the amount you owe on your account. We already have a [mortgage/lien/security interest] [on/in] your home as security for your account. You have a legal right under federal law to cancel the extension of credit, without cost, within three business days after the latest of the following events:

(1) the date of the additional extension of credit which is

_____; or

(2) the date you received your Truth-in-Lending disclosures; or

(3) the date you received this notice of your right to cancel the additional extension of credit.

If you cancel the additional extension of credit, your cancellation will only apply to the additional amount and to any increase in the [mortgage/lien/security interest] that resulted because of the additional amount. It will not affect the amount you presently owe, and it will not affect the [mortgage/lien/security interest] we already have [on/in] your home. Within 20 calendar days after we receive your notice of cancellation, we must take the necessary steps to reflect the fact that any increase in the [mortgage/lien/security interest] [on/in] your home has been cancelled. We must also return to you any money or property you have given to us or to anyone else in connection with this extension of credit.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address shown below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

2. How to Cancel.
If you decide to cancel the additional extension of credit, you may do so by notifying us, in writing, at

(creditor's name and business address),

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice no matter how you notify us because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of (date) (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL.

_____ _____

Consumer's Signature Date

G-7—Rescission Model Form (When Increasing the Credit Limit)

NOTICE OF RIGHT TO CANCEL

1. Your Right to Cancel.

We have agreed to increase the credit limit on your open-end credit account. We have a [mortgage/lien/security interest] [on/in] your home as security for your account. Increasing the credit limit will increase the amount of the [mortgage/lien/security interest] [on/in] your home. You have a legal right under federal law to cancel the increase in your credit limit, without cost, within three business days after the latest of the following events:

(1) the date of the increase in your credit limit which is

_____; or

(2) the date you received your Truth-in-Lending disclosures; or

(3) the date you received this notice of your right to cancel the increase in your credit limit.

If you cancel, your cancellation will apply only to the increase in your credit limit and to the [mortgage/lien/security interest] that resulted from the increase in your credit limit. It will not affect the amount you presently owe, and it will not affect the [mortgage/lien/security interest] we already have [on/in] your home. Within 20 calendar days after we receive your notice of cancellation, we must take the necessary steps to reflect the fact that any increase in the [mortgage/lien/security interest] [on/in] your home has been cancelled. We must also return to you any money or property you have given to us or to anyone else in connection with this increase.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address shown below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

2. How to Cancel.

If you decide to cancel the increase in your credit limit, you may do so by notifying us, in writing, at

(creditor's name and business address).

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice no matter how you notify us because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of (date) (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL.

_____ _____

Consumer's Signature Date

G-8—Rescission Model Form (When Adding a Security Interest)

NOTICE OF RIGHT TO CANCEL

1. Your Right to Cancel.
You have agreed to give us a [mortgage/lien/security interest] [on/in] your home as security for your existing open-end credit account. You have a legal right under federal law to cancel the [mortgage/lien/security interest], without cost, within three business days after the latest of the following events:

(1) the date of the [mortgage/lien/security interest]

which is _____; or
(2) the date you received your Truth-in-Lending disclosures; or
(3) the date you received this notice of your right to cancel the [mortgage/lien/security interest]

If you cancel the [mortgage/lien/security interest], your cancellation will apply only to the [mortgage/lien/security interest]. It will not affect the amount you owe on your account. Within 20 calendar days after we receive your notice of cancellation, we must take the necessary steps to reflect that any [mortgage/lien/security interest] [on/in] your home has been cancelled. We must also return to you any money or property you have given to us or to anyone else in connection with this increase.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may make the offer at your home or at the location of the property. Money must be returned to the address shown below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

2. How to Cancel.
If you decide to cancel the [mortgage/lien/security interest], you may do so by notifying us, in writing, at

(creditor's name and business address).

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice no matter how you notify us because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no

later than midnight of (date)
(or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL.

_____ _____
Consumer's Signature Date

G-9—Rescission Model Form (When Increasing the Security)

NOTICE OF RIGHT TO CANCEL

1. Your Right to Cancel.

You have agreed to increase the amount of the [mortgage/lien/security interest] [on/in] your home that we hold as security for your open-end credit account. You have a legal right under federal law to cancel the increase, without cost, within three business days after the latest of the following events:

(1) the date of the increase in the security which is

_____; or

(2) the date you received your Truth-in-Lending disclosures; or

(3) the date you received this notice of your right to cancel the increase in the security.

If you cancel the increase in the security, your cancellation will apply only to the increase in the amount of the [mortgage/lien/security interest]. It will not affect the amount you presently owe on your account, and it will not affect the [mortgage/lien/security interest] we already have [on/in] your home. Within 20 calendar days after we receive your notice of cancellation, we must take the necessary steps to reflect that any increase in the [mortgage/lien/security interest] [on/in] your home has been cancelled. We must also return to you any money or property you have given to us or to anyone else in connection with this increase.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address shown below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

2. How to Cancel.

If you decide to cancel the increase in security, you may do so by notifying us, in writing, at

(creditor's name and business address).

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice no matter how you notify us because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of (date) (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL.

_____ _____

Consumer's Signature Date

G-10(A) Applications and Solicitations Model Form (Credit Cards)

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	[Purchase rate] [Description that rate varies and how it is determined, if applicable]
APR for Balance Transfers	[Balance transfer rate] [Description that rate varies and how it is determined, if applicable]
APR for Cash Advances	[Cash advance rate] [Description that rate varies and how it is determined, if applicable]
Penalty APR and When it Applies	[Penalty rate] [Description of events that may result in the penalty rate] [Description of how long penalty rate may apply]
[How to Avoid Paying Interest on Purchases/ Paying Interest]	[Description of grace period for purchases or statement that no grace period applies]
[Minimum Interest Charge]/[Minimum Charge]	[Description of minimum interest charge or minimum charge]
For Credit Card Tips from the Consumer Financial Protection Bureau	**[Reference to the Bureau's Website]**

Fees	
[Annual Fee]/[Set-up and Maintenance Fees]	[Notice of available credit, if applicable] [Description of fees for availability or issuance of credit, such as an annual fee, if applicable]
Transaction Fees	
• Balance Transfer	[Description of balance transfer fee]
• Cash Advance	[Description of cash advance fee]
• Foreign Transaction	[Description of foreign transaction fee]
Penalty Fees	
• Late Payment	[Description of late payment fee]
• Over-the-Credit Limit	[Description of over-the-credit limit fee]
• Returned Payment	[Description of returned payment fee]
Other Fees	
• Required [insert name of required insurance, or debt cancellation or suspension coverage]	[Description of cost of insurance, or debt cancellation or suspension plans] [Cross reference to additional information, if applicable]

How We Will Calculate Your Balance: [Description of balance computation method]

Loss of Introductory APR [Circumstances in which introductory rate may be revoked and rate that applies if introductory rate is revoked, if applicable]

[Description that rate that applies after introductory rate is revoked varies and how it is determined, if applicable]

G-10(B) Applications and Solicitations Sample (Credit Cards)

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	**8.99%** to **19.99%** when you open your account, based on your creditworthiness. After that, your APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	**15.99%** This APR will vary with the market based on the Prime Rate.
APR for Cash Advances	**21.99%** This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	**28.99%** This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit twice in a six-month period; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. **How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
How to Avoid Paying Interest on Purchases	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month.
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
For Credit Card Tips from the Consumer Financial Protection Bureau	**To learn more about factors to consider when applying for or using a credit card, visit the website of the Consumer Financial Protection Bureau at http://www.consumerfinance.gov/learnmore**

Fees	
Annual Fee	**None**
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
• Foreign Transaction	**2%** of each transaction in U.S. dollars.
Penalty Fees	
• Late Payment	Up to **$35**.
• Over-the-Credit Limit	Up to **$35**.
• Returned Payment	Up to **$35**.
Other Fees	
• Required Account Protector Plan	**$0.79** per $100 of balance at the end of each statement period. See back for details.

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)."

G-10(C) Applications and Solicitations (Credit Cards)

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	**8.99%, 10.99%, or 12.99%** introductory APR for one year, based on your creditworthiness. After that, your APR will be **14.99%**. This APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	**15.99%** This APR will vary with the market based on the Prime Rate
APR for Cash Advances	**21.99%** This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	**28.99%** This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. **How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
How to Avoid Paying Interest on Purchases	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month.
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
For Credit Card Tips from the Consumer Financial Protection Bureau	**To learn more about factors to consider when applying for or using a credit card, visit the website of the Consumer Financial Protection Bureau at http://www.consumerfinance.gov/learnmore**

Fees	
Set-up and Maintenance Fees	NOTICE: Some of these set-up and maintenance fees will be assessed before you begin using your card and will reduce the amount of credit you initially have available. For example, if you are assigned the minimum credit limit of $250, your initial available credit will be only about $209 (or about $204 if you choose to have an additional card).
• Annual Fee	**$20**
• Account Set-up Fee	**$20** (one-time fee)
• Participation Fee	**$12** annually ($1 per month)
• Additional Card Fee	**$5** annually (if applicable)
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
• Foreign Transaction	**2%** of each transaction in U.S. dollars.
Penalty Fees	
• Late Payment	Up to **$35**.
• Over-the-Credit Limit	Up to **$35**.
• Returned Payment	Up to **$35**.

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)."

Loss of Introductory APR: We may end your introductory APR and apply the Penalty APR if you make a late payment.

G-10(D) Applications and Solicitations Model Form (Charge Cards)

Payment Information
[A statement that charges incurred through use of the charge card are due when the periodic statement is received]

Fees	
[Annual Fee]/[Set-up and Maintenance Fees]	[Notice of available credit, if applicable] [Description of fees for availability or issuance of credit, such as an annual fee, if applicable]
Transaction Fees	
• Balance Transfer	[Description of balance transfer fee]
• Cash Advance	[Description of cash advance fee]
• Foreign Transaction	[Description of foreign transaction fee]
Penalty Fees	
• Late Payment	[Description of late payment fee]
• Over-the-Credit Limit	[Description of over-the-credit limit fee]
• Returned Payment	[Description of returned payment fee]

G-10(E) Applications and Solicitations Sample (Charge Cards)

Payment Information
All charges made on this charge card are due and payable when you receive your periodic statement.

Fees	
Annual Fee	**$50**
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
Penalty Fees	
• Late Payment	Up to **$35**. If you do not pay for two consecutive billing cycles, your fee will be **$35** or **3%** of the past due amount, whichever is greater.
• Over-the-Credit Limit	Up to **$35**.
• Returned Payment	Up to **$35**.

G–11—Applications and Solicitations Made Available to the General Public Model Clauses

(a) Disclosure of Required Credit Information

The information about the costs of the card described in this [application]/[solicitation] is accurate as of (*month/year*). This information may have changed after that date. To find out what may have changed, [call us at (*telephone number*)][write to us at (*address*)].

(b) No Disclosure of Credit Information

There are costs associated with the use of this card. To obtain information about these costs, call us at (*telephone number*) or write to us at (*address*).

G–12 [Reserved]

G–13(A)—Change in Insurance Provider Model Form (Combined Notice)

The credit card account you have with us is insured. This is to notify you that we plan to replace your current coverage with insurance coverage from a different insurer.

If we obtain insurance for your account from a different insurer, you may cancel the insurance.

[Your premium rate will increase to $ ____ per ____.]

[Your coverage will be affected by the following:

[ ] The elimination of a type of coverage previously provided to you. [(explanation)] [See ____ of the attached policy for details.]

[ ] A lowering of the age at which your coverage will terminate or will become more restrictive. [(explanation)] [See ____ of the attached policy or certificate for details.]

[ ] A decrease in your maximum insurable loan balance, maximum periodic benefit payment, maximum number of payments, or any other decrease in the dollar amount of your coverage or benefits. [(explanation)] [See ____ of the attached policy or certificate for details.]

[ ] A restriction on the eligibility for benefits for you or others. [(explanation)] [See ____ of the attached policy or certificate for details.]

[ ] A restriction in the definition of ''disability'' or other key term of coverage. [(explanation)] [See ____ of the attached policy or certificate for details.]

[ ] The addition of exclusions or limitations that are broader or other than those under the current coverage. [(explanation)] [See ____ of the attached policy or certificate for details.]

[ ] An increase in the elimination (waiting) period or a change to nonretroactive coverage. [(explanation)] [See ____ of the attached policy or certificate for details).]

[The name and mailing address of the new insurer providing the coverage for your account is (name and address).]

G–13(B)—Change in Insurance Provider Model Form

We have changed the insurer providing the coverage for your account. The new insurer's name and address are (name and address). A copy of the new policy or certificate is attached.

You may cancel the insurance for your account.

G-14A -- Home Equity Sample

IMPORTANT TERMS
of our
HOME EQUITY LINE OF CREDIT

This disclosure contains important information about our Home Equity Line of Credit. You should read it carefully and keep a copy for your records.

Availability of Terms: To obtain the terms described below, you must submit your application before January 1, 1990.

If these terms change (other than the annual percentage rate) and you decide, as a result, not to enter into an agreement with us, you are entitled to a refund of any fees that you have paid to us or anyone else in connection with your application.

Security Interest: We will take a mortgage on your home. You could lose your home if you do not meet the obligations in your agreement with us.

Possible Actions: Under certain circumstances, we can (1) terminate your line, require you to pay us the entire outstanding balance in one payment, and charge you certain fees; (2) refuse to make additional extensions of credit; and (3) reduce your credit limit.

If you ask, we will give you more specific information concerning when we can take these actions.

Minimum Payment Requirements: You can obtain advances of credit for 10 years (the "draw period"). During the draw period, payments will be due monthly. Your minimum monthly payment will equal the greater of $100 or 1/360th of the outstanding balance plus the finance charges that have accrued on the outstanding balance.

After the draw period ends, you will no longer be able to obtain credit advances and must pay the outstanding balance over 5 years (the "repayment period"). During the repayment period, payments will be due monthly. Your minimum monthly payment will equal 1/60th of the balance that was outstanding at the end of the draw period plus the finance charges that have accrued on the remaining balance.

Minimum Payment Example: If you made only the minimum monthly payments and took no other credit advances, it would take 15 years to pay off a credit advance of $10,000 at an ANNUAL PERCENTAGE RATE of 12%. During that period, you would make 120 monthly payments varying between $127.78 and $100.00 followed by 60 monthly payments varying between $187.06 and $118.08.

Fees and Charges: To open and maintain a line of credit, you must pay the following fees to us:

- Application fee: $150 (due at application)
- Points: 1% of credit limit (due when account opened)
- Annual maintenance fee: $75 (due each year)

You also must pay certain fees to third parties to open a line. These fees generally total between $500 and $900. If you ask, we will give you an itemization of the fees you will have to pay to third parties.

Minimum Draw and Balance Requirements: The minimum credit advance you can receive is $500. You must maintain an outstanding balance of at least $100.

Tax Deductibility: You should consult a tax advisor regarding the deductibility of interest and charges for the line.

Variable-Rate Information: The line has a variable-rate feature, and the annual percentage rate (corresponding to the periodic rate) and the minimum payment can change as a result.

The annual percentage rate includes only interest and not other costs.

The annual percentage rate is based on the value of an index. The index is the monthly average prime rate charged by banks and is published in the *Federal Reserve Bulletin*. To determine the annual percentage rate that will apply to your line, we add a margin to the value of the index.

Ask us for the current index value, margin and annual percentage rate. After you open a credit line, rate information will be provided on periodic statements that we will send you.

Rate Changes: The annual percentage rate can change each month. The maximum ANNUAL PERCENTAGE RATE that can apply is 18%. Except for this 18% "cap," there is no limit on the amount by which the rate can change during any one-year period.

Maximum Rate and Payment Examples: If you had an outstanding balance of $10,000 during the draw period, the minimum monthly payment at the maximum ANNUAL PERCENTAGE RATE of 18% would be $177.78. This annual percentage rate could be reached during the first month of the draw period.

If you had an outstanding balance of $10,000 at the beginning of the repayment period, the minimum monthly payment at the maximum ANNUAL PERCENTAGE RATE of 18% would be $316.67. This annual percentage rate could be reached during the first month of the repayment period.

Historical Example: The following table shows how the annual percentage rate and the minimum monthly payments for a single $10,000 credit advance would have changed based on changes in the index over the past 15 years. The index values are from September of each year. While only one payment amount per year is shown, payments would have varied during each year.

The table assumes that no additional credit advances were taken, that only the minimum payments were made each month, and that the rate remained constant during each year. It does not necessarily indicate how the index or your payments will change in the future.

Year	Index (%)	Margin * (%)		ANNUAL PERCENTAGE RATE (%)	Minimum Monthly Payment ($)
1974	12.00	2		14.00	144.44
1975	7.88	2		9.88	106.50
1976	7.00	2		9.00	100.00
1977	7.13	2		9.13	100.00
1978	9.41	2	*Draw Period*	11.41	105.47
1979	12.90	2		14.90	126.16
1980	12.23	2		14.23	117.53
1981	20.08	2		18.00**	138.07
1982	13.50	2		15.50	117.89
1983	11.00	2		13.00	100.00
1984	12.97	2		14.97	203.81
1985	9.50	2		11.50	170.18
1986	7.50	2	*Repayment Period*	9.50	149.78
1987	8.70	2		10.70	141.50
1988	10.00	2		12.00	130.55

* This is a margin we have used recently.
** This rate reflects the 18% rate cap.

G-14B -- Home Equity Sample

IMPORTANT TERMS
of our
HOME EQUITY LINE OF CREDIT

This disclosure contains important information about our Home Equity Line of Credit. You should read it carefully and keep a copy for your records.

Availability of Terms: All of the terms described below are subject to change.

If these terms change (other than the annual percentage rate) and you decide, as a result, not to enter into an agreement with us, you are entitled to a refund of any fees you paid to us or anyone else in connection with your application.

Security Interest: We will take a mortgage on your home. You could lose your home if you do not meet the obligations in your agreement with us.

Possible Actions: We can terminate your line, require you to pay us the entire outstanding balance in one payment, and charge you certain fees if:

- You engage in fraud or material misrepresentation in connection with the line.

- You do not meet the repayment terms.

- Your action or inaction adversely affects the collateral or our rights in the collateral.

We can refuse to make additional extensions of credit or reduce your credit limit if:

- The value of the dwelling securing the line declines significantly below its appraised value for purposes of the line.

- We reasonably believe you will not be able to meet the repayment requirements due to a material change in your financial circumstances.

- You are in default of a material obligation in the agreement.

- Government action prevents us from imposing the annual percentage rate provided for or impairs our security interest such that the value of the interest is less than 120 percent of the credit line.

- A regulatory agency has notified us that continued advances would constitute an unsafe and unsound practice.

- The maximum annual percentage rate is reached.

The initial agreement permits us to make certain changes to the terms of the agreement at specified times or upon the occurrence of specified events.

Minimum Payment Requirements: You can obtain advances of credit for 10 years (the "draw period"). You can choose one of three payment options for the draw period:

- *Monthly interest-only payments.* Under this option, your payments will be due monthly and will equal the finance charges that accrued on the outstanding balance during the preceding month.

- *Quarterly interest-only payments.* Under this option, your payments will be due quarterly and will equal the finance charges that accrued on the outstanding balance during the preceding quarter.

- *2% of the balance.* Under this option, your payments will be due monthly and will equal 2% of the outstanding balance on your line plus finance charges that accrued on the outstanding balance during the preceding month.

If the payment determined under any option is less than $50, the minimum payment will equal $50 or the outstanding balance on your line, whichever is less.

Under both the monthly and quarterly interest-only payment options, the minimum payment will not reduce the principal that is outstanding on your line.

After the draw period ends, you will no longer be able to obtain credit advances and must repay the outstanding balance (the "repayment period"). The length of the repayment period will depend on the balance outstanding at the beginning of it. During the repayment period, payments will be due monthly and will equal 3% of the outstanding balance on your line plus finance charges that accrued on the outstanding balance or $50, whichever is greater.

Minimum Payment Examples: If you took a single $10,000 advance and the ANNUAL PERCENTAGE RATE was 9.52%:

· Under the monthly interest-only payment option, it would take 18 years and 1 month to pay off the advance if you made only the minimum payments. During that period, you would make 120 payments of $79.33, followed by 96 payments varying between $379.33 and $50 and one final payment of $10.75.

· Under the 2% of the balance payment option, it would take 10 years and 8 months to pay off the advance if you made only the minimum payments. During that period, you would make 120 payments varying between $279.33 and $50, followed by 7 payments of $50 and one final payment of $21.53.

Fees and Charges: To open and maintain a line of credit, you must pay us the following fees:

- Application fee: $100 (due at application)
- Points: 1% of credit limit (due when account opened)
- Annual maintenance fee: $50 during the first 3 years, $75 thereafter (due each year)

You also must pay certain fees to third parties to open a line. These fees generally total between $500 and $900. If you ask, we will give you an itemization of the fees you will have to pay to third parties.

Minimum Draw Requirement: The minimum credit advance that you can receive is $200.

Tax Deductibility: You should consult a tax advisor regarding the deductibility of interest and charges for the line.

Variable-Rate Feature: The line has a variable-rate feature, and the annual percentage rate (corresponding to the periodic rate) and the minimum monthly payment can change as a result.

The annual percentage rate includes only interest and not other costs.

The annual percentage rate is based on the value of an index. During the draw period, the index is the monthly average prime rate charged by banks. During the repayment period, the index is the weekly average yield on U.S. Treasury securities adjusted to a constant maturity of one year. Information on these indices is published in the *Federal Reserve Bulletin*. To determine the annual percentage rate that will apply to your line, we add a margin to the value of the index.

The initial annual percentage rate is "discounted" -- it is not based on the index and margin used for later rate adjustments. The initial rate will be in effect for the first year your credit line is open.

Ask us for the current index values, margin, discount and annual percentage rate. After you open a credit line, rate information will be provided on periodic statements that we send you.

Rate Changes: The annual percentage rate can change monthly. The maximum ANNUAL PERCENTAGE RATE that can apply is 18%. Apart from this rate "cap," there is no limit on the amount by which the rate can change during any one-year period.

Maximum Rate and Payment Examples: If the ANNUAL PERCENTAGE RATE during the draw period equaled the 18% maximum and you had an outstanding balance of $10,000:

· Under the monthly interest-only payment option, the minimum monthly payment would be $150.

· Under the 2% of the balance payment option, the minimum monthly payment would be $350.

This annual percentage rate could be reached during the first month of the draw period.

If you had an outstanding balance of $10,000 during the repayment period, the minimum monthly payment at the maximum ANNUAL PERCENTAGE RATE of 18% would be $450. This annual percentage rate could be reached during the first month of the repayment period.

Historical Example: The following table shows how the annual percentage rate and the monthly payments for a single $10,000 credit advance would have changed based on changes in the indices over the past 15 years. For the draw period, the index values for the prime rate are from September of each year. For the repayment period, the index values for the yield on U.S. Treasury securities are from the first week ending in July. While only one payment amount per year is shown, payments under the 2% of the balance payment option and during the repayment period would have varied during each year.

The table assumes that no additional credit advances were taken, that only the minimum payments were made, and that the rate remained constant during each year. It does not necessarily indicate how the indices or your payments will change in the future.

	Year	Index	Margin*	ANNUAL PERCENTAGE RATE	Monthly Interest-Only Payments	Monthly 2% of Balance Payments
		%	%	%	($)	($)
	1974	12.00	2	10.00 **	83.33	283.33
	1975	7.88	2	9.88	82.33	221.55
	1976	7.00	2	9.00	75.00	169.34
	1977	7.13	2	9.13	76.08	133.41
Draw	1978	9.41	2	11.41	95.08	111.89
Period	1979	12.90	2	14.90	124.17	96.46
	1980	12.23	2	14.23	118.58	74.39
	1981	20.08	2	18.00 ***	150.00	64.13
	1982	13.50	2	15.50	129.17	50.00
	1983	11.00	2	13.00	108.33	50.00
	1984	12.17	2	14.17	418.08	50.00
Repayment	1985	7.66	2	9.66	264.01	
Period	1986	6.36	2	8.36	177.96	
	1987	6.71	2	8.71	124.45	
	1988	7.52	2	9.52	87.92	

* This is a margin we have used recently.
** This rate reflects a 4% "discount" we have used recently.
***This rate reflects the18% rate cap.

G-15 -- Home Equity Model Clauses

(a) Retention of Information: This disclosure contains important information about our Home Equity Line of Credit. You should read it carefully and keep a copy for your records.

(b) Availability of Terms: To obtain the terms described below, you must submit your application before (*date*). However the (*description of terms*) are subject to change.

or

All of the terms described below are subject to change.

If these terms change [(other than the annual percentage rate)] and you decide, as a result, not to enter into an agreement with us, you are entitled to a refund of any fees you paid to us or anyone else in connection with your application.

(c) Security Interest: We will take a [security interest in/mortgage on] your home. You could lose your home if you do not meet the obligations in your agreement with us.

(d) Possible Actions: Under certain circumstances, we can (1) terminate your line, require you to pay us the entire outstanding balance in one payment [, and charge you certain fees]; (2) refuse to make additional extensions of credit; (3) reduce your credit limit [; and (4) make specific changes that are set forth in your agreement with us].

If you ask, we will give you more specific information about when we can take these actions.

or

Possible Actions: We can terminate your account, require you to pay us the entire outstanding balance in one payment[, and charge you certain fees] if:

- You engage in fraud or material misrepresentation in connection with the line.
- You do not meet the repayment terms.
- Your action or inaction adversely affects the collateral or our rights in the collateral.

We can refuse to make additional extensions of credit or reduce your credit limit if:

- The value of the dwelling securing the line declines significantly below its appraised value for purposes of the line.
- We reasonably believe you will not be able to meet the repayment requirements due to a material change in your financial circumstances.
- You are in default of a material obligation in the agreement.
- Government action prevents us from imposing the annual percentage rate provided for or impairs our security interest such that the value of the interest is less than 120 percent of the credit line.
- A regulatory agency has notified us that continued advances would constitute an unsafe and unsound practice.
- The maximum annual percentage rate is reached.

[The initial agreement permits us to make certain changes to the terms of the agreement at specified times or upon the occurrence of specified events.]

(e) Minimum Payment Requirements: The length of the [draw period/repayment period] is (*length*). Payments will be due (*frequency*). Your minimum payment will equal (*how payment determined*).

[The minimum payment will not reduce the principal that is outstanding on your line./The minimum payment will not fully repay the principal that is outstanding on your line.] You will then be required to pay the entire balance in a single "balloon" payment.

(f) Minimum Payment Example: If you made only the minimum payments and took no other credit advances, it would take (*length of time*) to pay off a credit advance of $10,000 at an ANNUAL PERCENTAGE RATE of (*recent rate*). During that period, you would make (*number*) (*frequency*) payments of $___.

(g) Fees and Charges: To open and maintain a line of credit, you must pay the following fees to us:

(*Description of fee*) [$___/__% of _____] (*When payable*)

(*Description of fee*) [$___/__% of _____] (*When payable*)

You also must pay certain fees to third parties. These fees generally total [$___/__% of _____/between $___ and $___]. If you ask, we will give you an itemization of the fees you will have to pay to third parties.

(h) Minimum Draw and Balance Requirements: The minimum credit advance you can receive is $___. You must maintain an outstanding balance of at least $___.

(i) Negative Amortization: Under some circumstances, your payments will not cover the finance charges that accrue and "negative amortization" will occur. Negative amortization will increase the amount that you owe us and reduce your equity in your home.

(j) Tax Deductibility: You should consult a tax advisor regarding the deductibility of interest and charges for the line.

(k) Other Products: If you ask, we will provide you with information on our other available home equity lines.

(l) Variable-Rate Feature: The plan has a variable-rate feature and the annual percentage rate (corresponding to the periodic rate) and the [minimum payment/term of the line] can change as a result.

The annual percentage rate includes only interest and not other costs.

The annual percentage rate is based on the value of an index. The index is the (*identification of index*) and is [published in/available from] (*source of information*). To determine the annual percentage rate that will apply to your line, we add a margin to the value of the index.

[The initial annual percentage rate is "discounted" -- it is not based on the index and margin used for later rate adjustments. The initial rate will be in effect for (*period*).]

Ask us for the current index value, margin, [discount,] and annual percentage rate. After you open a credit line, rate information will be provided on periodic statements that we send you.

(m) Rate Changes: The annual percentage rate can change (*frequency*). [The rate cannot increase by more than __ percentage points in any one year period./There is no limit on the amount by which the rate can change in any one year period.] [The maximum ANNUAL PERCENTAGE RATE that can apply is __%./The ANNUAL PERCENTAGE RATE cannot increase by more than __ percentage points above the initial rate.] [Ask us for the specific rate limitations that will apply to your credit line.]

(n) Maximum Rate and Payment Examples: If you had an outstanding balance of $10,000, the minimum payment at the maximum ANNUAL PERCENTAGE RATE of __% would be $___. This annual percentage rate could be reached (*when maximum rate could be reached*).

(o) Historical Example: The following table shows how the annual percentage rate and the minimum payments for a single $10,000 credit advance would have changed based on changes in the index over the past 15 years. The index values are from (*when values are measured*). [While only one payment amount per year is shown, payments would have varied during each year.]

The table assumes that no additional credit advances were taken, that only the minimum payments were made, and that the rate remained constant during each year. It does not necessarily indicate how the index or your payments will change in the future.

Year	Index	Margin	ANNUAL PERCENTAGE RATE	Minimum Payment
	(%)	(%)	(%)	($)
1975				
1976				
1977				
1978				
1979				
1980				
1981				
1982				
1983				
1984				
1985				
1986				
1987				
1988				
1989				

G–16(A) Debt Suspension Model Clause

Please enroll me in the optional [insert name of program], and bill my account the fee of [how cost is determined]. I understand that enrollment is not required to obtain credit. I also understand that depending on the event, the protection may only temporarily suspend my duty to make minimum payments, not reduce the balance I owe. I understand that my balance will actually grow during the suspension period as interest continues to accumulate.

[To Enroll, Sign Here]/[To Enroll, Initial Here]. X_____

G–16(B) Debt Suspension Sample

Please enroll me in the optional [name of program], and bill my account the fee of $.83 per $100 of my month-end account balance. I understand that enrollment is not required to obtain credit. I also understand that depending on the event, the protection may only temporarily suspend my duty to make minimum payments, not reduce the balance I owe. I understand that my balance will actually grow during the suspension period as interest continues to accumulate.

To Enroll, Initial Here. X_____

G-17(A) Account-Opening Model Form

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	[Purchase rate] [Description that rate varies and how it is determined, if applicable]
APR for Balance Transfers	[Balance transfer rate] [Description that rate varies and how it is determined, if applicable]
APR for Cash Advances	[Cash advance rate] [Description that rate varies and how it is determined, if applicable]
Penalty APR and When it Applies	[Penalty rate] [Description of events that may result in the penalty rate] [Description of how long penalty rate may apply]
[How to Avoid Paying Interest]/[Paying Interest]	[Description of grace period for purchases, cash advances, balance transfers, or any other credit extended or statement that no grace period applies]
[Minimum Interest Charge]/[Minimum Charge]	[Description of minimum interest charge or minimum charge, if applicable]
For Credit Card Tips from the Consumer Financial Protection Bureau	**[Reference to the Bureau's Website]**

Fees	
[Annual Fee]/[Set-up and Maintenance Fees]	[Notice of available credit, if applicable] [Notice of right to reject plan, if applicable] [Description of fees for availability or issuance of credit, such as an annual fee, if applicable]
Transaction Fees	
• Balance Transfer	[Description of balance transfer fee]
• Cash Advance	[Description of cash advance fee]
• Foreign Transaction	[Description of foreign transaction fee]
Penalty Fees	
• Late Payment	[Description of late payment fee]
• Over-the-Credit Limit	[Description of over-the-credit limit fee]
• Returned Payment	[Description of returned payment fee]
Other Fees	
• Required [insert name of required insurance, or debt cancellation or suspension coverage]	[Description of cost of insurance, or debt cancellation or suspension plans] [Cross reference to additional information, if applicable]

How We Will Calculate Your Balance: [Description of balance computation method]

Loss of Introductory APR: [Circumstances in which introductory rate may be revoked and rate that applies if introduct rate is revoked, if applicable]

[Description that rate that applies after introductory rate is revoked varies and how it is determined, if applicable]

Billing Rights: [Reference to account agreement for details on billing-error rights]

G-17(B) Account-Opening Sample

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	**8.99%** This APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	**15.99%** This APR will vary with the market based on the Prime Rate.
APR for Cash Advances	**21.99%** This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	**28.99%** This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit twice in a six-month period; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. **How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
Paying Interest	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date.
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
For Credit Card Tips from the Consumer Financial Protection Bureau	**To learn more about factors to consider when applying for or using a credit card, visit the website of the Consumer Financial Protection Bureau at http://www.consumerfinance.gov/learnmore**

Fees	
Annual Fee	**None**
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
• Foreign Transaction	**2%** of each transaction in U.S. dollars.
Penalty Fees	
• Late Payment	Up to **$35**.
• Over-the-Credit Limit	Up to **$35**.
• Returned Payment	Up to **$35**.
Other Fees	
• Required Account Protector Plan	**$0.79** per $100 of balance at the end of each statement period. See back for details.

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)." See your account agreement for more details.

Billing Rights: Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

G-17(C) Account-Opening Sample

Interest Rates and Interest Charges	
Annual Percentage Rate (APR) for Purchases	**8.99%** introductory APR for one year. After that, your APR will be **14.99%**. This APR will vary with the market based on the Prime Rate.
APR for Balance Transfers	**15.99%** This APR will vary with the market based on the Prime Rate.
APR for Cash Advances	**21.99%** This APR will vary with the market based on the Prime Rate.
Penalty APR and When it Applies	**28.99%** This APR may be applied to your account if you: 1) Make a late payment; 2) Go over your credit limit; 3) Make a payment that is returned; or 4) Do any of the above on another account that you have with us. **How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due.
Paying Interest	Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date.
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
For Credit Card Tips from the Consumer Financial Protection Bureau	**To learn more about factors to consider when applying for or using a credit card, visit the website of the Consumer Financial Protection Bureau at http://www.consumerfinance.gov/learnmore**

Fees	
Set-up and Maintenance Fees	NOTICE: Some of these set-up and maintenance fees will be assessed before you begin using your card and will reduce the amount of credit you initially have available. Based on your initial credit limit of $250, your initial available credit will be only about $209 (or about $204 if you choose to have an additional card). You may still reject this plan, provided that you have not yet used the account or paid a fee after receiving a billing statement. If you do reject the plan, you are not responsible for any fees or charges.
• Annual Fee	**$20**
• Account Set-up Fee	**$20** (one-time fee)
• Participation Fee	**$12** annually ($1 per month)
• Additional Card Fee	**$5** annually (if applicable)
Transaction Fees	
• Balance Transfer	Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**).
• Cash Advance	Either **$5** or **3%** of the amount of each cash advance, whichever is greater.
• Foreign Transaction	**2%** of each transaction in U.S. dollars.
Penalty Fees	
• Late Payment	Up to **$35**.
• Over-the-Credit Limit	Up to **$35**.
• Returned Payment	Up to **$35**.

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)." See your account agreement for more details.

Loss of Introductory APR: We may end your introductory APR and apply the Penalty APR if you make a late payment.

Billing Rights: Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

G-17(D) Account-Opening Sample (Line of Credit)

Interest Rate and Interest Charges	
APR for Cash Advances	**18.00%.**
Minimum Interest Charge	If you are charged interest, the charge will be no less than $1.50.
Paying Interest	You will be charged interest from the transaction date.

Fees	
Annual Fee	**$20**
Penalty Fees	
• Late Payment	**$10**
• Over-the-Credit Limit	**$29**

How We Will Calculate Your Balance: We use a method called "average daily balance (including new purchases)." See your account agreement for more details.

Billing Rights: Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

G-18(A) Periodic Statement Transactions; Interest Charges; Fees Sample

Transactions				
Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
5884186PS0388W6YM	2/22	2/23	Store #1	$2.05
0544400060ZLV72VL	2/24	2/25	Store #2	$12.11
854338203FS8OO0Z5	2/25	2/25	Pymt Thank You	$450.00–
55541860705RDYD0X	2/25	2/26	Store #3	$4.63
554328608008W90M0	2/25	2/26	Store #4	$114.95
054830709LYMRPT4L	2/25	2/26	Store #5	$7.35
564891561545KOSHD	2/25	2/26	Store #6	$14.35
841517877845AKOJIO	2/25	2/26	Store #7	$40.35
8958485561561894KOH	2/26	2/27	Store #8	$27.68
1871556189456SAMKL	2/26	2/27	Store #9	$124.76
1542202074TWWZV48	2/26	2/26	Cash Advance	$121.50
2564894185189LKDFID	2/27	2/28	Store #10	$32.87
4545754784KOHUIOS	2/27	3/1	Balance Transfer	$785.00
2564561023184102315	2/28	3/1	Store #11	$14.78
14547847586KDDL564	2/28	2/28	Cash Advance	$196.50
55542818705RASD0X	3/1	3/2	Store #12	$3.76
289189194ASDS8744	3/1	3/3	Store #13	$13.45
178105417841045784	3/2	3/4	Store #14	$2.35
045148714518979874	3/4	3/5	Store #13	$13.45–
8456152156181SDSA	3/5	3/6	Store #15	$25.00
31289105205648AWD	3/11	3/12	Store #16	$7.34
04518478415615ASD	3/11	3/16	Store #17	$10.56
0547810544898718AF	3/15	3/17	Store #18	$24.50
056489413216848OP	3/16	3/17	Store #19	$8.76
054894561564ASDW	3/17	3/18	Store #20	$14.23
5648974891AD98156	3/19	3/20	Store #21	$23.76
Fees				
9525156489SFD4545Q	2/23	2/23	Late Fee	$35.00
56415615647OJSNDS	2/26	2/26	Cash Advance Fee	$5.00
84151564SADS8745H	2/27	2/27	Balance Transfer Fee	$23.55
2564891561894515 16L	2/28	2/28	Cash Advance Fee	$5.90
			TOTAL FEES FOR THIS PERIOD	$69.45
Interest Charged				
			Interest Charge on Purchases	$6.31
			Interest Charge on Cash Advances	$4.58
			TOTAL INTEREST FOR THIS PERIOD	$10.89

2012 Totals Year-to-Date	
Total fees charged in 2012	$90.14
Total interest charged in 2012	$18.27

G–18(B)—Late Payment Fee Sample

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a $35 late fee and your APRs may be increased up to the Penalty APR of 28.99%.

G-18(C)(1) Minimum Payment Warning (When Amortization Occurs and the 36-month Disclosures Are Required)

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	10 years	$3,284
$62	3 years	$2,232 (*Savings=$1,052*)

If you would like information about credit counseling services, call 1-800-xxx-xxxx.

G-18(C)(2) Minimum Payment Warning (When Amortization Occurs and the 36-month Disclosures Are Not Required)

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	14 months	$130

If you would like information about credit counseling services, call 1-800-xxx-xxxx.

G-18(C)(3) Minimum Payment Warning (When Negative or No Amortization Occurs)

Minimum Payment Warning: Even if you make no more charges using this card, if you make only the minimum payment each month we estimate **you will never pay off the balance shown on this statement** because your payment will be less than the interest charged each month.

If you make more than the minimum payment each period, you will pay less in interest and pay off your balance sooner. For example, if you instead paid **$74** per month, you would pay off the balance shown on this statement in around **3 years**.

If you would like information about credit counseling services, call 1-800-xxx-xxxx.

G-18(D) Periodic Statement New Balance, Due Date, Late Payment and Minimum Payment Sample (Credit Cards)

Payment Information	
New Balance	$1,784.53
Minimum Payment Due	$53.00
Payment Due Date	4/20/12

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a late fee of up to **$35** and your APRs may be increased up to the Penalty APR of 28.99%.

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	10 years	$3,284
$62	3 years	$2,232 *(Savings=$1,052)*

If you would like information about credit counseling services, call 1-800-xxx-xxxx.

G–18(E) [Reserved]

G-18(F) Periodic Statement Form

Page 1 of 2

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Summary of Account Activity

Previous Balance	$535.07
Payments	-$450.00
Other Credits	-$13.45
Purchases	+$529.57
Balance Transfers	+$785.00
Cash Advances	+$318.00
Past Due Amount	+$0.00
Fees Charged	**+$69.45**
Interest Charged	**+$10.89**
New Balance	$1,784.53
Credit limit	$2,000.00
Available credit	$215.47
Statement closing date	3/22/2012
Days in billing cycle	30

QUESTIONS?

Call Customer Service	1-XXX-XXX-XXXX
Lost or Stolen Credit Card	1-XXX-XXX-XXXX

Payment Information

New Balance	$1,784.53
Minimum Payment Due	$53.00
Payment Due Date	4/20/12

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a late fee of up to $35 and your APRs may be increased up to the Penalty APR of 28.99%.

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	10 years	$3,284
$62	3 years	$2,232 *(Savings=$1,052)*

If you would like information about credit counseling services, call 1-800-XXX-XXXX.

Please send billing inquiries and correspondence to:
PO Box XXXX, Anytown, Anystate XXXXX

Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms. Changes to APRs described below are due to changes in market conditions. For more detailed information, please refer to the booklet enclosed with this statement.

These changes will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, changes to APRs described below will apply to these transactions.

Transactions made before 4/9/12: Current APRs will continue to apply to these transactions.

If you are already being charged a higher Penalty APR for purchases: In this case, changes to APRs described below will not go into effect at this time. These changes will go into effect when the Penalty APR no longer applies to your account.

Revised Terms, as of 5/10/12	
APR for Purchases	16.99%

Transactions

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
5884186PS0388W6YM	2/22	2/23	Store #1	$2.05
0544400060ZLV72VL	2/24	2/25	Store #2	$12.11
55541860705RDYD0X	2/24	2/25	Store #3	$4.63
554328608008W90M0	2/24	2/25	Store #4	$114.95
054830709LYMRPT4L	2/24	2/25	Store #5	$7.35
854338203FS8OO0Z5	2/25	2/25	Pymt Thank You	$450.00–

(transactions continued on next page)

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION

Please detach this portion and return with your payment to insure proper credit. Retain upper portion for your records.

Account Number:	**XXXX XXXX XXXX XXXX**
New Balance	**$1,784.53**
Minimum Payment Due	**$53.00**
Payment Due Date	**4/20/12**
AMOUNT ENCLOSED:	**$**

Please indicate address change and additional cardholder requests on the reverse side.

XXX Bank
P.O. Box XXXX
Anytown, Anystate XXXXX

G-18(F) Periodic Statement Form (contd.)

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Page 2 of 2

Transactions (cont.)

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
564891561545KOSHD	2/25	2/26	Store #6	$14.35
841517877845AKOJIO	2/25	2/26	Store #7	$40.35
895848561561894KOH	2/26	2/27	Store #8	$27.68
1871556189456SAMKL	2/26	2/27	Store #9	$124.76
1542202074TWWZV48	2/26	2/26	Cash Advance	$121.50
2564894185189LKDFID	2/27	2/28	Store #10	$32.87
4545754784KOHUIOS	2/27	3/1	Balance Transfer	$785.00
14547847586KDDL564	2/28	2/28	Cash Advance	$196.50
2564561023184102315	2/28	3/1	Store #11	$14.76
55542818705RASD0X	3/1	3/2	Store #12	$3.76
289189194ASDS8744	3/1	3/3	Store #13	$13.45
178105417841045784	3/2	3/6	Store #14	$2.35
045148714518979874	3/4	3/5	Store #13	$13.45–
8456152156181SDSA	3/5	3/12	Store #15	$25.00
31289105205648AWD	3/11	3/12	Store #16	$7.34
04518478415615ASD	3/11	3/16	Store #17	$10.56
0547810544898718AF	3/15	3/17	Store #18	$24.50
056489413216848OP	3/16	3/17	Store #19	$8.76
054894561564ASDW	3/17	3/18	Store #20	$14.23
5648974891AD98156	3/19	3/20	Store #21	$23.76
			Fees	
9525156489SFD4545Q	2/23	2/23	Late Fee	$35.00
56415615647OJSNDS	2/26	2/26	Cash Advance Fee	$5.00
84151564SADS8745H	2/27	2/27	Balance Transfer Fee	$23.55
2564891561894515 16L	2/28	2/28	Cash Advance Fee	$5.90
			TOTAL FEES FOR THIS PERIOD	**$69.45**
			Interest Charged	
			Interest Charge on Purchases	$6.31
			Interest Charge on Cash Advances	$4.58
			TOTAL INTEREST FOR THIS PERIOD	**$10.89**

2012 Totals Year-to-Date	
Total fees charged in 2012	$90.14
Total interest charged in 2012	$18.27

Interest Charge Calculation

Your **Annual Percentage Rate (APR)** is the annual interest rate on your account.

Type of Balance	Annual Percentage Rate (APR)	Balance Subject to Interest Rate	Interest Charge
Purchases	14.99% (v)	$512.14	$6.31
Cash Advances	21.99% (v)	$253.50	$4.58
Balance Transfers	0.00%	$637.50	$0.00

(v) = Variable Rate

G-18(G) Periodic Statement Form

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Summary of Account Activity

Previous Balance	$80.52
Payments	-$50.00
Other Credits	+$0.00
Purchases	+$52.13
Balance Transfers	+$0.00
Cash Advances	+$0.00
Past Due Amount	+$0.00
Fees Charged	**+$37.00**
Interest Charged	**+$0.00**
New Balance	$119.65
Credit limit	$2,000.00
Available credit	$1,880.35
Statement closing date	3/22/2012
Days in billing cycle	30

QUESTIONS?

Call Customer Service	1-XXX-XXX-XXXX
Lost or Stolen Credit Card	1-XXX-XXX-XXXX

Payment Information

New Balance	$119.65
Minimum Payment Due	$10.00
Payment Due Date	4/20/12

Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a $35 late fee and your APRs may be increased up to the Penalty APR of 28.99%.

Minimum Payment Warning: If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

If you make no additional charges using this card and each month you pay...	You will pay off the balance shown on this statement in about...	And you will end up paying an estimated total of...
Only the minimum payment	14 months	$130

If you would like information about credit counseling services, call 1-800-XXX-XXXX.

Please send billing inquiries and correspondence to:
PO Box XXXX, Anytown, Anystate XXXXX

Notice of Changes to Your Interest Rates

You have triggered the Penalty APR of 28.99%. This change will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, the Penalty APR will apply to these transactions. We may keep the APR at this level indefinitely.

Transactions made before 4/9/12: Current rates will continue to apply to these transactions. However, if you become more than 60 days late on your account, the Penalty APR will apply to those transactions as well.

Transactions

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
			Payments and Other Credits	
854338203FS8OO0Z5	2/25	2/25	Pymt Thank You	$50.00–
			Purchases	
5884186PS0388W6YM	2/22	2/23	Store #1	$2.05
0544400060ZLV72VL	2/24	2/25	Store #2	$2.11
55541860705RDYD0X	2/24	2/25	Store #3	$4.63
554328608008W90M0	2/24	2/25	Store #4	$4.95
054830709LYMRPT4L	2/24	2/25	Store #5	$7.35
564891561545KOSHD	2/25	2/26	Store #6	$4.35
841517877845AKOJIO	2/25	2/26	Store #7	$2.35
895848561561894KOH	2/26	2/27	Store #8	$7.68
1871556189456SAMKL	2/26	2/27	Store #9	$4.76
2564894185189LKDFID	2/27	2/28	Store #10	$2.87
55542818705RASD0X	3/1	3/2	Store #11	$3.76
178105417841045784	3/2	3/6	Store #12	$2.35
8456152156181SDSA	3/5	3/12	Store #13	$2.92

(transactions continued on next page)

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION

Please detach this portion and return with your payment to insure proper credit. Retain upper portion for your records.

Account Number:	**XXXX XXXX XXXX XXXX**
New Balance	**$119.65**
Minimum Payment Due	**$10.00**
Payment Due Date	**4/20/12**

AMOUNT ENCLOSED: $

Please indicate address change and additional cardholder requests on the reverse side.

XXX Bank
P.O. Box XXXX
Anytown, Anystate XXXXX

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

Transactions (cont.)

Reference Number	Trans Date	Post Date	Description of Transaction or Credit	Amount
			Fees	
9525156489SFD4545Q	2/23	2/23	Late Fee	$35.00
56415615647OJSNDS	3/22	3/22	Minimum Charge	$2.00
			TOTAL FEES FOR THIS PERIOD	**$37.00**
			Interest Charged	
			Interest Charge on Purchases	$0.00
			Interest Charge on Cash Advances	$0.00
			TOTAL INTEREST FOR THIS PERIOD	**$0.00**

2012 Totals Year-to-Date	
Total fees charged in 2012	$90.14
Total interest charged in 2012	$18.27

Interest Charge Calculation

Your **Annual Percentage Rate (APR)** is the annual interest rate on your account.

Type of Balance	Annual Percentage Rate (APR)	Balance Subject to Interest Rate	Interest Charge
Purchases	14.99% (v)	$113.80	$0.00
Cash Advances	21.99% (v)	$0.00	$0.00
Balance Transfers	0.00%	$0.00	$0.00

(v) = Variable Rate

G–18(H)—Deferred Interest Periodic Statement Clause

[You must pay your promotional balance in full by [date] to avoid paying accrued interest charges.]

G-19 Checks Accessing a Credit Card Sample

Interest and Fee Information	
APR for Check Transactions	1.7% (Promotional APR through your November 2012 billing cycle) After November 2012, you will be charged the APR for Cash Advances, currently 21.99%.
Use by Date	You must use the check by 4/1/12 for the promotional APR to apply. If you use the check after that date, we may still honor the check but you will not receive the promotional APR. Instead, the standard APR for Cash Advances will apply.
Fee	Either $5 or 3% of the amount of each transaction, whichever is greater.
Paying Interest	We will begin charging interest on these checks on the transaction date.

G-20 Change-in-Terms Sample (Increase in Annual Percentage Rate)

Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms. For more detailed information, please refer to the booklet enclosed with this statement.

These changes will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, any changes to APRs described below will apply to these transactions.

Transactions made before 4/9/12: Current APRs will continue to apply to these transactions.

If you are already being charged a higher Penalty APR for purchases: In this case, any changes to APRs described below will not go into effect at this time. These changes will go into effect when the Penalty APR no longer applies to your account.

Revised Terms, as of 5/10/12	
APR for Purchases	16.99%

G-21 Change-in-Terms Sample (Increase in Fees)

Important Changes to Your Account Terms

The following is a summary of changes that are being made to your account terms. These changes will take effect on 5/10/12. For more detailed information, please refer to the booklet enclosed with this statement.

You have the right to reject these changes, unless you become more than 60 days late on your account. However, if you do reject these changes you will not be able to use your account for new transactions. You can reject the changes by calling us at 1-800-xxx-xxxx.

Revised Terms, as of 5/10/12	
Late Payment Fee	Up to **$35**.
Returned Payment Fee	Up to **$35**.

G-22 Penalty Rate Increase Sample (Payment 60 or Fewer Days Late)

Notice of Changes to Your Interest Rates

You have triggered the Penalty APR of 28.99%. This change will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, the Penalty APR will apply to these transactions. We may keep the APR at this level indefinitely.

Transactions made before 4/9/12: Current rates will continue to apply to these transactions. However, if you become more than 60 days late on your account, the Penalty APR will apply to those transactions as well.

G-23 Penalty Rate Increase Sample (Payment More Than 60 Days Late)

Notice of Changes to Your Interest Rates

You have triggered the Penalty APR of 28.99% because we did not receive your minimum payment within 60 days of the due date. As of 5/10/12, the Penalty APR will apply to all existing balances and new transactions on your account.

If you make six consecutive minimum payments starting with your first payment due after 5/10/12, your rate for transactions made before 4/9/12 will return to the Standard APR. If you do not make these six consecutive minimum payments, we may keep the Penalty APR on your account indefinitely.

BILLING CODE 4810–AM–C

G–24—Deferred Interest Offer Clauses

(a) For Credit Card Accounts Under an Open-End (Not Home-Secured) Consumer Credit Plan

[Interest will be charged to your account from the purchase date if the purchase balance is not paid in full within the/by [deferred interest period/date] or if you make a late payment.]

(b) For Other Open-End Plans

[Interest will be charged to your account from the purchase date if the purchase balance is not paid in full within the/by [deferred interest period/date] or if your account is otherwise in default.]

G–25(A)—Consent Form for Over-the-Credit Limit Transactions

Your Choice Regarding Over-the-Credit Limit Coverage

Unless you tell us otherwise, we will decline any transaction that causes you to go over your credit limit. If you want us to authorize these transactions, you can request over-the-credit limit coverage.

If you have over-the-credit limit coverage and you go over your credit limit, we will charge you a fee of up to $35. We may also increase your APRs to the Penalty APR of XX.XX%. You will only pay one fee per billing cycle, even if you go over your limit multiple times in the same cycle.

Even if you request over-the-credit limit coverage, in some cases we may still decline a transaction that would cause you to go over your limit, such as if you are past due or significantly over your credit limit.

If you want over-the-limit coverage and to allow us to authorize transactions that go over your credit limit, please:

—Call us at [telephone number];
—Visit [Web site]; or
—Check or initial the box below, and return the form to us at [address].

_____

__ I want over-the-limit coverage. I understand that if I go over my credit limit, my APRs may be increased and I will be charged a fee of up to $35. [I have the right to cancel this coverage at any time.]

[__ I *do not* want over-the-limit coverage. I understand that transactions that exceed my credit limit will not be authorized.]

Printed Name: _____
Date: _____
[Account Number]: _____

G–25(B)—Revocation Notice for Periodic Statement Regarding Over-the-Credit Limit Transactions

You currently have over-the-credit limit coverage on your account, which means that we pay transactions that cause you go to over your credit limit. If you do go over your credit limit, we will charge you a fee of up to $35. We may also increase your APRs. To remove over-the-credit-limit coverage from your account, call us at 1–800-xxxxxxx or visit [insert Web site].

[You may also write us at: [insert address].]

[You may also check or initial the box below and return this form to us at: [insert address].

__ I want to cancel over-the-limit coverage for my account.

Printed Name: _____
Date: _____
[Account Number]: _____

Appendix H to Part 1026—Closed-End Model Forms and Clauses

H–1 Credit Sale Model Form (§ 1026.18)
H–2 Loan Model Form (§ 1026.18)
H–3 Amount Financed Itemization Model Form (§ 1026.18(c))
H–4(A) Variable-Rate Model Clauses (§ 1026.18(f)(1))
H–4(B) Variable-Rate Model Clauses (§ 1026.18(f)(2))
H–4(C) Variable-Rate Model Clauses (§ 1026.19(b))
H–4(D) Variable-Rate Model Clauses (§ 1026.20(c))
H–4(E) Fixed-Rate Mortgage Interest Rate and Payment Summary Model Clause (§ 1026.18(s))
H–4(F) Adjustable-Rate Mortgage or Step-Rate Mortgage Interest Rate and Payment Summary Model Clause (§ 1026.18(s))
H–4(G) Mortgage with Negative Amortization Interest Rate and Payment Summary Model Clause (§ 1026.18(s))
H–4(H) Fixed-Rate Mortgage with Interest-Only Interest Rate and Payment Summary Model Clause (§ 1026.18(s))
H–4(I) Adjustable-Rate Mortgage Introductory Rate Disclosure Model Clause (§ 1026.18(s)(2)(iii))
H–4(J) Balloon Payment Disclosure Model Clause (§ 1026.18(s)(5))
H–4(K) No Guarantee to Refinance Statement Model Clause (§ 1026.18(t))
H–5 Demand Feature Model Clauses (§ 1026.18(i))
H–6 Assumption Policy Model Clause (§ 1026.18(q))
H–7 Required Deposit Model Clause (§ 1026.18(r))
H–8 Rescission Model Form (General) (§ 1026.23)
H–9 Rescission Model Form (Refinancing (with Original Creditor)) (§ 1026.23)
H–10 Credit Sale Sample
H–11 Installment Loan Sample
H–12 Refinancing Sample
H–13 Mortgage with Demand Feature Sample
H–14 Variable-Rate Mortgage Sample (§ 1026.19(b))
H–15 Graduated-Payment Mortgage Sample
H–16 Mortgage Sample
H–17(A) Debt Suspension Model Clause
H–17(B) Debt Suspension Sample
H–18 Private Education Loan Application and Solicitation Model Form
H–19 Private Education Loan Approval Model Form
H–20 Private Education Loan Final Model Form
H–21 Private Education Loan Application and Solicitation Sample
H–22 Private Education Loan Approval Sample
H–23 Private Education Loan Final Sample

BILLING CODE 4810–AM–P

H-1—Credit Sale Model Form

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.	Total Sale Price The total cost of your purchase on credit, including your downpayment of $ _____.
%	$	$	$	$

You have the right to receive at this time an itemization of the Amount Financed.

☐ I want an itemization. ☐ I do not want an itemization.

Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Insurance

Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost.

Type	Premium	Signature
Credit Life		I want credit life insurance. _____ Signature
Credit Disability		I want credit disability insurance. _____ Signature
Credit Life and Disability		I want credit life and disability insurance. _____ Signature

You may obtain property insurance from anyone you want that is acceptable to (creditor). If you get the insurance from (creditor), you will pay $_____.

Security: You are giving a security interest in:

☐ the goods or property being purchased.

☐ (brief description of other property).

Filing fees $ _____ **Non-filing insurance** $ _____

Late Charge: If a payment is late, you will be charged $ _____/_____% of the payment.

Prepayment: If you pay off early, you

☐ may ☐ will not have to pay a penalty.

☐ may ☐ will not be entitled to a refund of part of the finance charge.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

_____

e means an estimate

H-2—Loan Model Form

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.
%	$	$	$

You have the right to receive at this time an itemization of the Amount Financed.

☐ I want an itemization. ☐ I do not want an itemization.

Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Insurance

Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost.

Type	Premium	Signature
Credit Life		I want credit life insurance. _____ Signature
Credit Disability		I want credit disability insurance. _____ Signature
Credit Life and Disability		I want credit life and disability insurance. _____ Signature

You may obtain property insurance from anyone you want that is acceptable to (creditor). If you get the insurance from (creditor), you will pay $_____.

Security: You are giving a security interest in:

☐ the goods or property being purchased.

☐ (brief description of other property).

Filing fees $ _____ **Non-filing insurance** $ _____

Late Charge: If a payment is late, you will be charged $ _____/_____% of the payment.

Prepayment: If you pay off early, you

☐ may ☐ will not have to pay a penalty.

☐ may ☐ will not be entitled to a refund of part of the finance charge.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

_____

e means an estimate

H-3—Amount Financed Itemization Model Form

Itemization of the Amount Financed of $_____

$_____ Amount given to you directly

$_____ Amount paid on your account

Amount paid to others on your behalf

$_____ to [public officials] [credit bureau] [appraiser] [insurance company]

$_____ to (name of another creditor)

$_____ to (other)

$_____ Prepaid finance charge

H-4(A)—Variable-Rate Model Clauses

The annual percentage rate may increase during the term of this transaction if:
[the prime interest rate of (creditor) increases.]
[the balance in your deposit account falls below $_____.]
[you terminate your employment with (employer) .]

[The interest rate will not increase above _____%.]
[The maximum interest rate increase at one time will be _____%.]
[The rate will not increase more than once every (time period) .]

Any increase will take the form of:
[higher payment amounts.]
[more payments of the same amount.]
[a larger amount due at maturity.]

Example based on the specific transaction
[If the interest rate increases by _____% in (time period),
[your regular payments will increase to $_____.]
[you will have to make _____ additional payments.]
[your final payment will increase to $_____.]]

Example based on a typical transaction
[If your loan were for $_____ at _____% for (term) and the rate increased to _____% in (time period),
[your regular payments would increase by $_____.]
[you would have to make _____ additional payments.]
[your final payment would increase by $_____.]]

H-4(B)—Variable-Rate Model Clauses

Your loan contains a variable-rate feature. Disclosures about the variable-rate feature have been provided to you earlier.

H–4(C)—Variable-Rate Model Clauses

This disclosure describes the features of the adjustable-rate mortgage (ARM) program you are considering. Information on other ARM programs is available upon request.

How Your Interest Rate and Payment Are Determined

- Your interest rate will be based on [an index plus a margin] [a formula].
- Your payment will be based on the interest rate, loan balance, and loan term.

—[The interest rate will be based on (identification of index) plus our margin. Ask for our current interest rate and margin.]

—[The interest rate will be based on (identification of formula). Ask us for our current interest rate.]

—Information about the index [formula for rate adjustments] is published [can be found] _____.

—[The initial interest rate is not based on the (index) (formula) used to make later adjustments. Ask us for the amount of current interest rate discounts.]

How Your Interest Rate Can Change

• Your interest rate can change (frequency).

• [Your interest rate cannot increase or decrease more than ____ percentage points at each adjustment.]

• Your interest rate cannot increase [or decrease] more than ____ percentage points over the term of the loan.

How Your Payment Can Change

• Your payment can change (frequency) based on changes in the interest rate.

• [Your payment cannot increase more than (amount or percentage) at each adjustment.]

• You will be notified in writing _____ days before the due date of a payment at a new level. This notice will contain information about your interest rates, payment amount, and loan balance.

• [You will be notified once each year during which interest rate adjustments, but no payment adjustments, have been made to your loan. This notice will contain information about your interest rates, payment amount, and loan balance.]

• [For example, on a $10,000 [term] loan with an initial interest rate of _____ [(the rate shown in the interest rate column below for the year 19 _____)] [(in effect (month) (year)], the maximum amount that the interest rate can rise under this program is _____ percentage points, to _____%, and the monthly payment can rise from a first-year payment of $_____ to a maximum of $_____ in the _____ year. To see what your payments would be, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, the monthly payment for a mortgage amount of $60,000 would be: $60,000 ÷ $10,000 = 6; 6 × _____ = $_____ per month.)]

[Example

The example below shows how your payments would have changed under this ARM program based on actual changes in the index from 1982 to 1996. This does not necessarily indicate how your index will change in the future.

The example is based on the following assumptions:

Amount	$10,000
Term	_____
Change date	_____
Payment adjustment	(frequency)
Interest adjustment	(frequency)
[Margin]*	____
Caps ____ [periodic interest rate cap]	
____ [lifetime interest rate cap	
____ [payment cap]	
[Interest rate carryover]	
[Negative amortization]	
[Interest rate discount]**	
Index.....(identification of index or formula)	

*This is a margin we have used recently, your margin may be different.

**This is the amount of a discount we have provided recently; your loan may be discounted by a different amount.]

Year	Index (%)	Margin (Percentage points)	Interest Rate (%)	Monthly Payment ($)	Remaining Balance ($)
1982					
1983					
1984					
1985					
1986					
1987					
1988					
1989					
1990					
1991					
1992					
1993					
1994					
1995					
1996					

Note: To see what your payments would have been during that period, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, in 1996 the monthly payment for a mortgage amount of $60,000 taken out in 1982 would be: $60,000÷$10,000=6; 6×____=$____ per month.)

H-4(D)—Variable-Rate Model Clauses

Your new interest rate will be _____%, which is based on an index value of _____%.
Your previous interest rate was _____%, which was based on an index value of _____%.
[The new interest rate does not reflect a change of _____ percentage point in the index value which was not added because of _____.]
[The new payment will be $_____.]
[Your new loan balance is $_____.]
[Your (new) (existing) payment will not be sufficient to cover the interest due and the difference will be added to the loan amount. The payment amount needed to pay your loan in full by the end of the term at the new interest rate is $_____.]
[The following interest rate adjustments have been implemented this year without changing your payment: _____.
These interest rates were based on the following index values: _____.]

H-4(E) Fixed Rate Mortgage Interest Rate and Payment Summary Model Clause

INTEREST RATE AND PAYMENT SUMMARY

	Rate & Monthly Payment
Interest Rate	____%
Principal + Interest Payment	$_____
Est. Taxes + Insurance (Escrow) • [Includes [Private] Mortgage Insurance]	$_____
Total Est. Monthly Payment	**$____**

H-4(F) Adjustable-Rate Mortgage or Step-Rate Mortgage Interest Rate and Payment Summary Model Clause

INTEREST RATE AND PAYMENT SUMMARY

	INTRODUCTORY Rate & Monthly Payment (for first (*period*))	[MAXIMUM during FIRST FIVE YEARS (*date*)]	MAXIMUM EVER (as early as (*date*))
Interest Rate	___%	[___%]	___%
Principal + Interest Payment	$_____	[$_____]	$_____
Est. Taxes + Insurance [(Escrow)] • [Includes [Private] Mortgage Insurance]	[$_____]	[$_____]	[$_____]
Total Est. Monthly Payment	**$_____**	**[$_____]**	**$_____**

H-4(G) Mortgage with Negative Amortization Interest Rate and Payment Summary Model Clause

INTEREST RATE AND PAYMENT SUMMARY

[This loan offers you several monthly payment options. The table below shows you what your payments would be under two of these options **if the interest rate reached its maximum of** ___% in the (*period*) of this loan.]

[All payments shown in the table include $___ for estimated taxes and insurance [(escrow)].

	(*Date*) [((*period*) [intro])]	[(*Date*) (1st adjustment)]	[(*Date*) (2nd adjustment)]	(*Date*) + every (*period*) after
Maximum Interest Rate	___% [(intro rate)]	[___%]	[___%]	___% (max. ever)
Full Payment Option *Monthly payments cover all principal and interest.*	$_____	[$_____]	[$_____]	$_____
Minimum Payment Option *Initial monthly payments cover no principal and only some interest and increase your loan amount.*	$_____	[$_____]	[$_____]	$_____

You will borrow an additional $_____ by (date) if you make only minimum payments on this loan.

H-4(H) Fixed Rate Mortgage with Interest Only Interest Rate and Payment Summary Model Clause

INTEREST RATE AND PAYMENT SUMMARY

	INTRODUCTORY Rate & Monthly Payment (for first ____ years)	**MAXIMUM EVER** (as early as ____)
Interest Rate	____%	____%
Principal Payment	- none -	$_____
Interest Payment	$_____	$_____
Est. Taxes + Insurance (Escrow)	$_____	$_____
Total Est. Monthly Payment	$____	$____

H–4(I)—Introductory Rate Model Clause

[Introductory Rate Notice

You have a discounted introductory rate of _____ % that ends after (period).

In the (period in sequence), even if market rates do not change, this rate will increase to ____ %.]

H–4(J)—Balloon Payment Model Clause

[Final Balloon Payment due (date): $_____]

H–4(K)—"No-Guarantee-to-Refinance" Statement Model Clause

There is no guarantee that you will be able to refinance to lower your rate and payments.

H-5—Demand Feature Model Clauses

This obligation [is payable on demand.]
[has a demand feature.]
[All disclosures are based on an assumed maturity of one year.]

H-6—Assumption Policy Model Clause

Assumption: Someone buying your house [may, subject to conditions, be allowed to] [cannot] assume the remainder of the mortgage on the original terms.

H-7—Required Deposit Model Clause

The annual percentage rate does not take into account your required deposit.

H-8—Rescission Model Form (General)

NOTICE OF RIGHT TO CANCEL

Your Right to Cancel

You are entering into a transaction that will result in a [mortgage/lien/ security interest] [on/in] your home. You have a legal right under federal law to cancel this transaction, without cost, within three business days from whichever of the following events occurs last:

(1) the date of the transaction, which is

_____; or

(2) the date you received your Truth in Lending disclosures; or

(3) the date you received this notice of your right to cancel.

If you cancel the transaction, the [mortgage/lien/security interest] is also cancelled. Within 20 calendar days after we receive your notice, we must take the steps necessary to reflect the fact that the [mortgage/lien/security interest] [on/in] your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel this transaction, you may do so by notifying us in writing, at

(creditor's name and business address).

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of (date) (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL

_____ _____

Consumer's Signature Date

H–9—Rescission Model Form (Refinancing With Original Creditor)

NOTICE OF RIGHT TO CANCEL

Your Right To Cancel

You are entering into a new transaction to increase the amount of credit previously provided to you. Your home is the security for this new transaction. You have a legal right under Federal law to cancel this new transaction, without cost, within three business days from whichever of the following events occurs last:

(1) the date of this new transaction, which is _____; or

(2) the date you received your new Truth in Lending disclosures; or

(3) the date you received this notice of your right to cancel.

If you cancel this new transaction, it will not affect any amount that you presently owe. Your home is the security for that amount. Within 20 calendar days after we receive your notice of cancellation of this new transaction, we must take the steps necessary to reflect the fact that your home does not secure the increase of credit. We must also return any money you have given to us or anyone else in connection with this new transaction.

You may keep any money we have given you in this new transaction until we have done the things mentioned above, but you must then offer to return the money at the address below.

If we do not take possession of the money within 20 calendar days of your offer, you may keep it without further obligation.

How To Cancel

If you decide to cancel this new transaction, you may do so by notifying us in writing, at

_____

(Creditor's name and business address).

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of

_____

(Date) _____

(or midnight of the third business day following the latest of the three events listed above).

If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL

Consumer's Signature _____

Date _____

H-10—Credit Sale Sample

Big Wheel Auto

Alice Green

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.	Total Sale Price The total cost of your purchase on credit, including your downpayment of $ 1500 —
14.84 %	$ 1496.80	$ 6107.50	$ 7604.30	$ 9129.30

You have the right to receive at this time an itemization of the Amount Financed.

☐ I want an itemization. ☒ I do not want an itemization.

Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due
36	$211.23	Monthly beginning 6-1-81

Insurance

Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost.

Type	Premium	Signature	
Credit Life	$120 —	I want credit life insurance.	Alice Green Signature
Credit Disability		I want credit disability insurance.	Signature
Credit Life and Disability		I want credit life and disability insurance.	Signature

Security: You are giving a security interest in:

☒ the goods being purchased.

☐ _____.

Filing fees $ 12.50 **Non-filing insurance** $ _____

Late Charge: If a payment is late, you will be charged $10.

Prepayment: If you pay off early, you

☐ may ☐ will not have to pay a penalty.

☒ may ☐ will not be entitled to a refund of part of the finance charge.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

I have received a copy of this statement.

Alice Green 5-1-81

Signature Date

_____

e means an estimate

H-11—Installment Loan Sample

Friendly Bank & Trust Co.
700 East Street
Little Creek, USA

Lisa Stone
22-4859-22
300 Maple Avenue
Little Creek, USA

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf	Total of Payments The amount you will have paid after you have made all payments as scheduled
12 %	$ 675.31	$ 5000-	$ 5675.31

You have the right to receive at this time an itemization of the Amount Financed.
☐ I want an itemization. ☒ I do not want an itemization.

Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due
1	$262.03 e	6/1/81
23	$235.36	Monthly beginning 7/1/81

Late Charge: If a payment is late, you will be charged $5 or 10% of the payment, whichever is less.

Prepayment: If you pay off early, you ☒ may ☐ will not have to pay a penalty.

Required Deposit: The annual percentage rate does not take into account your required deposit.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

e means an estimate

H-12—Refinancing Sample

Everyone's Credit Union Date: April 1, 1981

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf	Total of Payments The amount you will have paid after you have made all payments as scheduled.
15 %	$1285.06	$5177.73	$6462.79

Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due
35	$179.53	monthly starting 5-1-81
1	$179.24	4-1-84

Insurance

Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost.

Type	Premium	Signature
Credit Life		I want credit life insurance. Signature _____
Credit Disability	$177.73	I want credit disability insurance. Signature Joseph Day

Security: You are giving a security interest in: ☐ the goods or property being purchased. ☒ your automobile.

Late Charge: If a payment is late, you will be charged 20% of the interest due with a minimum charge of $.05.

Prepayment: If you pay off early, you will not have to pay a penalty.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

e means an estimate

Itemization of the Amount Financed of $ 5177.73

$ 1000- Amount given to you directly
$ 3000- Amount paid on your account

Amount paid to others on your behalf
$ _____ to public officials
$ 500- to Coop Credit Union
$ 500- to Acme Finance Co.
$ 177.73 to Pan-Galactic Ins. Co.
$ _____ for credit report

$ _____ Prepaid finance charge

H-13—Mortgage with Demand Feature Sample

Mortgage Savings and Loan Assoc.
Date: April 15, 1981

Glenn Jones
700 Oak Drive
Little Creek, USA

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	Amount Financed The amount of credit provided to you or on your behalf.	Total of Payments The amount you will have paid after you have made all payments as scheduled.
14.85 %	$156,551.54	$44,605.66	$201,157.20

Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due
360	$558.77	Monthly beginning 6/1/81

This obligation has a demand feature.

You may obtain property insurance from anyone you want that is acceptable to Mortgage Savings and Loan Assoc.. If you get the insurance from Mortgage Savings and Loan Assoc. you will pay $ 150-/year

Security: You are giving a security interest in:
☒ the goods or property being purchased.
☐ _____.

Late Charge: If a payment is late, you will be charged $ N/A 5 % of the payment.

Prepayment: If you pay off early, you may have to pay a penalty.

Assumption: Someone buying your house may, subject to conditions, be allowed to assume the remainder of the mortgage on the original terms.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

_____
e means an estimate

H–14—Variable-Rate Mortgage Sample

This disclosure describes the features of the adjustable-rate mortgage (ARM) program you are considering. Information on other ARM programs is available upon request.

How Your Interest Rate and Payment Are Determined

• Your interest rate will be based on an index rate plus a margin.

• Your payment will be based on the interest rate, loan balance, and loan term.

—The interest rate will be based on the weekly average yield on United States Treasury securities adjusted to a constant maturity of 1 year (your index), plus our margin. Ask us for our current interest rate and margin.

—Information about the index rate is published weekly in the Wall Street Journal.

• Your interest rate will equal the index rate plus our margin unless your interest rate ''caps'' limit the amount of change in the interest rate.

How Your Interest Rate Can Change

• Your interest rate can change yearly.

• Your interest rate cannot increase or decrease more than 2 percentage points per year.

• Your interest rate cannot increase or decrease more than 5 percentage points over the term of the loan.

How Your Monthly Payment Can Change

• Your monthly payment can increase or decrease substantially based on annual changes in the interest rate.

• [For example, on a $10,000, 30-year loan with an initial interest rate of 12.41 percent in effect in July 1996, the maximum amount that the interest rate can rise under this program is 5 percentage points, to 17.41 percent, and the monthly payment can rise from a first-year payment of $106.03 to a maximum of $145.34 in the fourth year. To see what your payment is, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, the monthly payment for a mortgage amount of $60,000 would be: $60,000 ÷ $10,000 = 6; 6 × 106.03 = $636.18 per month.)

• You will be notified in writing 25 days before the annual payment adjustment may be made. This notice will contain information about your interest rates, payment amount and loan balance.]

Example

The example below shows how your payments would have changed under this ARM program based on actual changes in the index from 1982 to 1996. This does not necessarily indicate how your index will change in the future. The example is based on the following assumptions:

BILLING CODE 4810–AM–P

Amount	$10,000
Term	30 years
Payment adjustment	1 year
Interest adjustment	1 year
Margin	3 percentage points
Caps____ 2 percentage points annual interest rate	
____ 5 percentage points lifetime interest rate	
Index____ Weekly average yield on U.S. Treasury securities adjusted to a constant maturity of one year.	

Year (as of 1st week ending in July)	**Index (%)**	**Margin* (percentage points)**	**Interest Rate (%)**	**Monthly Payment ($)**	**Remaining Balance ($)**
1982	14.41	3	17.41	145.90	9,989.37
1983	9.78	3	**15.41	129.81	9,969.66
1984	12.17	3	15.17	127.91	9,945.51
1985	7.66	3	**13.17	112.43	9,903.70
1986	6.36	3	***12.41	106.73	9,848.94
1987	6.71	3	***12.41	106.73	9,786.98

1988	7.52	3	***12.41	106.73	9,716.88
1989	7.97	3	***12.41	106.73	9,637.56
1990	8.06	3	***12.41	106.73	9,547.83
1991	6.40	3	***12.41	106.73	9,446.29
1992	3.96	3	***12.41	106.73	9,331.56
1993	3.42	3	***12.41	106.73	9,201.61
1994	5.47	3	***12.41	106.73	9,054.72
1995	5.53	3	***12.41	106.73	8,888.52
1996	5.82	3	***12.41	106.73	8,700.37

*This is a margin we have used recently; your margin may be different.

**This interest rate reflects a 2 percentage point annual interest rate cap.

***This interest rate reflects a 5 percentage point lifetime interest rate cap.

Note: To see what your payments would have been during that period, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, in 1996 the monthly payment for a mortgage amount of $60,000 taken out in 1982 would be: $60,000÷$10,000=6; 6×$106.73=$640.38.)

- You will be notified in writing 25 days before the annual payment adjustment may be made. This notice will contain information about your interest rates, payment amount and loan balance.]

H-15—Graduated Payment Mortgage Sample

Convenient Savings and Loan

Account number: 4862-88

Michael Jones
500 Walnut Court, Little Creek USA

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	FINANCE CHARGE The dollar amount the credit will cost you	Amount Financed The amount of credit provided to you or on your behalf	Total of Payments The amount you will have paid after you have made all payments as scheduled
15.37 %	$177,970.44	$43,777	$221,548.44

Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due	
12	$446.62	monthly beginning	6/1/81
12	$479.67	" "	6/1/82
12	$515.11	" "	6/1/83
12	$553.13	" "	6/1/84
12	$593.91	" "	6/1/85
300	varying from $637.68 to $627.37	" "	6/1/86

Security: You are giving a security interest in the property being purchased.

Late Charge: If a payment is late, you will be charged 5% of the payment.

Prepayment: If you pay off early, you

☒ may ☐ will not have to pay a penalty.
☒ may ☐ will not be entitled to a refund of part of the finance charge.

Assumption: Someone buying your home cannot assume the remainder of the mortgage on the original terms.

See your contract documents for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

e means an estimate

H-16—Mortgage Sample

You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application.

If you obtain this loan, the lender will have a mortgage on your home.

YOU COULD LOSE YOUR HOME, AND ANY MONEY YOU HAVE PUT INTO IT, IF YOU DO NOT MEET YOUR OBLIGATIONS UNDER THE LOAN.

You are borrowing $____.____ (optional credit insurance is ☐ is not ☐ included in this amount).

The annual percentage rate on your loan will be: _____%.

Your regular _[frequency]_ payment will be: $_____.
[At the end of your loan, you will still owe us: $ [balloon amount].]

[Your interest rate may increase. Increases in the interest rate could increase your payment. The highest amount your payment could increase is to $_____.]

H–17(A) Debt Suspension Model Clause

Please enroll me in the optional [insert name of program], and bill my account the fee of [insert charge for the initial term of coverage]. I understand that enrollment is not required to obtain credit. I also understand that depending on the event, the protection may only temporarily suspend my duty to make minimum payments, not reduce the balance I owe. I understand that my balance will actually grow during the suspension period as interest continues to accumulate.

[To Enroll, Sign Here]/[To Enroll, Initial Here].

X _____

H–17(B) Debt Suspension Sample

Please enroll me in the optional [name of program], and bill my account the fee of $200.00. I understand that enrollment is not required to obtain credit. I also understand that depending on the event, the protection may only temporarily suspend my duty to make minimum payments, not reduce the balance I owe. I understand that my balance will actually grow during the suspension period as interest continues to accumulate.

To Enroll, Initial Here.

X _____

H-18 Private Education Loan Application and Solicitation Model Form

[Creditor Name]
[Creditor Address]
[Creditor Phone Number]

Loan Interest Rate & Fees

Your **starting interest rate** will be between

% and %

After the starting rate is set, your rate will then vary with the market

Your Starting Interest Rate (upon approval)

The starting interest rate you pay will be determined after you apply. [Description of how starting rate is determined]. If approved, we will notify you of the rate you qualify for within the stated range.

Your Interest Rate during the life of the loan

Your rate is variable. This means that your rate could move lower or higher than the rates on this form. The variable rate is based upon the [Index] Rate (as published in the [source of index]). For more information on this rate, see the reference notes.

[Indication of **maximum rate** or **lack thereof**]

Loan Fees

[Itemization of fees]

Loan Cost Examples

The total amount you will pay for this loan will vary depending upon when you start to repay it. This example provides estimates based upon [number of repayment options] repayment options available to you while enrolled in school.

Repayment Option (while enrolled in school)	**Amount Provided** (amount provided directly to you or your school)	**Interest Rate** (highest possible starting rate)	**Loan Term** (how long you have to pay off the loan)	**Total Paid over [term of loan]** (includes associated fees)
1. **[REPAYMENT OPTION]** [Description]	$10,000	[Rate]	[Loan Term] [description of when repayment begins]	**[Total Cost]**
2. **[REPAYMENT OPTION]** [Description]	$10,000	[Rate]	[Loan Term] [description of when repayment begins]	**[Total Cost]**
3. **[REPAYMENT OPTION]** [Description]	$10,000	[Rate]	[Loan Term] [description of when repayment begins]	**[Total Cost]**

About this example

[Description of example assumptions]
[Description of other loan terms, if applicable]

Federal Loan Alternatives

Loan program	Current Interest Rates by Program Type	
PERKINS for Students	[Rate] fixed	
STAFFORD for Students	[Rate] fixed	Undergraduate subsidized
	[Rate] fixed	Undergraduate unsubsidized & Graduate
PLUS for Parents and Graduate / Professional Students	[Rate] fixed	Federal Family Education Loan
	[Rate] fixed	Federal Direct Loan

You may qualify for Federal education loans.

For additional information, **contact your school's financial aid office or the Department of Education at:**

www.federalstudentaid.ed.gov

Next Steps

1. **Find Out About Other Loan Options.**
   Some schools have school-specific student loan benefits and terms not detailed on this form. Contact your school's financial aid office or visit the Department of Education's web site at: www.federalstudentaid.ed.gov for more information about other loans.

2. **To Apply for this Loan, Complete the Application and the Self-Certification Form.**
   You may get the certification form from your school's financial aid office. If you are approved for this loan, the loan terms will be available for 30 days (terms will not change during this period, except as permitted by law and the variable interest rate may change based on the market).

REFERENCE NOTES

Variable Interest Rate
- [Variable interest rate information, if applicable]

Eligibility Criteria
- [Description of eligibility criteria]

Bankruptcy Limitations
- If you file for bankruptcy you may still be required to pay back this loan.

More information about loan eligibility and repayment deferral or forbearance options is available in your loan application and loan agreement.

H-19 Private Education Loan Approval Model Form

BORROWER:
[Borrower Name]
[Borrower Address]

CREDITOR:
[Creditor Name]
[Creditor Address]

Loan Rates & Estimated Total Costs

Total Loan Amount	Interest Rate	Finance Charge	Total of Payments
The total amount you are borrowing.	Your current interest rate.	The estimated dollar amount the credit will cost you.	The estimated amount you will have paid when you have made all payments.

ITEMIZATION OF AMOUNT FINANCED

Amount paid to you	[Amount]
Amount paid to others on your Behalf: • [Institution Name]	+ [Amount]
Amount Financed [Description]	= [Amount]
Initial finance charges (total) • [Charge Type], [Amount] • [Charge Type], [Amount]	+ [Amount]
Total Loan Amount	= **[Amount]**

ABOUT YOUR INTEREST RATE

- **Your rate is variable.** This means that your actual rate varies with the market and could be lower or higher than the rate on this form. The variable rate is based upon the [Index] Rate (as published in the [source of index]). For more information on this rate, see reference notes.
- Although your rate will vary, **it will never exceed [maximum interest rate]** (the maximum allowable [by law] for this loan).
- Your **Annual Percentage Rate (APR) is [Rate]**. The APR is typically different than the Interest Rate since it considers fees and reflects the cost of your loan as a yearly rate. For more information about the APR, see reference notes.

FEES

- [Itemization of Fees, if applicable]

Estimated Repayment Schedule & Terms

[LOAN TERM]	[PAYMENT PERIOD, e.g. MONTHLY PAYMENTS]	
	at [Interest Rate]% the current interest rate of your loan	**at [Maximum Rate]%** the maximum interest rate possible for your loan
[Dates of Deferment Period, if applicable] deferment period	**No payment required** ([Amount of accrued interest] interest will accrue during this time)	**No payment required** (Interest will accrue during this time)
[Payment Due Dates] [number of monthly payments] monthly payments	[Payment Amount]	[Payment Amount]
[Payment Due Dates] [number of monthly payments] monthly payments	[Payment Amount]	[Payment Amount]

◀ The estimated **Total of Payments** at the Maximum Rate of Interest would be **[Total Payment Amount]**.

Federal Loan Alternatives

Loan program	Current Interest Rates by Program Type	
PERKINS for Students	[Rate] fixed	
STAFFORD for Students	[Rate] fixed	Undergraduate subsidized
	[Rate] fixed	Undergraduate unsubsidized & Graduate
PLUS for Parents and Graduate / Professional Students	[Rate] fixed	Federal Family Education Loan
	[Rate] fixed	Federal Direct Loan

You may qualify for Federal education loans.

For additional information, **contact your school's financial aid office or the Department of Education at:**

www.federalstudentaid.ed.gov

Next Steps & Terms of Acceptance

This offer is good until:

[Date of Acceptance Deadline]

1. **Find Out About Other Loan Options.**
   Contact your school's financial aid office for more information.

2. **You Have Until [Date of Acceptance Deadline] to Accept this Offer**
   The terms of this offer will not change except as permitted by law and the variable interest rate may change based on the market.

To Accept the Terms of this loan,
[Description of method of acceptance]

REFERENCE NOTES

Variable Interest Rate:

- Your loan has a variable Interest Rate that is based on a publicly available index, the [Index Name], which is currently [Rate]. Your rate is calculated each month by adding a margin of [Margin Rate] to the [Index].
- The Interest Rate may be higher or lower than your Annual Percentage Rate (APR) because the APR considers certain fees you pay to obtain this loan, the Interest Rate, and whether you defer (postpone) payments while in school.
- [Description of effect of an increase]

Bankruptcy Limitations

- If you file for bankruptcy you may still be required to pay back this loan.

Repayment Options:

- [Description of deferment options, if applicable]

Prepayments:

- [Prepayment disclosure]

Security

- You are giving a security interest in [description, if applicable]

See your loan agreement for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

H-20 Private Education Loan Final Model Form

BORROWER:
[Borrower Name]
[Borrower Address]

CREDITOR:
[Creditor Name]
[Creditor Address]

RIGHT TO CANCEL

You have a right to cancel this transaction, without penalty, by midnight on [deadline for cancellation]. No funds will be disbursed to you or to your school until after this time. You may cancel by calling us at [Creditor Phone Number].

Loan Rates & Estimated Total Costs

Total Loan Amount	Interest Rate	Finance Charge	Total of Payments
The total amount you are borrowing.	Your current interest rate.	The estimated dollar amount the credit will cost you.	The estimated amount you will have paid when you have made all payments.

ITEMIZATION OF AMOUNT FINANCED

Amount paid to you	[Amount]
Amount paid to others on your Behalf: • [Institution Name]	+ [Amount]
Amount Financed [Description]	= [Amount]
Initial finance charges (total) • [Charge Type], [Amount] • [Charge Type], [Amount]	+ [Amount]
Total Loan Amount	= **[Amount]**

ABOUT YOUR INTEREST RATE

- **Your rate is variable.** This means that your actual rate varies with the market and could be lower or higher than the rate on this form. The variable rate is based upon the [Index] Rate (as published in the [source of index]). For more information on this rate, see reference notes.
- There **is no limit on the amount the interest rate can increase.**
- Your **Annual Percentage Rate (APR) is [Rate].** The APR is typically different than the Interest Rate since it considers fees and reflects the cost of your loan as a yearly rate. For more information about the APR, see reference notes.

FEES

- [Itemization of Fees, if applicable]

Estimated Repayment Schedule & Terms

[LOAN TERM]	[PAYMENT PERIOD, e.g. MONTHLY PAYMENTS]	
	at [Interest Rate]% the current interest rate of your loan	**No Maximum Rate** example **at 25%**
[Dates of Deferment Period, if applicable] deferment period	**No payment required** ([Amount of accrued interest] interest will accrue during this time)	**No payment required** (Interest will accrue during this time)
[Payment Due Dates] [number of monthly payments] monthly payments	[Payment Amount]	[Payment Amount] (your payments will be higher if the rate increases above 25%)
[Payment Due Dates] [number of monthly payments] monthly payments	[Payment Amount]	[Payment Amount] (your payments will be higher if the rate increases above 25%)

Though your loan does not have a maximum interest rate, **an example rate of 25%** has been used for comparative purposes.

The estimated **Total of Payments** if your rate rises to 25% would be **[Total Payment Amount].** Your Total of Payments will be higher if rate increases above 25%.

REFERENCE NOTES

Variable Interest Rate:

- Your loan has a variable Interest Rate that is based on a publicly available index, the [Index Name], which is currently [Rate]. Your rate is calculated each month by adding a margin of [Margin Rate] to the [Index].
- The Interest Rate may be higher or lower than your Annual Percentage Rate (APR) because the APR considers certain fees you pay to obtain this loan, the Interest Rate, and whether you defer (postpone) payments while in school.
- [Description of effect of an increase]

Bankruptcy Limitations

- If you file for bankruptcy you may still be required to pay back this loan.

Repayment Options:

- [Description of deferment options, if applicable]

Prepayments:

- [Prepayment disclosure]

Security

- You are giving a security interest in [description, if applicable]

See your loan agreement for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

H-21 Private Education Loan Application and Solicitation Sample

First ABC Bank
12345 1st St.
Anytown, CA 93120
(800) 555 - 5555

Loan Interest Rate & Fees

Your **starting interest rate** will be between

7.375% and 17.375%

After the starting rate is set, your rate will then vary with the market

Your Starting Interest Rate (upon approval)

The starting interest rate you pay will be determined after you apply. It will be based upon your credit history and other factors (co-signer credit, school type, etc). If approved, we will notify you of the rate you qualify for within the stated range.

Your Interest Rate during the life of the loan

Your rate is variable. This means that your rate could move lower or higher than the rates on this form. The variable rate is based upon the LIBOR Rate (as published in the *Wall Street Journal*). For more information on this rate, see the reference notes.

Although the rate will vary after you are approved, it will **never exceed 25%** (the maximum allowable for this loan).

Loan Fees

Application Fee: $15. **Origination Fee:** The fees that we charge to make this loan range from 0% to 3% of total loan amount. **Loan Guarantee Fee:** 0% to 3% of total loan amount. **Repayment Fee:** The fees we charge when you begin repayment range from 0% to 3.5% of the total loan amount. **Late Charge:** 5% of the amount of the past due payment, or $25, whichever is greater. **Returned check charge:** up to $25.

Loan Cost Examples

The total amount you will pay for this loan will vary depending upon when you start to repay it. This example provides estimates based upon three (3) different repayment options available to you while enrolled in school.

Repayment Option (while enrolled in school)	**Amount Provided** (amount provided directly to you or your school)	**Interest Rate** (highest possible starting rate)	**Loan Term** (how long you have to pay off the loan)	**Total Paid over 20 years** (includes associated fees)
1. DEFER PAYMENTS Make no payments while enrolled in school. Interest will be charged and added to your loan	$10,000	17.375%	20 years starting after the deferment period	**$81,084**
2. PAY ONLY THE INTEREST Make interest payments but defer payments on the principal amount while enrolled in school.	$10,000	17.375%	20 years starting after the deferment period	**$50,707**
3. MAKE FULL PAYMENTS Pay both the principal and interest amounts while enrolled in school.	$10,000	17.375%	20 years starting after your first payment	**$38,180**

About this example

The repayment example assumes that you remain in school for 4 years and have a 6 month grace period before beginning repayment. It is based on the **highest starting rate currently charged** and associated fees. For loan amounts **up to $20,000**, repayment will last 20 years, starting once the initial principal payment is made. For loan amounts **more than $20,000** repayment will last 30 years, starting once the initial principal payment is made.

Federal Loan Alternatives

Loan program	Current Interest Rates by Program Type	
PERKINS for Students	5% fixed	
STAFFORD for Students	5.6% fixed	Undergraduate subsidized
	6.8% fixed	Undergraduate unsubsidized & Graduate
PLUS for Parents and Graduate / Professional Students	8.5% fixed	Federal Family Education Loan
	7.9% fixed	Federal Direct Loan

You may qualify for Federal education loans.

For additional information, **contact your school's financial aid office or the Department of Education at:**

www.federalstudentaid.ed.gov

Next Steps

1. **Find Out About Other Loan Options.**
   Some schools have school-specific student loan benefits and terms not detailed on this form. Contact your school's financial aid office or visit the Department of Education's web site at: www.federalstudentaid.ed.gov for more information about other loans.

2. **To Apply for this Loan, Complete the Application and the Self-Certification Form.**
   You may get the certification form from your school's financial aid office. If you are approved for this loan, the loan terms will be available for 30 days (terms will not change during this period, except as permitted by law and the variable interest rate may change based on the market).

REFERENCE NOTES

Variable Interest Rate

- This loan has a variable interest rate, that is based on a publicly available index, the London Interbank Offered Rate (LIBOR). Your rate will be calculated each month by adding a margin between 3% and 13% to the LIBOR.
- The rate will not increase more than once a month, but there is no limit on the amount that the rate could increase at one time.

Eligibility Criteria

Borrower

- Must be enrolled at an eligible school at least half-time.
- Must be 18 years or older at the time you apply.

Co-signers

- Rates are typically higher without a co-signer.
- Must be 18 years or older at the time of loan application.

Bankruptcy Limitations

- If you file for bankruptcy you may still be required to pay back this loan.

More information about loan eligibility and repayment deferral or forbearance options is available in your loan application and loan agreement.

H-22 Private Education Loan Approval Sample

BORROWER:
Christopher Smith Jr.
1492 Columbus Way
Plymouth, MA 02360

CREDITOR:
First ABC Bank
12345 1st St
Anytown, CA 93120

Loan Rates & Estimated Total Costs

Total Loan Amount	Interest Rate	Finance Charge	Total of Payments
$10,600.00	7.375%	$18,541.24	$ 28,541.24
The total amount you are borrowing.	Your current interest rate.	The estimated dollar amount the credit will cost you.	The estimated amount you will have paid when you have made all payments.

ITEMIZATION OF AMOUNT FINANCED

Amount paid to you	$0.00
Amount paid to others on your Behalf: • ABC State University	+ $10,000
Amount Financed (total amount provided)	= $10,000
Initial finance charges (total) • Origination Fee ($300) • Loan Guarantee Fee ($300)	+ $600
Total Loan Amount	**= $10,600**

ABOUT YOUR INTEREST RATE

- **Your rate is variable.** This means that your actual rate varies with the market and could be lower or higher than the rate on this form. The variable rate is based upon the LIBOR Rate (as published in the *Wall Street Journal*). For more information on this rate, see reference notes.
- Although your rate will vary, **it will never exceed 25%** (the maximum allowable for this loan).
- Your **Annual Percentage Rate (APR) is 8.23%.** The APR is typically different than the Interest Rate since it considers fees and reflects the cost of your loan as a yearly rate. For more information about the APR, see reference notes.

FEES

- **Late Charge:** 5% of the amount of the past due payment, or $25, whichever is greater.
- **Returned check charge:** up to $25.
- **Fee when you begin repaying the loan:** 3.5% of loan balance.

Estimated Repayment Schedule & Terms

20 YEAR LOAN TERM	MONTHLY PAYMENTS	
	at 7.375% the current interest rate of your loan	**at 25%** the maximum interest rate possible for your loan
Sept. 1, 2009 - Oct. 31, 2013 deferment period	**No payment required** ($3,799.67 in interest will accrue during this time)	**No payment required** (Interest will accrue during this time)
Nov. 1, 2013 - Sept. 30, 2033 239 monthly payments	$118.93	$645.41
Oct. 1, 2033 1 monthly payment	$116.97	$674.63

◀ The estimated **Total of Payments** at the Maximum Rate of Interest would be **$154,928.**

Federal Loan Alternatives

Loan program	Current Interest Rates by Program Type	
PERKINS for Students	5% fixed	
STAFFORD for Students	5.6% fixed	Undergraduate subsidized
	6.8% fixed	Undergraduate unsubsidized & Graduate
PLUS for Parents and Graduate / Professional Students	8.5% fixed	Federal Family Education Loan
	7.9% fixed	Federal Direct Loan

You may qualify for Federal education loans.

For additional information, **contact your school's financial aid office or the Department of Education at:**

www.federalstudentaid.ed.gov

Next Steps & Terms of Acceptance

This offer is good until:

August 1, 2009

1. **Find Out About Other Loan Options.**
   Contact your school's financial aid office for more information.

2. **You Have Until August 1, 2009 to Accept this Offer**
   The terms of this offer will not change except as permitted by law and the variable interest may change based on the market.

To Accept the Terms of this loan, contact us at

First ABC Bank
12345 1st St.
Anytown, CA 93120
(800) 555 - 5555

REFERENCE NOTES

Variable Interest Rate:

- Your loan has a variable Interest Rate that is based on a publicly available index, the London Interbank Offered Rate (LIBOR), which is currently 4.375%. Your rate is calculated each month by adding a margin of 3% to the LIBOR.
- The Interest Rate may be higher or lower than your Annual Percentage Rate (APR) because the APR considers certain fees you pay to obtain this loan, the Interest Rate, and whether you defer (postpone) payments while in school.
- The rate will not increase more than once a month, but there is no limit on the amount that the rate could increase at one time. Your rate will never exceed 25%.
- If the Interest Rate increases your monthly payments will be higher.

Bankruptcy Limitations

- If you file for bankruptcy you may still be required to pay back this loan.

Repayment Options:

- Although you elected to postpone payments, you can still make payments while you are in school. You can also choose to change your deferment choice to: Pay Interest Only or Make Full Payments. More information about repayment deferral or forbearance options is available in your loan agreement.

Prepayments:

- If you pay the loan off early, you will not have to pay a penalty. You will not be entitled to a refund of part of the finance charge.

See your loan agreement for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

H-23 Private Education Loan Final Sample

BORROWER:
Christopher Smith Jr.
1492 Columbus Way
Plymouth, MA 02360

CREDITOR:
First ABC Bank
12345 1st St
Anytown, CA 93120
(800) 555 - 5555

RIGHT TO CANCEL

You have a right to cancel this transaction, without penalty, by midnight on August 4, 2009. No funds will be disbursed to you or to your school until after this time. You may cancel by calling us at 800-555-5555.

Loan Rates & Estimated Total Costs

Total Loan Amount	Interest Rate	Finance Charge	Total of Payments
$10,600.00	7.375%	$18,541.24	$ 28,541.24
The total amount you are borrowing.	Your current interest rate.	The estimated dollar amount the credit will cost you.	The estimated amount you will have paid when you have made all payments.

ITEMIZATION OF AMOUNT FINANCED

Amount paid to you	$0.00
Amount paid to others on your Behalf: • ABC State University	+ $10,000
Amount Financed (total amount provided)	= $10,000
Initial finance charges (total) • Origination Fee ($300) • Loan Guarantee Fee ($300)	+ $600
Total Loan Amount	**= $10,600**

ABOUT YOUR INTEREST RATE

- **Your rate is variable.** This means that your actual rate varies with the market and could be lower or higher than the rate on this form. The variable rate is based upon the LIBOR Rate (as published in the *Wall Street Journal*). For more information on this rate, see reference notes.
- **There is no limit on the amount the interest rate can increase.**
- Your **Annual Percentage Rate (APR) is 8.23%.** The APR is typically different than the Interest Rate since it considers fees and reflects the cost of your loan as a yearly rate. For more information about the APR, see reference notes.

FEES

- **Late Charge:** 5% of the amount of the past due payment, or $25, whichever is greater.
- **Returned check charge:** up to $25.
- **Fee when you begin repaying the loan:** 3.5% of loan balance.

Estimated Repayment Schedule & Terms

20 YEAR LOAN TERM	MONTHLY PAYMENTS	
	at 7.375% the current interest rate of your loan	**No Maximum Rate** example **at 25%**
Sept. 1, 2009 - Oct. 31, 2013 deferment period	**No payment required** ($3,799.67 in interest will accrue during this time)	**No payment required** (Interest will accrue during this time)
Nov. 1, 2013 - Sept. 30, 2033 239 monthly payments	$118.93	$645.41 (your payments will be higher if the rate increases above 25%)
Oct. 1, 2033 1 monthly payment	$116.97	$674.63 (your payments will be higher if the rate increases above 25%)

Though your loan does not have a maximum interest rate, **an example rate of 25%** has been used for comparative purposes.

The estimated **Total of Payments** if your rate rises to 25% would be **$154,928.** Your Total of Payments will be higher if rate increases above 25%.

REFERENCE NOTES

Variable Interest Rate:

- Your loan has a variable Interest Rate that is based on a publicly available index, the London Interbank Offered Rate (LIBOR), which is currently 4.375%. Your rate is calculated each month by adding a margin of 3% to the LIBOR.
- The Interest Rate may be higher or lower than your Annual Percentage Rate (APR) because the APR considers certain fees you pay to obtain this loan, the Interest Rate, and whether you defer (postpone) payments while in school.
- The rate will not increase more than once a month, but there is no limit on the amount that the rate could increase at one time. Your rate will never exceed 25%.
- If the Interest Rate increases your monthly payments will be higher.

Bankruptcy Limitations

- If you file for bankruptcy you may still be required to pay back this loan.

Repayment Options:

- Although you elected to postpone payments, you can still make payments while you are in school. You can also choose to change your deferment choice to: Pay Interest Only or Make Full Payments. More information about repayment deferral or forbearance options is available in your loan agreement.

Prepayments:

- If you pay the loan off early, you will not have to pay a penalty. You will not be entitled to a refund of part of the finance charge.

See your loan agreement for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

BILLING CODE 4810–AM–C

Appendix I to Part 1026—[Reserved]

Appendix J to Part 1026—Annual Percentage Rate Computations for Closed-End Credit Transactions

(a) Introduction

(1) Section 1026.22(a) of Regulation Z provides that the annual percentage rate for other than open-end credit transactions shall be determined in accordance with either the actuarial method or the United States Rule method. This appendix contains an explanation of the actuarial method as well as equations, instructions and examples of how this method applies to single advance and multiple advance transactions.

(2) Under the actuarial method, at the end of each unit-period (or fractional unit-period) the unpaid balance of the amount financed is increased by the finance charge earned during that period and is decreased by the total payment (if any) made at the end of that period. The determination of unit-periods and fractional unit-periods shall be consistent with the definitions and rules in paragraphs (b)(3), (4) and (5) of this section and the general equation in paragraph (b)(8) of this section.

(3) In contrast, under the United States Rule method, at the end of each payment period, the unpaid balance of the amount financed is increased by the finance charge earned during that payment period and is decreased by the payment made at the end of that payment period. If the payment is less than the finance charge earned, the adjustment of the unpaid balance of the amount financed is postponed until the end of the next payment period. If at that time the sum of the two payments is still less than the total earned finance charge for the two payment periods, the adjustment of the unpaid balance of the amount financed is postponed still another payment period, and so forth.

(B) Instructions and Equations for the Actuarial Method

(1) General Rule

The annual percentage rate shall be the nominal annual percentage rate determined by multiplying the unit-period rate by the number of unit-periods in a year.

(2) Term of the Transaction

The term of the transaction begins on the date of its consummation, except that if the finance charge or any portion of it is earned beginning on a later date, the term begins on the later date. The term ends on the date the last payment is due, except that if an advance is scheduled after that date, the term ends on the later date. For computation purposes, the length of the term shall be equal to the time interval between any point in time on the beginning date to the same point in time on the ending date.

(3) Definitions of Time Intervals

(i) A period is the interval of time between advances or between payments and includes the interval of time between the date the finance charge begins to be earned and the date of the first advance thereafter or the date of the first payment thereafter, as applicable.

(ii) A common period is any period that occurs more than once in a transaction.

(iii) A standard interval of time is a day, week, semimonth, month, or a multiple of a week or a month up to, but not exceeding, 1 year.

(iv) All months shall be considered equal. Full months shall be measured from any point in time on a given date of a given month to the same point in time on the same date of another month. If a series of payments (or advances) is scheduled for the last day of each month, months shall be measured from the last day of the given month to the last day of another month. If payments (or advances) are scheduled for the 29th or 30th of each month, the last day of February shall be used when applicable.

(4) Unit-Period

(i) In all transactions other than a single advance, single payment transaction, the unit-period shall be that common period, not to exceed 1 year, that occurs most frequently in the transaction, except that

(A) If 2 or more common periods occur with equal frequency, the smaller of such common periods shall be the unit-period; or

(B) If there is no common period in the transaction, the unit-period shall be that period which is the average of all periods rounded to the nearest whole standard interval of time. If the average is equally near 2 standard intervals of time, the lower shall be the unit-period.

(ii) In a single advance, single payment transaction, the unit-period shall be the term of the transaction, but shall not exceed 1 year.

(5) Number of Unit-Periods Between 2 Given Dates

(i) The number of days between 2 dates shall be the number of 24-hour intervals between any point in time on the first date to the same point in time on the second date.

(ii) If the unit-period is a month, the number of full unit-periods between 2 dates shall be the number of months measured back from the later date. The remaining fraction of a unit-period shall be the number of days measured forward from the earlier date to the beginning of the first full unit-period, divided by 30. If the unit-period is a month, there are 12 unit-periods per year.

(iii) If the unit-period is a semimonth or a multiple of a month not exceeding 11 months, the number of days between 2 dates shall be 30 times the number of full months measured back from the later date, plus the number of remaining days. The number of full unit-periods and the remaining fraction of a unit-period shall be determined by dividing such number of days by 15 in the case of a semimonthly unit-period or by the appropriate multiple of 30 in the case of a multimonthly unit-period. If the unit-period is a semimonth, the number of unit-periods

per year shall be 24. If the number of unit-periods is a multiple of a month, the number of unit-periods per year shall be 12 divided by the number of months per unit-period.

(iv) If the unit-period is a day, a week, or a multiple of a week, the number of full unit-periods and the remaining fractions of a unit-period shall be determined by dividing the number of days between the 2 given dates by the number of days per unit-period. If the unit-period is a day, the number of unit-periods per year shall be 365. If the unit-period is a week or a multiple of a week, the number of unit-periods per year shall be 52 divided by the number of weeks per unit-period.

(v) If the unit-period is a year, the number of full unit-periods between 2 dates shall be the number of full years (each equal to 12 months) measured back from the later date. The remaining fraction of a unit-period shall be

(A) The remaining number of months divided by 12 if the remaining interval is equal to a whole number of months, or

(B) The remaining number of days divided by 365 if the remaining interval is *not* equal to a whole number of months.

(vi) In a single advance, single payment transaction in which the term is less than a year and is equal to a whole number of months, the number of unit-periods in the term shall be 1, and the number of unit-periods per year shall be 12 divided by the number of months in the term or 365 divided by the number of days in the term.

(vii) In a single advance, single payment transaction in which the term is less than a year and is *not* equal to a whole number of months, the number of unit-periods in the term shall be 1, and the number of unit-periods per year shall be 365 divided by the number of days in the term.

(6) Percentage Rate for a Fraction of a Unit-Period

The percentage rate of finance charge for a fraction (less than 1) of a unit-period shall be equal to such fraction multiplied by the percentage rate of finance charge per unit-period.

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(7) Symbols. The symbols used to express the terms of a transaction in the equation set forth in paragraph (b)(8) of this section are defined as follows:

A_k = The amount of the kth advance.

q_k = The number of full unit-periods from the beginning of the term of the transaction to the kth advance.

e_k = The fraction of a unit-period in the time interval from the beginning of the term of the transaction to the kth advance.

m = The number of advances.

P_j = The amount of the jth payment.

t_j = The number of full unit-periods from the beginning of the term of the transaction to the jth payment.

f_j = The fraction of a unit-period in the time interval from the beginning of the term of the transaction to the jth payment.

n = The number of payments.

i = The percentage rate of finance charge per unit-period, expressed as a decimal equivalent.

Symbols used in the examples shown in this appendix are defined as follows:

$\ddot{a}_{\overline{x}|}$ = The present value of 1 per unit-period for x unit-periods, first payment due immediately.

$$= 1 + \frac{1}{(1+i)} + \frac{1}{(1+i)^2} + \ldots\ldots\ldots\ldots + \frac{1}{(1+i)^{x-1}}$$

w = The number of unit-periods per year.

I = wi x 100 = The nominal annual percentage rate.

(8) General equation. The following equation sets forth the relationship among the terms of a transaction:

$$\frac{A_1}{(1+e_1 i)(1+i)^{q_1}} + \frac{A_2}{(1+e_2 i)(1+i)^{q_2}} + \ldots + \frac{A_m}{(1+e_m i)(1+i)^{q_m}} =$$

$$\frac{P_1}{(1+f_1 i)(1+i)^{t_1}} + \frac{P_2}{(1+f_2 i)(1+i)^{t_2}} + \ldots + \frac{P_n}{(1+f_n i)(1+i)^{t_n}}$$

(9) Solution of general equation by iteration process. (i) The general equation in paragraph (b)(8) of this section, when applied to a simple transaction in which a loan of $1000 is repaid by 36 monthly payments of $33.61 each, takes the special form:

$$A = \frac{33.61\, \ddot{a}_{\overline{36}|}}{(1+i)}$$

Step 1: Let I_1 = estimated annual percentage rate = 12.50 %

Evaluate expression for A, letting $i = I_1/(100w)$ = .010416667

Result (referred to as A')= 1004.674391

Step 2: Let $I_2 = I_1 + .1$ = 12.60 %

Evaluate expression for A, letting $i = I_2/(100w)$ = .010500000

Result (referred to as A'') = 1003.235366

Step 3: Interpolate for I (annual percentage rate):

$$I = I_1 + .1\left[\frac{(A - A')}{(A''-A')}\right]$$

$$= 12.50 + .1\left[\frac{(1000.000000 - 1004.674391)}{(1003.235366 - 1004.674391)}\right] = 12.82483042\ \%$$

Step 4: First iteration, let I_1 = 12.82483042 % and repeat

Steps 1, 2, and 3 obtaining a new I = 12.82557859 %

Second iteration, let I_1 = 12.82557859 % and repeat

Steps 1, 2, and 3 obtaining a new I = 12.82557529 %

In this case, no further iterations are required to obtain the annual percentage rate correct to two decimal places, 12.83%.

(ii) When the iteration approach is used, it is expected that calculators or computers will be programmed to carry all available decimals throughout the calculation and that enough iterations will be performed to make virtually certain that the annual percentage rate obtained, when rounded to 2 decimals, is correct. Annual percentage rates in the examples below were obtained by using a 10 digit programmable calculator and the iteration procedure described above.

(c) Examples for the actuarial method. (1) Single advance transaction, with or without an odd first period, and otherwise regular. The general equation in paragraph (b)(8) of this section can be put in the following special form for this type of transaction:

$$A = \frac{1}{(1+fi)(1+i)^{t}} \left(P\, \ddot{a}_{\overline{n}|} \right)$$

Example (i): Monthly payments (regular first period)

Amount advanced (A) = $5000. Payment (P) = $230.
Number of payments (n) = 24.
Unit-period = 1 month. Unit-periods per year (w) = 12.
Advance, 1-10-78. First payment, 2-10-78.
From 1-10-78 through 2-10-78 = 1 unit-period. (t = 1; f= 0)
Annual percentage rate (I) = wi = .0969 = 9.69 %

Example (ii): Monthly payments (long first period)

Amount advanced (A) = $6000. Payment (P) = $200.
Number of payments (n) = 36.
Unit-period = 1 month. Unit-periods per year (w) = 12.
Advance, 2-10-78. First payment, 4-1-78.
From 3-1-78 through 4-1-78 = 1 unit-period. (t = 1)
From 2-10-78 through 3-1-78 = 19 days. (f = 19/30)
Annual percentage rate (I) = wi = .1182 = 11.82%

Example (iii): Semimonthly payments (short first period)

Amount advanced (A) = $5000. Payment (P) = $219.17.
Number of payments (n) = 24.
Unit-period = 1/2 month. Unit-periods per year (w) = 24.
Advance, 2-23-78. First payment, 3-1-78. Payments made on 1st and 16th of each month.
From 2-23-78 through 3-1-78 = 6 days. (t = 0; f = 6/15)
Annual percentage rate (I) = wi = .1034 = 10.34 %

Example (iv): Quarterly payments (long first period)

Amount advanced (A) = $10,000. Payment (P) = $385.
Number of payments (n) = 40.
Unit-period = 3 months. Unit-periods per year (w) = 4.
Advance, 5-23-78. First payment, 10-1-78.
From 7-1-78 through 10-1-78 = 1 unit-period. (t = 1)
From 6-1-78 through 7-1-78 = 1 month = 30 days. From 5-23-78 through 6-1-78 = 9 days. (f = 39/90)
Annual percentage rate (I) = wi = .0897 = 8.97 %

Example (v): Weekly payments (long first period)

Amount advanced (A) = $500. Payment (P) = $17.60.
Number of payments (n) = 30.
Unit-period = 1 week. Unit-periods per year (w) = 52.
Advance, 3-20-78. First payment, 4-21-78.
From 3-24-78 through 4-21-78 = 4 unit-periods. (t = 4)
From 3-20-78 through 3-24-78 = 4 days. (f = 4/7)
Annual percentage rate (I) = wi = .1496 = 14.96 %

(2) Single advance transaction, with an odd first payment, with or without an odd first period, and otherwise regular. The general equation in paragraph (b)(8) of this section can be put in the following special form for this type of transaction:

$$A = \frac{1}{(1+fi)(1+i)^{t}} \left[P_1 + \frac{P\ddot{a}_{\overline{n-1}|}}{(1+i)} \right]$$

Example (i): Monthly payments (regular first period and irregular first payment)

Amount advanced (A) = $5000. First payment $\left(P_1\right)$ = $250.
Regular payment (P) = $230. Number of payments (n) = 24.
Unit-period = 1 month. Unit-periods per year (w) = 12.
Advance, 1-10-78. First payment, 2-10-78.
From 1-10-78 through 2-10-78 = 1 unit-period. (t = 1; f = 0)
Annual percentage rate (I) = wi = .1008 = 10.08%

Example (ii): Payments every 4 weeks (long first period and irregular first payment)

Amount advanced (A) = $400. First payment $\left(P_1\right)$ = $39.50.
Regular payment (P) = $38.31. Number of payments (n) = 12.
Unit-period = 4 weeks. Unit-periods per year (w) = 52/4 = 13.
Advance, 3-18-78. First payment, 4-20-78.
From 3-23-78 through 4-20-78 = 1 unit-period. (t = 1)
From 3-18-78 through 3-23-78 = 5 days. (f = 5/28)
Annual percentage rate (I) = wi = .2850 = 28.50%

(3) Single advance transaction, with an odd final payment, with or without an odd first period, and otherwise regular. The general equation in paragraph (b)(8) of this section can be put in the following special form for this type of transaction:

$$A = \frac{1}{(1+fi)(1+i)^{t}} \left[P\ddot{a}_{\overline{n-1}|} + \frac{Pn}{(1+i)^{n-1}} \right]$$

Example (i): Monthly payments (regular first period and irregular final payment)

Amount advanced (A) = $5000. Regular payment (P) = $230.
Final payment $\left(P_n\right)$ = $280. Number of payments (n) = 24.
Unit-period = 1 month. Unit-periods per year (w) = 12.
Advance, 1-10-78. First payment, 2-10-78.
From 1-10-78 through 2-10-78 = 1 unit-period. (t = 1; f = 0)
Annual percentage rate (I) = wi = .1050 = 10.50%

Example (ii): Payments every 2 weeks (short first period and irregular final payment)

Amount advanced (A) = $200. Regular payment (P) = $9.50.
Final payment $\left(P_n\right)$ = $30. Number of payments (n) = 20.
Unit-period = 2 weeks. Unit-periods per year (w) = 52/2 = 26.
Advance, 4-3-78. First payment, 4-11-78.
From 4-3-78 through 4-11-78 = 8 days. (t = 0; f = 8/14)
Annual percentage rate (I) = wi = .1222 = 12.22%

(4) Single advance transaction, with an odd first payment, odd final payment, with or without an odd first period, and otherwise regular. The general equation in paragraph (b)(8) of this section can be put in the following special form for this type of transaction:

$$A = \frac{1}{(1+fi)(1+i)^t}\left[P_1 + \frac{P\,\ddot{a}_{\overline{n-2}|}}{(1+i)} + \frac{P_n}{(1+i)^{n-1}}\right]$$

Example (i): Monthly payments (regular first period, irregular first payment, and irregular final payment)

Amount advanced (A) = $5000. First payment $\left(P_1\right)$ = $250.
Regular payment (P) = $230. Final payment $\left(P_n\right)$ = $280.
Number of payments (n) = 24. Unit-period = 1 month.
Unit-periods per year (w) = 12.
Advance, 1-10-78. First payment, 2-10-78.
From 1-10-78 through 2-10-78 = 1 unit-period. (t = 1; f = 0)
Annual percentage rate (I) = wi = .1090 = 10.90%

Example (ii): Payments every two months (short first period, irregular first payment, and irregular final payment)

Amount advanced (A) = $8000. First payment $\left(P_1\right)$ = $449.36.
Regular payment (P) = $465. Final payment $\left(P_n\right)$ = $200.
Number of payments (n) = 20. Unit-period = 2 months.
Unit-periods per year (w) = 12/2 = 6.
Advance, 1-10-78. First payment, 3-1-78.
From 2-1-78 through 3-1-78 = 1 month. From 1-10-78 through 2-1-78 = 22 days. (t = 0; f = 52/60)
Annual percentage rate (I) = wi = .0730 = 7.30%

(5) Single advance, single payment transaction. The general equation in paragraph (b)(8) of this section can be put in the special forms below for single advance, single payment transactions. Forms 1 through 3 are for the direct determination of the annual percentage rate under special conditions. Form 4 requires the use of the iteration procedure of paragraph (b)(9) of this section and can be used for all single advance, single payment transactions regardless of term.

Form 1 - Term less than 1 year:

$$I = 100w\left(\frac{P}{A} - 1\right)$$

Form 2 - Term more than 1 year but less than 2 years:

$$I = \frac{50}{f}\left\{\left[(1 + f)^2 + 4f\left(\frac{P}{A} - 1\right)\right]^{1/2} - (1 + f)\right\}$$

Form 3 - Term equal to exactly a year or exact multiple of a year:

$$I = 100\left[\left(\frac{P}{A}\right)^{1/t} - 1\right]$$

Form 4 - Special form for iteration procedure (no restriction on term):

$$A = \frac{P}{(1 + fi)(1 + i)^t}$$

Example (i): Single advance, single payment (term of less than 1 year, measured in days)

Amount advanced (A) = $1000. Payment (P) = $1080.
Unit-period = 255 days. Unit-periods per year (w) = 365/255.
Advance, 1-3-78. Payment, 9-15-78.
From 1-3-78 through 9-15-78 = 255 days. (t = 1; f = 0)
Annual percentage rate (I) = wi = .1145 = 11.45%. (Use Form 1 or 4.)

Example (ii): Single advance, single payment (term of less than 1 year, measured in exact calendar months)

Amount advanced (A) = $1000. Payment (P) = $1044.
Unit-period = 6 months. Unit-periods per year (w) = 2.
Advance, 7-15-78. Payment, 1-15-79.
From 7-15-78 through 1-15-79 = 6 mos. (t = 1; f = 0)
Annual percentage rate (I) = wi = .0880 = 8.80%. (Use Form 1 or 4.)

Example (iii): Single advance, single payment (term of more than 1 year but less than 2 years, fraction measured in exact months)

Amount advanced (A) = $1000. Payment (P) = $1135.19.
Unit-period = 1 year. Unit-periods per year (w) = 1.
Advance, 7-17-78. Payment, 1-17-80.
From 1-17-79 through 1-17-80 = 1 unit-period. (t = 1)
From 7-17-78 through 1-17-79 = 6 mos. (f = 6/12)
Annual percentage rate (I) = wi = .0876 = 8.76%. (Use Form 2 or 4.)

Example (iv): Single advance, single payment (term of exactly 2 years)

Amount advanced (A) = $1000. Payment (P) = $1240.
Unit-period = 1 year. Unit-periods per year (w) = 1.
Advance, 1-3-78. Payment, 1-3-80.
From 1-3-78 through 1-3-79 = 1 unit-period. (t = 2; f = 0)
Annual percentage rate (I) = wi = .1136 = 11.36%. (Use Form 3 or 4.)

(6) Complex single advance transaction.

Example (i): Skipped payment loan (payments every 4 weeks)

A loan of $2135 is advanced on 1-25-78. It is to be repaid by 24 payments of $100 each. Payments are due every 4 weeks beginning 2-20-78. However, in those months in which 2 payments would be due, only the first of the 2 payments is made and the following payment is delayed by 2 weeks to place it in the next month.
Unit-period = 4 weeks. Unit-periods per year (w) = 52/4 = 13.
First series of payments begins 26 days after 1-25-78.
$(t_1 = 0;\ f_1 = 26/28)$

Second series of payments begins 9 unit-periods plus 2 weeks after start of first series. $(t_2 = 10;\ f_2 = 12/28)$

Third series of payments begins 6 unit-periods plus 2 weeks after start of second series. $(t_3 = 16;\ f_3 = 26/28)$

Last series of payments begins 6 unit-periods plus 2 weeks after start of third series. $(t_4 = 23;\ f_4 = 12/28)$

The general equation in paragraph (b)(8) of this section can be written in the special form:

$$2135 = \frac{100\,\ddot{a}_{\overline{9}|}}{(1+(26/28)i)} + \frac{100\,\ddot{a}_{\overline{6}|}}{(1+(12/28)i)(1+i)^{10}} + \frac{100\,\ddot{a}_{\overline{6}|}}{(1+(26/28)i)(1+i)^{16}} + \frac{100\,\ddot{a}_{\overline{3}|}}{(1+(12/28)i)(1+i)^{23}}$$

Annual percentage rate (I) = wi = .1200 = 12.00%

Example (ii): Skipped payment loan plus single payments

A loan of $7350 on 3-3-78 is to be repaid by 3 monthly payments of $1000 each beginning 9-15-78, plus a single payment of $2000 on 3-15-79, plus 3 more monthly payments of $750 each beginning 9-15-79, plus a final payment of $1000 on 2-1-80.
Unit-period = 1 month. Unit-periods per year (w) = 12.
First series of payments begins 6 unit-periods plus 12 days after 3-3-78. ($t_1 = 6$; $f_1 = 12/30$)

Second series of payments (single payment) occurs 12 unit-periods plus 12 days after 3-3-78. ($t_2 = 12$; $f_2 = 12/30$)

Third series of payments begins 18 unit-periods plus 12 days after 3-3-78. ($t_3 = 18$; $f_3 = 12/30$)

Final payment occurs 22 unit-periods plus 29 days after 3-3-78. ($t_4 = 22$; $f_4 = 29/30$)

The general equation in paragraph (b)(8) of this section can be written in the special form:

$$7350 = \frac{1000\ \ddot{a}_{\overline{3}|}}{(1+(12/30)i)(1+i)^{6}} + \frac{2000}{(1+(12/30)i)(1+i)^{12}} + \frac{750\ \ddot{a}_{\overline{3}|}}{(1+(12/30)i)(1+i)^{18}} + \frac{1000}{(1+(29/30)i)(1+i)^{22}}$$

Annual percentage rate (I) = wi = .1022 = 10.22%

Example (iii): Mortgage with varying payments

A loan of $39,688.56 (net) on 4-10-78 is to be repaid by 360 monthly payments beginning 6-1-78. Payments are the same for 12 months at a time as follows:

Year	Monthly payment	Year	Monthly payment	Year	Monthly payment
1	$291.81	11	$385.76	21	$380.43
2	300.18	12	385.42	22	379.60
3	308.78	13	385.03	23	378.68
4	317.61	14	384.62	24	377.69
5	326.65	15	384.17	25	376.60
6	335.92	16	383.67	26	375.42
7	345.42	17	383.13	27	374.13
8	355.15	18	382.54	28	372.72
9	365.12	19	381.90	29	371.18
10	375.33	20	381.20	30	369.50

Unit-period = 1 month. Unit-periods per year (w) = 12.
From 5-1-78 through 6-1-78 = 1 unit-period. (t = 1)
From 4-10-78 through 5-1-78 = 21 days. (f = 21/30)

The general equation in paragraph (b)(8) of this section can be written in the special form:

$$39{,}688.56 = \frac{\ddot{a}_{\overline{12}|}}{(1+(21/30)i)(1+i)} \left[291.81 + \frac{300.18}{(1+i)^{12}} + \frac{308.78}{(1+i)^{24}} + \ldots \ldots + \frac{369.50}{(1+i)^{348}} \right]$$

Annual percentage rate (I) = wi = .0980 = 9.80%

(7) Multiple advance transactions.

Example (i): Construction loan

Three advances of $20,000 each are made on 4-10-79, 6-12-79, and 9-18-79. Repayment is by 240 monthly payments of $612.36 each beginning 12-10-79.
Unit-period = 1 month. Unit-periods per year (w) = 12.
From 4-10-79 through 6-12-79 = (2+2/30) unit-periods.
From 4-10-79 through 9-18-79 = (5+8/30) unit-periods.
From 4-10-79 through 12-10-79 = (8) unit-periods.

The general equation in paragraph (b)(8) of this section is changed to the single advance mode by treating the 2nd and 3rd advances as negative payments:

$$20{,}000 = \frac{612.36\ \ddot{a}_{\overline{240}|}}{(1+i)^{8}} - \frac{20{,}000}{(1+(2/30)i)(1+i)^{2}} - \frac{20{,}000}{(1+(8/30)i)(1+i)^{5}}$$

Annual percentage rate (I) = wi = .1025 = 10.25%

Example (ii): Student loan

A student loan consists of 8 advances: $1800 on 9-5-78, 9-5-79, 9-5-80, and 9-5-81; plus $1000 on 1-5-79, 1-5-80, 1-5-81, and 1-5-82. The borrower is to make 50 monthly payments of $240 each beginning 7-1-78 (prior to first advance).
Unit-period = 1 month. Unit-periods per year (w) = 12.
Zero point is date of first payment since it precedes first advance.
From 7-1-78 to 9-5-78 = (2 + 4/30) unit-periods.

" " " 9-5-79 = (14 + 4/30) "

" " " 9-5-80 = (26 + 4/30) "

" " " 9-5-81 = (38 + 4/30) "

" " " 1-5-79 = (6 + 4/30) "

" " " 1-5-80 = (18 + 4/30) "

" " " 1-5-81 = (30 + 4/30) "

" " " 1-5-82 = (42 + 4/30) "

Since the zero point is date of first payment, the general equation in paragraph (b)(8) of this section is written in the single advance form below by treating the first payment as a negative advance and the 8 advances as negative payments:

$$-240 = \frac{240\ \ddot{a}_{\overline{49}|}}{(1+i)} - \frac{1800}{(1+(4/30)i)}\left[\frac{1}{(1+i)^{2}} + \frac{1}{(1+i)^{14}} + \frac{1}{(1+i)^{26}} + \frac{1}{(1+i)^{38}}\right]$$

$$- \frac{1000}{(1+(4/30)i)}\left[\frac{1}{(1+i)^{6}} + \frac{1}{(1+i)^{18}} + \frac{1}{(1+i)^{30}} + \frac{1}{(1+i)^{42}}\right]$$

Annual percentage rate (I) = wi = .3204 = 32.04%

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Appendix K to Part 1026—Total Annual Loan Cost Rate Computations for Reverse Mortgage Transactions

(a) *Introduction.* Creditors are required to disclose a series of total annual loan cost rates for each reverse mortgage transaction. This appendix contains the equations creditors must use in computing the total annual loan cost rate for various transactions, as well as instructions, explanations, and examples for various transactions. This appendix is modeled after Appendix J of this part (Annual Percentage Rates Computations for Closed-end Credit Transactions); creditors should consult Appendix J of this part for additional guidance in using the formulas for reverse mortgages.

(b) *Instructions and equations for the total annual loan cost rate.* (1) *General rule.* The total annual loan cost rate shall be the nominal total annual loan cost rate

determined by multiplying the unit-period rate by the number of unit-periods in a year.

(2) *Term of the transaction.* For purposes of total annual loan cost disclosures, the term of a reverse mortgage transaction is assumed to begin on the first of the month in which consummation is expected to occur. If a loan cost or any portion of a loan cost is initially incurred beginning on a date later than consummation, the term of the transaction is assumed to begin on the first of the month in which that loan cost is incurred. For purposes of total annual loan cost disclosures, the term ends on each of the assumed loan periods specified in § 1026.33(c)(6).

(3) *Definitions of time intervals.* (i) A *period* is the interval of time between advances.

(ii) A *common period* is any period that occurs more than once in a transaction.

(iii) A *standard interval of time* is a day, week, semimonth, month, or a multiple of a week or a month up to, but not exceeding, 1 year.

(iv) All months shall be considered to have an equal number of days.

(4) *Unit-period.* (i) In all transactions other than single-advance, single-payment transactions, the unit-period shall be that common period, not to exceed one year, that occurs most frequently in the transaction, except that:

(A) If two or more common periods occur with equal frequency, the smaller of such common periods shall be the unit-period; or

(B) If there is no common period in the transaction, the unit-period shall be that period which is the average of all periods rounded to the nearest whole standard interval of time. If the average is equally near two standard intervals of time, the lower shall be the unit-period.

(ii) In a single-advance, single-payment transaction, the unit-period shall be the term of the transaction, but shall not exceed one year.

(5) *Number of unit-periods between two given dates.* (i) The number of days between two dates shall be the number of 24-hour intervals between any point in time on the first date to the same point in time on the second date.

(ii) If the unit-period is a month, the number of full unit-periods between two dates shall be the number of months. If the unit-period is a month, the number of unit-periods per year shall be 12.

(iii) If the unit-period is a semimonth or a multiple of a month not exceeding 11 months, the number of days between two dates shall be 30 times the number of full months. The number of full unit-periods shall be determined by dividing the number of days by 15 in the case of a semimonthly unit-period or by the appropriate multiple of 30 in the case of a multimonthly unit-period. If the unit-period is a semimonth, the number of unit-periods per year shall be 24. If the number of unit-periods is a multiple of a month, the number of unit-periods per year shall be 12 divided by the number of months per unit-period.

(iv) If the unit-period is a day, a week, or a multiple of a week, the number of full unit-periods shall be determined by dividing the number of days between the two given dates by the number of days per unit-period. If the unit-period is a day, the number of unit-periods per year shall be 365. If the unit-period is a week or a multiple of a week, the number of unit-periods per year shall be 52 divided by the number of weeks per unit-period.

(v) If the unit-period is a year, the number of full unit-periods between two dates shall be the number of full years (each equal to 12 months).

(6) *Symbols.* The symbols used to express the terms of a transaction in the equation set forth in paragraph (b)(8) of this appendix are defined as follows:

A_j = The amount of each periodic or lump-sum advance to the consumer under the reverse mortgage transaction.

i = Percentage rate of the total annual loan cost per unit-period, expressed as a decimal equivalent.

j = The number of unit-periods until the jth advance.

n = The number of unit-periods between consummation and repayment of the debt.

P_n = Min (Bal_n, Val_n). This is the maximum amount that the creditor can be repaid at the specified loan term.

Bal_n = Loan balance at time of repayment, including all costs and fees incurred by the consumer (including any shared appreciation or shared equity amount) compounded to time n at the creditor's contract rate of interest.

$Val_n = Val_0(1 + \sigma)^y$, where Val_0 is the property value at consummation, σ is the assumed annual rate of appreciation for the dwelling, and y is the number of years in the assumed term. Val_n must be reduced by the amount of any equity reserved for the consumer by agreement between the parties, or by 7 percent (or the amount or percentage specified in the credit agreement), if the amount required to be repaid is limited to the net proceeds of sale.

σ = The summation operator.

Symbols used in the examples shown in this appendix are defined as follows:

$FV_{x\neg}i$ = The future value of 1 per unit period for x unit periods, first advance due immediately (at time = 0, which is consummation).

$$= \sum_{j=0}^{x-1} (1+i)^{x-j}$$

$$= (1+i)^x + (1+i)^{x-1} + \cdots (1+i)^1; \; or$$

$$= \frac{(1+i)^x - 1}{i} \times (1+i)$$

w = The number of unit-periods per year.

I = wi × 100 = the nominal total annual loan cost rate.

(7) *General equation.* The total annual loan cost rate for a reverse mortgage transaction must be determined by first solving the following formula, which sets forth the relationship between the advances to the consumer and the amount owed to the creditor under the terms of the reverse mortgage agreement for the loan cost rate per unit-period (the loan cost rate per unit-period is then multiplied by the number of unit-periods per year to obtain the total annual loan cost rate I; that is, I = wi):

$$\sum_{j=0}^{n-1} A_j (1+i)^{n-j} = P_n$$

(8) *Solution of general equation by iteration process.* (i) The general equation in paragraph (b)(7) of this appendix, when applied to a simple transaction for a reverse mortgage loan of equal monthly advances of $350 each, and with a total amount owed of $14,313.08 at an assumed repayment period of two years, takes the special form:

$$P_n = 350\, FV_{24\neg}\, i, or$$

$$P_n = 350 \times \left[\frac{(1+i)^n - 1}{i} \times (1+i) \right]$$

Using the iteration procedures found in steps 1 through 4 of (b)(9)(i) of Appendix J of this part, the total annual loan cost rate, correct to two decimals, is 48.53%.

(ii) In using these iteration procedures, it is expected that calculators or computers will be programmed to carry all available decimals throughout the calculation and that enough iterations will be performed to make virtually certain that the total annual loan cost rate obtained, when rounded to two decimals, is correct. Total annual loan cost rates in the examples below were obtained by using a 10-digit programmable calculator and the iteration procedure described in Appendix J of this part.

(9) *Assumption for discretionary cash advances.* If the consumer controls the timing of advances made after consummation (such as in a credit line arrangement), the creditor must use the general formula in paragraph (b)(7) of this appendix. The total annual loan cost rate shall be based on the assumption that 50 percent of the principal loan amount is advanced at closing, or in the case of an open-end transaction, at the time the consumer becomes obligated under the plan. Creditors shall assume the advances are made at the interest rate then in effect and that no further advances are made to, or repayments made by, the consumer during the term of the transaction or plan.

(10) *Assumption for variable-rate reverse mortgage transactions.* If the interest rate for a reverse mortgage transaction may increase during the loan term and the amount or timing is not known at consummation, creditors shall base the disclosures on the initial interest rate in effect at the time the disclosures are provided.

(11) *Assumption for closing costs.* In calculating the total annual loan cost rate, creditors shall assume all closing and other consumer costs are financed by the creditor.

(c) *Examples of total annual loan cost rate computations.* (1) *Lump-sum advance at consummation.*

Lump-sum advance to consumer at consummation: $30,000

Total of consumer's loan costs financed at consummation: $4,500

Contract interest rate: 11.60%

Estimated time of repayment (based on life expectancy of a consumer at age 78): 10 years

Appraised value of dwelling at consummation: $100,000

Assumed annual dwelling appreciation rate: 4%

P_{10} = Min (103,385.84, 137,662.72)

$$30{,}000(1+i)^{10-0} + \sum_{j=0}^{9} 0(1+i)^{10-j} = 103{,}385.84$$

i = .1317069438

Total annual loan cost rate (100(.1317069438 × 1)) = 13.17%

(2) *Monthly advance beginning at consummation.*

Monthly advance to consumer, beginning at consummation: $492.51

Total of consumer's loan costs financed at consummation: $4,500

Contract interest rate: 9.00%

Estimated time of repayment (based on life expectancy of a consumer at age 78): 10 years

Appraised value of dwelling at consummation: $100,000

Assumed annual dwelling appreciation rate: 8%

$$P_{120} = Min\,(107{,}053.63,\ 200{,}780.02)$$

$$492.51 \times \left[\frac{(1+i)^{120} - 1}{i} \times (1+i) \right] = 107{,}053.63$$

$$i = .009061140$$

Total annual loan cost rate (100(.009061140 × 12)) = 10.87%

(3) *Lump sum advance at consummation and monthly advances thereafter.*

Lump sum advance to consumer at consummation: $10,000

Monthly advance to consumer, beginning at consummation: $725

Total of consumer's loan costs financed at consummation: $4,500

Contract rate of interest: 8.5%

Estimated time of repayment (based on life expectancy of a consumer at age 75): 12 years

Appraised value of dwelling at consummation: $100,000

Assumed annual dwelling appreciation rate: 8%

$$P_{144} = Min\,(221{,}818.30,\ 234{,}189.82)$$

$$10{,}000(1+i)^{144-0} + \sum_{j=0}^{143} 725(1+i)^{144-j} = 221{,}818.30$$

$$i = .007708844$$

Total annual loan cost rate (100(.007708844 × 12)) = 9.25%

(d) *Reverse mortgage model form and sample form.* (1) *Model form.*

Total Annual Loan Cost Rate

Loan Terms

Age of youngest borrower:
Appraised property value:
Interest rate:
Monthly advance:
Initial draw:
Line of credit:

Initial Loan Charges

Closing costs:
Mortgage insurance premium:
Annuity cost:

Monthly Loan Charges

Servicing fee:

Other Charges:

Mortgage insurance:
Shared Appreciation:

Repayment Limits

Assumed annual appreciation (percent)	Total annual loan cost rate			
	2-year loan term	[ ]-year loan term]	[ ]-year loan term	[ ]-year loan term
0		[ ]		
4		[ ]		
8		[ ]		

The cost of any reverse mortgage loan depends on how long you keep the loan and how much your house appreciates in value. Generally, the longer you keep a reverse mortgage, the lower the total annual loan cost rate will be.

This table shows the estimated cost of your reverse mortgage loan, expressed as an annual rate. It illustrates the cost for three [four] loan terms: 2 years, [half of life expectancy for someone your age,] that life expectancy, and 1.4 times that life expectancy. The table also shows the cost of the loan, assuming the value of your home appreciates at three different rates: 0%, 4% and 8%.

The total annual loan cost rates in this table are based on the total charges associated with this loan. These charges typically include principal, interest, closing costs, mortgage insurance premiums, annuity costs, and servicing costs (but not costs when you sell the home).

The rates in this table are estimates. Your actual cost may differ if, for example, the amount of your loan advances varies or the interest rate on your mortgage changes.

Signing an Application or Receiving These Disclosures Does Not Require You To Complete This Loan

(2) Sample Form.

Total Annual Loan Cost Rate

Loan Terms

Age of youngest borrower: 75
Appraised property value: $100,000
Interest rate: 9%
Monthly advance: $301.80
Initial draw: $1,000
Line of credit: $4,000

Initial Loan Charges

Closing costs: $5,000
Mortgage insurance premium: None
Annuity cost: None

Monthly Loan Charges

Servicing fee: None

Other Charges

Mortgage insurance: None
Shared Appreciation: None

Repayment Limits

Net proceeds estimated at 93% of projected home sale

Assumed annual appreciation (percent)	Total annual loan cost rate			
	2-year loan term (percent)	6-year loan term (percent)	12-year loan term (percent)	17-year loan term (percent)
0	39.00	[14.94]	9.86	3.87
4	39.00	[14.94]	11.03	10.14
8	39.00	[14.94]	11.03	10.20

The cost of any reverse mortgage loan depends on how long you keep the loan and how much your house appreciates in value. Generally, the longer you keep a reverse mortgage, the lower the total annual loan cost rate will be.

This table shows the estimated cost of your reverse mortgage loan, expressed as an annual rate. It illustrates the cost for three [four] loan terms: 2 years, [half of life expectancy for someone your age,] that life expectancy, and 1.4 times that life expectancy. The table also shows the cost of the loan, assuming the value of your home appreciates at three different rates: 0%, 4% and 8%.

The total annual loan cost rates in this table are based on the total charges associated with this loan. These charges typically include principal, interest, closing costs, mortgage insurance premiums, annuity costs, and servicing costs (but not disposition costs—costs when you sell the home).

The rates in this table are estimates. Your actual cost may differ if, for example, the amount of your loan advances varies or the interest rate on your mortgage changes.

Signing an Application or Receiving These Disclosures Does Not Require You To Complete This Loan

Appendix L to Part 1026—Assumed Loan Periods for Computations of Total Annual Loan Cost Rates

(a) *Required tables.* In calculating the total annual loan cost rates in accordance with Appendix K of this part, creditors shall assume three loan periods, as determined by the following table.

(b) *Loan periods.* (1) Loan Period 1 is a two-year loan period.

(2) Loan Period 2 is the life expectancy in years of the youngest borrower to become obligated on the reverse mortgage loan, as shown in the U.S. Decennial Life Tables for 1979–1981 for females, rounded to the nearest whole year.

(3) Loan Period 3 is the life expectancy figure in Loan Period 3, multiplied by 1.4 and rounded to the nearest full year (life expectancy figures at .5 have been rounded up to 1).

(4) At the creditor's option, an additional period may be included, which is the life expectancy figure in Loan Period 2, multiplied by .5 and rounded to the nearest full year (life expectancy figures at .5 have been rounded up to 1).

Age of youngest borrower	Loan period 1 (in years)	[Optional loan period (in years)]	Loan period 2 (life expectancy) (in years)	Loan period 3 (in years)
62	2	[11]	21	29
63	2	[10]	20	28

Age of youngest borrower	Loan period 1 (in years)	[Optional loan period (in years)]	Loan period 2 (life expectancy) (in years)	Loan period 3 (in years)
64	2	[10]	19	27
65	2	[9]	18	25
66	2	[9]	18	25
67	2	[9]	17	24
68	2	[8]	16	22
69	2	[8]	16	22
70	2	[8]	15	21
71	2	[7]	14	20
72	2	[7]	13	18
73	2	[7]	13	18
74	2	[6]	12	17
75	2	[6]	12	17
76	2	[6]	11	15
77	2	[5]	10	14
78	2	[5]	10	14
79	2	[5]	9	13
80	2	[5]	9	13
81	2	[4]	8	11
82	2	[4]	8	11
83	2	[4]	7	10
84	2	[4]	7	10
85	2	[3]	6	8
86	2	[3]	6	8
87	2	[3]	6	8
88	2	[3]	5	7
89	2	[3]	5	7
90	2	[3]	5	7
91	2	[2]	4	6
92	2	[2]	4	6
93	2	[2]	4	6
94	2	[2]	4	6
95 and over	2	[2]	3	4

Appendix M1 to Part 1026—Repayment Disclosures

(a) *Definitions.* (1) ''Promotional terms'' means terms of a cardholder's account that will expire in a fixed period of time, as set forth by the card issuer.

(2) ''Deferred interest or similar plan'' means a plan where a consumer will not be obligated to pay interest that accrues on balances or transactions if those balances or transactions are paid in full prior to the expiration of a specified period of time.

(b) *Calculating minimum payment repayment estimates.* (1) *Minimum payment formulas.* When calculating the minimum payment repayment estimate, card issuers must use the minimum payment formula(s) that apply to a cardholder's account. If more than one minimum payment formula applies to an account, the issuer must apply each minimum payment formula to the portion of the balance to which the formula applies. In this case, the issuer must disclose the longest repayment period calculated. For example, assume that an issuer uses one minimum payment formula to calculate the minimum payment amount for a general revolving feature, and another minimum payment formula to calculate the minimum payment amount for special purchases, such as a ''club plan purchase.'' Also, assume that based on a consumer's balances in these features and the annual percentage rates that apply to such features, the repayment period calculated pursuant to this Appendix for the general revolving feature is 5 years, while the repayment period calculated for the special purchase feature is 3 years. This issuer must disclose 5 years as the repayment period for the entire balance to the consumer. If any promotional terms related to payments apply to a cardholder's account, such as a deferred billing plan where minimum payments are not required for 12 months, card issuers may assume no promotional terms apply to the account. For example, assume that a promotional minimum payment of $10 applies to an account for six months, and then after the promotional period expires, the minimum payment is calculated as 2 percent of the outstanding balance on the account or $20 whichever is greater. An issuer may assume during the promotional period that the $10 promotional minimum payment does not apply, and instead calculate the minimum payment disclosures based on the minimum payment formula of 2 percent of the outstanding balance or $20, whichever is greater. Alternatively, during the promotional period, an issuer in calculating the minimum payment repayment estimate may apply the promotional minimum payment until it expires and then apply the minimum payment formula that applies after the promotional minimum payment expires. In the above example, an issuer could calculate the minimum payment repayment estimate during the promotional period by applying the $10 promotional minimum payment for the first six months and then applying the 2 percent or $20 (whichever is greater) minimum payment formula after the promotional minimum payment expires. In calculating the minimum payment repayment estimate during a promotional period, an issuer may not assume that the promotional minimum payment will apply until the outstanding balance is paid off by making only minimum payments (assuming the repayment estimate is longer than the promotional period). In the above example, the issuer may not calculate the minimum payment repayment estimate during the promotional period by assuming that the $10 promotional minimum payment will apply beyond the six months until the outstanding balance is repaid.

(2) *Annual percentage rate.* When calculating the minimum payment repayment estimate, a card issuer must use the annual percentage rates that apply to a cardholder's account, based on the portion of the balance to which the rate applies. If any promotional terms related to annual percentage rates apply to a cardholder's account, other than deferred interest or similar plans, a card issuer in calculating the minimum payment repayment estimate during the promotional period must apply the promotional annual percentage rate(s) until it expires and then must apply the rate that applies after the promotional rate(s) expires. If the rate that applies after the promotional rate(s) expires is a variable rate, a card issuer must calculate that rate based on the applicable index or formula. This variable rate is accurate if it was in effect within the last 30 days before the minimum payment repayment estimate is provided. For deferred interest plans or similar plans, if minimum payments under the deferred interest or similar plan will repay the balances or transactions in full prior to the expiration of the specified period of time, a

card issuer must assume that the consumer will not be obligated to pay the accrued interest. This means, in calculating the minimum payment repayment estimate, the card issuer must apply a zero percent annual percentage rate to the balance subject to the deferred interest or similar plan. If, however, minimum payments under the deferred interest plan or similar plan may not repay the balances or transactions in full prior to the expiration of the specified period of time, a card issuer must assume that a consumer will not repay the balances or transactions in full prior to the expiration of the specified period of time and thus the consumer will be obligated to pay the accrued interest. This means, in calculating the minimum payment repayment estimate, the card issuer must apply the annual percentage rate at which interest is accruing to the balance subject to the deferred interest or similar plan.

(3) *Beginning balance.* When calculating the minimum payment repayment estimate, a card issuer must use as the beginning balance the outstanding balance on a consumer's account as of the closing date of the last billing cycle. When calculating the minimum payment repayment estimate, a card issuer may round the beginning balance as described above to the nearest whole dollar.

(4) *Assumptions.* When calculating the minimum payment repayment estimate, a card issuer for each of the terms below, may either make the following assumption about that term, or use the account term that applies to a consumer's account.

(i) Only minimum monthly payments are made each month. In addition, minimum monthly payments are made each month—for example, a debt cancellation or suspension agreement, or skip payment feature does not apply to the account.

(ii) No additional extensions of credit are obtained, such as new purchases, transactions, fees, charges or other activity. No refunds or rebates are given.

(iii) The annual percentage rate or rates that apply to a cardholder's account will not change, through either the operation of a variable rate or the change to a rate, except as provided in paragraph (b)(2) of this Appendix. For example, if a penalty annual percentage rate currently applies to a consumer's account, a card issuer may assume that the penalty annual percentage rate will apply to the consumer's account indefinitely, even if the consumer may potentially return to a non-penalty annual percentage rate in the future under the account agreement.

(iv) There is no grace period.

(v) The final payment pays the account in full (*i.e.,* there is no residual finance charge after the final month in a series of payments).

(vi) The average daily balance method is used to calculate the balance.

(vii) All months are the same length and leap year is ignored. A monthly or daily periodic rate may be assumed. If a daily periodic rate is assumed, the issuer may either assume (1) a year is 365 days long, and all months are 30.41667 days long, or (2) a year is 360 days long, and all months are 30 days long.

(viii) Payments are credited either on the last day of the month or the last day of the billing cycle.

(ix) Payments are allocated to lower annual percentage rate balances before higher annual percentage rate balances.

(x) The account is not past due and the account balance does not exceed the credit limit.

(xi) When calculating the minimum payment repayment estimate, the assumed payments, current balance and interest charges for each month may be rounded to the nearest cent, as shown in Appendix M2 to this part.

(5) *Tolerance.* A minimum payment repayment estimate shall be considered accurate if it is not more than 2 months above or below the minimum payment repayment estimate determined in accordance with the guidance in this Appendix (prior to rounding described in § 1026.7(b)(12)(i)(B) and without use of the assumptions listed in paragraph (b)(4) of this Appendix to the extent a card issuer chooses instead to use the account terms that apply to a consumer's account). For example, assume the minimum payment repayment estimate calculated using the guidance in this Appendix is 28 months (2 years, 4 months), and the minimum payment repayment estimate calculated by the issuer is 30 months (2 years, 6 months). The minimum payment repayment estimate should be disclosed as 2 years, due to the rounding rule set forth in § 1026.7(b)(12)(i)(B). Nonetheless, based on the 30-month estimate, the issuer disclosed 3 years, based on that rounding rule. The issuer would be in compliance with this guidance by disclosing 3 years, instead of 2 years, because the issuer's estimate is within the 2 months' tolerance, prior to rounding. In addition, even if an issuer's estimate is more than 2 months above or below the minimum payment repayment estimate calculated using the guidance in this Appendix, so long as the issuer discloses the correct number of years to the consumer based on the rounding rule set forth in § 1026.7(b)(12)(i)(B), the issuer would be in compliance with this guidance. For example, assume the minimum payment repayment estimate calculated using the guidance in this Appendix is 32 months (2 years, 8 months), and the minimum payment repayment estimate calculated by the issuer is 38 months (3 years, 2 months). Under the rounding rule set forth in § 1026.7(b)(12)(i)(B), both of these estimates would be rounded and disclosed to the consumer as 3 years. Thus, if the issuer disclosed 3 years to the consumer, the issuer would be in compliance with this guidance even though the minimum payment repayment estimate calculated by the issuer is outside the 2 months' tolerance amount.

(c) *Calculating the minimum payment total cost estimate.* When calculating the minimum payment total cost estimate, a card issuer must total the dollar amount of the interest and principal that the consumer would pay if he or she made minimum payments for the length of time calculated as the minimum payment repayment estimate under paragraph (b) of this Appendix. The minimum payment total cost estimate is deemed to be accurate if it is based on a minimum payment repayment estimate that is within the tolerance guidance set forth in paragraph (b)(5) of this Appendix. For example, assume the minimum payment repayment estimate calculated using the guidance in this Appendix is 28 months (2 years, 4 months), and the minimum payment repayment estimate calculated by the issuer is 30 months (2 years, 6 months). The minimum payment total cost estimate will be deemed accurate even if it is based on the 30 month estimate for length of repayment, because the issuer's minimum payment repayment estimate is within the 2 months' tolerance, prior to rounding. In addition, assume the minimum payment repayment estimate calculated under this Appendix is 32 months (2 years, 8 months), and the minimum payment repayment estimate calculated by the issuer is 38 months (3 years, 2 months). Under the rounding rule set forth in § 1026.7(b)(12)(i)(B), both of these estimates would be rounded and disclosed to the consumer as 3 years. If the issuer based the minimum payment total cost estimate on 38 months (or any other minimum payment repayment estimate that would be rounded to 3 years), the minimum payment total cost estimate would be deemed to be accurate.

(d) *Calculating the estimated monthly payment for repayment in 36 months.* (1) *In general.* When calculating the estimated monthly payment for repayment in 36 months, a card issuer must calculate the estimated monthly payment amount that would be required to pay off the outstanding balance shown on the statement within 36 months, assuming the consumer paid the same amount each month for 36 months.

(2) *Weighted annual percentage rate.* In calculating the estimated monthly payment for repayment in 36 months, an issuer may use a weighted annual percentage rate that is based on the annual percentage rates that apply to a cardholder's account and the portion of the balance to which the rate applies, as shown in Appendix M2 to this part. If a card issuer uses a weighted annual percentage rate and any promotional terms related to annual percentage rates apply to a cardholder's account, other than deferred interest plans or similar plans, in calculating the weighted annual percentage rate, the issuer must calculate a weighted average of the promotional rate and the rate that will apply after the promotional rate expires based on the percentage of 36 months each rate will apply, as shown in Appendix M2 to this part. For deferred interest plans or similar plans, if minimum payments under the deferred interest or similar plan will repay the balances or transactions in full prior to the expiration of the specified period of time, if a card issuer uses a weighted annual percentage rate, the card issuer must assume that the consumer will not be obligated to pay the accrued interest. This means, in calculating the weighted annual percentage rate, the card issuer must apply a zero percent annual percentage rate to the balance subject to the deferred interest or similar plan. If, however, minimum payments under the deferred interest plan or similar plan may not repay the balances or transactions in full prior to the expiration of the specified period of time, a card issuer in calculating the weighted annual percentage rate must assume that a consumer will not repay the balances or transactions in full

prior to the expiration of the specified period of time and thus the consumer will be obligated to pay the accrued interest. This means, in calculating the weighted annual percentage rate, the card issuer must apply the annual percentage rate at which interest is accruing to the balance subject to the deferred interest or similar plan. A card issuer may use a method of calculating the estimated monthly payment for repayment in 36 months other than a weighted annual percentage rate, so long as the calculation results in the same payment amount each month and so long as the total of the payments would pay off the outstanding balance shown on the periodic statement within 36 months.

(3) *Assumptions.* In calculating the estimated monthly payment for repayment in 36 months, a card issuer must use the same terms described in paragraph (b) of this Appendix, as appropriate.

(4) *Tolerance.* An estimated monthly payment for repayment in 36 months shall be considered accurate if it is not more than 10 percent above or below the estimated monthly payment for repayment in 36 months determined in accordance with the guidance in this Appendix (after rounding described in § 1026.7(b)(12)(i)(F)(*1*)(*i*)).

(e) *Calculating the total cost estimate for repayment in 36 months.* When calculating the total cost estimate for repayment in 36 months, a card issuer must total the dollar amount of the interest and principal that the consumer would pay if he or she made the estimated monthly payment calculated under paragraph (d) of this appendix each month for 36 months. The total cost estimate for repayment in 36 months shall be considered accurate if it is based on the estimated monthly payment for repayment in 36 months that is calculated in accordance with paragraph (d) of this appendix.

(f) *Calculating the savings estimate for repayment in 36 months.* When calculating the savings estimate for repayment in 36 months, if a card issuer chooses under § 1026.7(b)(12)(i) to round the disclosures to the nearest whole dollar when disclosing them on the periodic statement, the card issuer must calculate the savings estimate for repayment in 36 months by subtracting the total cost estimate for repayment in 36 months calculated under paragraph (e) of this appendix (rounded to the nearest whole dollar) from the minimum payment total cost estimate calculated under paragraph (c) of this appendix (rounded to the nearest whole dollar). If a card issuer chooses under § 1026.7(b)(12)(i), however, to round the disclosures to the nearest cent when disclosing them on the periodic statement, the card issuer must calculate the savings estimate for repayment in 36 months by subtracting the total cost estimate for repayment in 36 months calculated under paragraph (e) of this appendix (rounded to the nearest cent) from the minimum payment total cost estimate calculated under paragraph (c) of this appendix (rounded to the nearest cent). The savings estimate for repayment in 36 months shall be considered accurate if it is based on the total cost estimate for repayment in 36 months that is calculated in accordance with paragraph (e) of this appendix and the minimum payment total cost estimate calculated under paragraph (c) of this appendix.

Appendix M2 to Part 1026—Sample Calculations of Repayment Disclosures

The following is an example of how to calculate the minimum payment repayment estimate, the minimum payment total cost estimate, the estimated monthly payment for repayment in 36 months, the total cost estimate for repayment in 36 months, and the savings estimate for repayment in 36 months using the guidance in Appendix M1 to this part where three annual percentage rates apply (where one of the rates is a promotional APR), the total outstanding balance is $1000, and the minimum payment formula is 2 percent of the outstanding balance or $20, whichever is greater. The following calculation is written in SAS code.

```
data one;
/*
Note:
pmt01 = estimated monthly payment to repay
    balance in 36 months sumpmts36 = sum
    of payments for repayment in 36 months
month = number of months to repay total
    balance if making only minimum
    payments
pmt = minimum monthly payment
fc = monthly finance charge
sumpmts = sum of payments for minimum
    payments
*/
* inputs;
* annual percentage rates; apr1 = 0.0; apr2 =
    0.17; apr3 = 0.21; * insert in ascending
    order;
* outstanding balances; cbal1 = 500; cbal2 =
    250; cbal3 = 250;
* dollar minimum payment; dmin = 20;
* percent minimum payment; pmin = 0.02;
    * (0.02 + perrate);
* promotional rate information;
* last month for promotional rate; expm = 6;
    * = 0 if no promotional rate;
* regular rate; rrate = .17; * = 0 if no
    promotional rate;
array apr(3); array perrate(3);
days = 365/12; * calculate days in month;
* calculate estimated monthly payment to
    pay off balances in 36 months, and total
    cost of repaying balance in 36 months;
array xperrate(3);
do I = 1 to 3;
xperrate(I) = (apr(I)/365) * days; * calculate
    periodic rate;
end;
if expmgt 0 then xperrate1a = (expm/36) *
    xperrate1 + (1-(expm/36)) * (rrate/365) *
    days; else xperrate1a = xperrate1;
tbal = cbal1 + cbal2 + cbal3;
perrate36 = (cbal1 * xperrate1a + cbal2 *
    xperrate2 + cbal3 * xperrate3)/(cbal1 +
    cbal2 + cbal3);
* months to repay; dmonths = 36;
* initialize counters for sum of payments for
    repayment in 36 months; Sumpmts36 =
    0;
  pvaf = (1-(1 + perrate36) ** -dmonths)/
perrate36; * calculate present value of
annuity factor;
pmt01 = round(tbal/pvaf,0.01); * calculate
    monthly payment for designated number
    of months;
sumpmts36 = pmt01 * 36;
* calculate time to repay and total cost of
    making minimum payments each month;
* initialize counter for months, and sum of
    payments;
month = 0;
sumpmts = 0;
do I = 1 to 3;
perrate(I) = (apr(I)/365) * days; * calculate
    periodic rate;
end;
put perrate1 = perrate2 = perrate3 =;
eins:
month = month + 1; * increment month
    counter;
pmt = round(pmin * tbal,0.01); * calculate
    payment as percentage of balance;
if month geexpm and expm ne 0 then
    perrate1 = (rrate/365) * days;
if pmtltdmin then pmt = dmin; * set dollar
    minimum payment;
array xxxbal(3); array cbal(3);
do I = 1 to 3;
xxxbal(I) = round(cbal(I) * (1 +
    perrate(I)),0.01);
end;
fc = xxxbal1 + xxxbal2 + xxxbal3 − tbal;
if pmtgt (tbal + fc) then do;
do I = 1 to 3;
if cbal(I) gt 0 then pmt = round(cbal(I) * (1
    + perrate(I)),0.01); * set final payment
    amount;
end;
end;
if pmt le xxxbal1 then do;
cbal1 = xxxbal1 − pmt;
cbal2 = xxxbal2;
cbal3 = xxxbal3;
end;
if pmtgt xxxbal1 and xxxbal2 gt 0 and pmt
    le (xxxbal1 + xxxbal2) then do;
cbal2 = xxxbal2 − (pmt − xxxbal1);
cbal1 = 0;
cbal3 = xxxbal3;
end;
if pmtgt xxxbal2 and xxxbal3 gt 0 then do;
cbal3 = xxxbal3 − (pmt − xxxbal1 −
    xxxbal2);
cbal2 = 0;
end;
sumpmts = sumpmts + pmt; * increment sum
    of payments;
tbal = cbal1 + cbal2 + cbal3; * calculate new
    total balance;
* print month, balance, payment amount,
    and finance charge;
put month = tbal = cbal1 = cbal2 = cbal3 =
    pmt = fc =;
if tbalgt 0 then go to eins; * go to next month
    if balance is greater than zero;
* initialize total cost savings;
savtot = 0;
savtot = round(sumpmts,1)—round
    (sumpmts36,1);
* print number of months to repay debt if
    minimum payments made, final balance
    (zero), total cost if minimum payments
    made, estimated monthly payment for
    repayment in 36 months, total cost for
    repayment in 36 months, and total
    savings if repaid in 36 months;
put title = ' ';
put title = 'number of months to repay debt
    if minimum payment made, final
    balance, total cost if minimum payments
    made, estimated monthly payment for
```

```
    repayment in 36 months, total cost for
    repayment in 36 months, and total
    savings if repaid in 36 months';
put month = tbal = sumpmts = pmt01 =
    sumpmts36 = savtot =;
put title = ' ';
run;
```

Supplement I to Part 1026—Official Interpretations

Introduction

1. *Official status.* This commentary is the vehicle by which the Bureau of Consumer Financial Protection issues official interpretations of Regulation Z. Good faith compliance with this commentary affords protection from liability under section 130(f) of the Truth in Lending Act. Section 130(f) (15 U.S.C. 1640) protects creditors from civil liability for any act done or omitted in good faith in conformity with any interpretation issued by a duly authorized official or employee of the Bureau of Consumer Financial Protection.

2. *Procedure for requesting interpretations.* Under Appendix C of the regulation, anyone may request an official interpretation. Interpretations that are adopted will be incorporated in this commentary following publication in the **Federal Register.** No official interpretations are expected to be issued other than by means of this commentary.

3. *Rules of construction.* (a) Lists that appear in the commentary may be exhaustive or illustrative; the appropriate construction should be clear from the context. In most cases, illustrative lists are introduced by phrases such as ''including, but not limited to,'' ''among other things,'' ''for example,'' or ''such as.''

(b) Throughout the commentary, reference to ''this section'' or ''this paragraph'' means the section or paragraph in the regulation that is the subject of the comment.

4. *Comment designations.* Each comment in the commentary is identified by a number and the regulatory section or paragraph which it interprets. The comments are designated with as much specificity as possible according to the particular regulatory provision addressed. For example, some of the comments to § 1026.18(b) are further divided by subparagraph, such as comment 18(b)(1)–1 and comment 18(b)(2)–1. In other cases, comments have more general application and are designated, for example, as comment 18–1 or comment 18(b)–1. This introduction may be cited as comments I–1 through I–4. Comments to the appendices may be cited, for example, as comment app. A–1.

Subpart A—General

Section 1026.1—Authority, Purpose, Coverage, Organization, Enforcement and Liability

1(c) Coverage

1. *Foreign applicability.* Regulation Z applies to all persons (including branches of foreign banks and sellers located in the United States) that extend consumer credit to residents (including resident aliens) of any state as defined in § 1026.2. If an account is located in the United States and credit is extended to a U.S. resident, the transaction is subject to the regulation. This will be the case whether or not a particular advance or purchase on the account takes place in the United States and whether or not the extender of credit is chartered or based in the United States or a foreign country. For example, if a U.S. resident has a credit card account located in the consumer's state issued by a bank (whether U.S. or foreign-based), the account is covered by the regulation, including extensions of credit under the account that occur outside the United States. In contrast, if a U.S. resident residing or visiting abroad, or a foreign national abroad, opens a credit card account issued by a foreign branch of a U.S. bank, the account is not covered by the regulation.

Section 1026.2—Definitions and Rules of Construction

2(a)(2) Advertisement

1. *Coverage.* Only commercial messages that promote consumer credit transactions requiring disclosures are advertisements. Messages inviting, offering, or otherwise announcing generally to prospective customers the availability of credit transactions, whether in visual, oral, or print media, are covered by Regulation Z (12 CFR part 1026).

i. Examples include:

A. Messages in a newspaper, magazine, leaflet, promotional flyer, or catalog.

B. Announcements on radio, television, or public address system.

C. Electronic advertisements, such as on the Internet.

D. Direct mail literature or other printed material on any exterior or interior sign.

E. Point of sale displays.

F. Telephone solicitations.

G. Price tags that contain credit information.

H. Letters sent to customers or potential customers as part of an organized solicitation of business.

I. Messages on checking account statements offering auto loans at a stated annual percentage rate.

J. Communications promoting a new open-end plan or closed-end transaction.

ii. The term does not include:

A. Direct personal contacts, such as follow-up letters, cost estimates for individual consumers, or oral or written communication relating to the negotiation of a specific transaction.

B. Informational material, for example, interest-rate and loan-term memos, distributed only to business entities.

C. Notices required by Federal or state law, if the law mandates that specific information be displayed and only the information so mandated is included in the notice.

D. News articles the use of which is controlled by the news medium.

E. Market-research or educational materials that do not solicit business.

F. Communications about an existing credit account (for example, a promotion encouraging additional or different uses of an existing credit card account).

2. *Persons covered.* All *persons* must comply with the advertising provisions in §§ 1026.16 and 1026.24, not just those that meet the definition of creditor in § 1026.2(a)(17). Thus, home builders, merchants, and others who are not themselves creditors must comply with the advertising provisions of the regulation if they advertise consumer credit transactions. However, under section 145 of the Act, the owner and the personnel of the medium in which an advertisement appears, or through which it is disseminated, are not subject to civil liability for violations.

2(a)(4) Billing Cycle or Cycle

1. *Intervals.* In open-end credit plans, the billing cycle determines the intervals for which periodic disclosure statements are required; these intervals are also used as measuring points for other duties of the creditor. Typically, billing cycles are monthly, but they may be more frequent or less frequent (but not less frequent than quarterly).

2. *Creditors that do not bill.* The term *cycle* is interchangeable with *billing cycle* for definitional purposes, since some creditors' cycles do not involve the sending of bills in the traditional sense but only statements of account activity. This is commonly the case with financial institutions when periodic payments are made through payroll deduction or through automatic debit of the consumer's asset account.

3. *Equal cycles.* Although cycles must be equal, there is a permissible variance to account for weekends, holidays, and differences in the number of days in months. If the actual date of each statement does not vary by more than four days from a fixed ''day'' (for example, the third Thursday of each month) or ''date'' (for example, the 15th of each month) that the creditor regularly uses, the intervals between statements are considered equal. The requirement that cycles be equal applies even if the creditor applies a daily periodic rate to determine the finance charge. The requirement that intervals be equal does not apply to the first billing cycle on an open-end account (*i.e.,* the time period between account opening and the generation of the first periodic statement) or to a transitional billing cycle that can occur if the creditor occasionally changes its billing cycles so as to establish a new statement day or date. (*See* comments 9(c)(1)–3 and 9(c)(2)–3.)

4. *Payment reminder.* The sending of a regular payment reminder (rather than a late payment notice) establishes a cycle for which the creditor must send periodic statements.

2(a)(6) Business Day

1. *Business function test.* Activities that indicate that the creditor is open for substantially all of its business functions include the availability of personnel to make loan disbursements, to open new accounts, and to handle credit transaction inquiries. Activities that indicate that the creditor is not open for substantially all of its business functions include a retailer's merely accepting credit cards for purchases or a bank's having its customer-service windows open only for limited purposes such as deposits and withdrawals, bill paying, and related services.

2. *Rule for rescission, disclosures for certain mortgage transactions, and private*

education loans. A more precise rule for what is a business day (all calendar days except Sundays and the Federal legal holidays specified in 5 U.S.C. 6103(a)) applies when the right of rescission, the receipt of disclosures for certain dwelling-secured mortgage transactions under §§ 1026.19(a)(1)(ii), 1026.19(a)(2), 1026.31(c), or the receipt of disclosures for private education loans under § 1026.46(d)(4) is involved. Four Federal legal holidays are identified in 5 U.S.C. 6103(a) by a specific date: New Year's Day, January 1; Independence Day, July 4; Veterans Day, November 11; and Christmas Day, December 25. When one of these holidays (July 4, for example) falls on a Saturday, Federal offices and other entities might observe the holiday on the preceding Friday (July 3). In cases where the more precise rule applies, the observed holiday (in the example, July 3) is a business day.

2(a)(7) Card Issuer

1. *Agent.* An agent of a card issuer is considered a card issuer. Because agency relationships are traditionally defined by contract and by state or other applicable law, the regulation does not define agent. Merely providing services relating to the production of credit cards or data processing for others, however, does not make one the agent of the card issuer. In contrast, a financial institution may become the agent of the card issuer if an agreement between the institution and the card issuer provides that the cardholder may use a line of credit with the financial institution to pay obligations incurred by use of the credit card.

2(a)(8) Cardholder

1. *General rule.* A cardholder is a natural person at whose request a card is issued for consumer credit purposes or who is a co-obligor or guarantor for such a card issued to another. The second category does not include an employee who is a co-obligor or guarantor on a card issued to the employer for business purposes, nor does it include a person who is merely the authorized user of a card issued to another.

2. *Limited application of regulation.* For the limited purposes of the rules on issuance of credit cards and liability for unauthorized use, a cardholder includes *any* person, including an organization, to whom a card is issued for *any* purpose—including a business, agricultural, or commercial purpose.

3. *Issuance.* See the commentary to § 1026.12(a).

4. *Dual-purpose cards and dual-card systems.* Some card issuers offer dual-purpose cards that are for business as well as consumer purposes. If a card is issued to an individual for consumer purposes, the fact that an organization has guaranteed to pay the debt does not make it business credit. On the other hand, if a card is issued for business purposes, the fact that an individual sometimes uses it for consumer purchases does not subject the card issuer to the provisions on periodic statements, billing-error resolution, and other protections afforded to consumer credit. Some card issuers offer dual-card systems—that is, they issue two cards to the same individual, one intended for business use, the other for consumer or personal use. With such a system, the same person may be a cardholder for general purposes when using the card issued for consumer use, and a cardholder only for the limited purposes of the restrictions on issuance and liability when using the card issued for business purposes.

2(a)(9) Cash Price

1. *Components.* This amount is a starting point in computing the amount financed and the total sale price under § 1026.18 for credit sales. Any charges imposed equally in cash and credit transactions may be included in the cash price, or they may be treated as other amounts financed under § 1026.18(b)(2).

2. *Service contracts.* Service contracts include contracts for the repair or the servicing of goods, such as mechanical breakdown coverage, even if such a contract is characterized as insurance under state law.

3. *Rebates.* The creditor has complete flexibility in the way it treats rebates for purposes of disclosure and calculation. (See the commentary to § 1026.18(b).)

2(a)(10) Closed-End Credit

1. *General.* The coverage of this term is defined by exclusion. That is, it includes any credit arrangement that does not fall within the definition of open-end credit. Subpart C contains the disclosure rules for closed-end credit when the obligation is subject to a finance charge or is payable by written agreement in more than four installments.

2(a)(11) Consumer

1. *Scope.* Guarantors, endorsers, and sureties are not generally consumers for purposes of the regulation, but they may be entitled to rescind under certain circumstances and they may have certain rights if they are obligated on credit card plans.

2. *Rescission rules.* For purposes of rescission under §§ 1026.15 and 1026.23, a consumer includes any natural person whose ownership interest in his or her principal dwelling is subject to the risk of loss. Thus, if a security interest is taken in A's ownership interest in a house and that house is A's principal dwelling, A is a consumer for purposes of rescission, even if A is not liable, either primarily or secondarily, on the underlying consumer credit transaction. An ownership interest does not include, for example, leaseholds or inchoate rights, such as dower.

3. *Land trusts.* Credit extended to land trusts, as described in the commentary to § 1026.3(a), is considered to be extended to a natural person for purposes of the definition of consumer.

2(a)(12) Consumer Credit

1. *Primary purpose.* There is no precise test for what constitutes credit offered or extended for personal, family, or household purposes, nor for what constitutes the primary purpose. (See, however, the discussion of business purposes in the commentary to § 1026.3(a).)

2(a)(13) Consummation

1. *State law governs.* When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law; Regulation Z does not make this determination. A contractual commitment agreement, for example, that under applicable law binds the consumer to the credit terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a nonrefundable fee) unless, of course, applicable law holds otherwise.

2. *Credit v. sale.* Consummation does not occur when the consumer becomes contractually committed to a sale transaction, unless the consumer also becomes legally obligated to accept a particular credit arrangement. For example, when a consumer pays a nonrefundable deposit to purchase an automobile, a purchase contract may be created, but consummation for purposes of the regulation does not occur unless the consumer also contracts for financing at that time.

2(a)(14) Credit

1. *Exclusions.* The following situations are not considered credit for purposes of the regulation:

i. Layaway plans, unless the consumer is contractually obligated to continue making payments. Whether the consumer is so obligated is a matter to be determined under applicable law. The fact that the consumer is not entitled to a refund of any amounts paid towards the cash price of the merchandise does not bring layaways within the definition of credit.

ii. Tax liens, tax assessments, court judgments, and court approvals of reaffirmation of debts in bankruptcy. However, third-party financing of such obligations (for example, a bank loan obtained to pay off a tax lien) is credit for purposes of the regulation.

iii. Insurance premium plans that involve payment in installments with each installment representing the payment for insurance coverage for a certain future period of time, unless the consumer is contractually obligated to continue making payments.

iv. Home improvement transactions that involve progress payments, if the consumer pays, as the work progresses, only for work completed and has no contractual obligation to continue making payments.

v. Borrowing against the accrued cash value of an insurance policy or a pension account, if there is no independent obligation to repay.

vi. Letters of credit.

vii. The execution of option contracts. However, there may be an extension of credit when the option is exercised, if there is an agreement at that time to defer payment of a debt.

viii. Investment plans in which the party extending capital to the consumer risks the loss of the capital advanced. This includes, for example, an arrangement with a home purchaser in which the investor pays a portion of the downpayment and of the periodic mortgage payments in return for an ownership interest in the property, and shares in any gain or loss of property value.

ix. Mortgage assistance plans administered by a government agency in which a portion

of the consumer's monthly payment amount is paid by the agency. No finance charge is imposed on the subsidy amount, and that amount is due in a lump-sum payment on a set date or upon the occurrence of certain events. (If payment is not made when due, a new note imposing a finance charge may be written, which may then be subject to the regulation.)

2. *Payday loans; deferred presentment.* Credit includes a transaction in which a cash advance is made to a consumer in exchange for the consumer's personal check, or in exchange for the consumer's authorization to debit the consumer's deposit account, and where the parties agree either that the check will not be cashed or deposited, or that the consumer's deposit account will not be debited, until a designated future date. This type of transaction is often referred to as a ''payday loan'' or ''payday advance'' or ''deferred-presentment loan.'' A fee charged in connection with such a transaction may be a finance charge for purposes of § 1026.4, regardless of how the fee is characterized under state law. Where the fee charged constitutes a finance charge under § 1026.4 and the person advancing funds regularly extends consumer credit, that person is a creditor and is required to provide disclosures consistent with the requirements of Regulation Z. (*See* § 1026.2(a)(17).)

Paragraph 2(a)(15)

1. *Usable from time to time.* A credit card must be usable from time to time. Since this involves the possibility of repeated use of a single device, checks and similar instruments that can be used only once to obtain a single credit extension are not credit cards.

2. *Examples.* i. Examples of credit cards include:

A. A card that guarantees checks or similar instruments, if the asset account is also tied to an overdraft line or if the instrument directly accesses a line of credit.

B. A card that accesses both a credit and an asset account (that is, a debit-credit card).

C. An identification card that permits the consumer to defer payment on a purchase.

D. An identification card indicating loan approval that is presented to a merchant or to a lender, whether or not the consumer signs a separate promissory note for each credit extension.

E. A card or device that can be activated upon receipt to access credit, even if the card has a substantive use other than credit, such as a purchase-price discount card. Such a card or device is a credit card notwithstanding the fact that the recipient must first contact the card issuer to access or activate the credit feature.

ii. In contrast, credit card does not include, for example:

A. A check-guarantee or debit card with no credit feature or agreement, even if the creditor occasionally honors an inadvertent overdraft.

B. Any card, key, plate, or other device that is used in order to obtain petroleum products for business purposes from a wholesale distribution facility or to gain access to that facility, and that is required to be used without regard to payment terms.

C. An account number that accesses a credit account, unless the account number can access an open-end line of credit to purchase goods or services. For example, if a creditor provides a consumer with an open-end line of credit that can be accessed by an account number in order to transfer funds into another account (such as an asset account with the same creditor), the account number is not a credit card for purposes of § 1026.2(a)(15)(i). However, if the account number can also access the line of credit to purchase goods or services (such as an account number that can be used to purchase goods or services on the Internet), the account number is a credit card for purposes of § 1026.2(a)(15)(i), regardless of whether the creditor treats such transactions as purchases, cash advances, or some other type of transaction. Furthermore, if the line of credit can also be accessed by a card (such as a debit card), that card is a credit card for purposes of § 1026.2(a)(15)(i).

3. *Charge card.* Generally, charge cards are cards used in connection with an account on which outstanding balances cannot be carried from one billing cycle to another and are payable when a periodic statement is received. Under the regulation, a reference to credit cards generally includes charge cards. In particular, references to credit card accounts under an open-end (not home-secured) consumer credit plan in Subparts B and G generally include charge cards. The term *charge card* is, however, distinguished from *credit card* or *credit card account under an open-end (not home-secured) consumer credit plan* in §§ 1026.60, 1026.6(b)(2)(xiv), 1026.7(b)(11), 1026.7(b)(12), 1026.9(e), 1026.9(f), 1026.28(d), 1026.52(b)(1)(ii)(C), and Appendices G–10 through G–13.

4. *Credit card account under an open-end (not home-secured) consumer credit plan.* An open-end consumer credit account is a credit card account under an open-end (not home-secured) consumer credit plan for purposes of § 1026.2(a)(15)(ii) if:

i. The account is accessed by a credit card, as defined in § 1026.2(a)(15)(i); and

ii. The account is not excluded under § 1026.2(a)(15)(ii)(A) or (a)(15)(ii)(B).

2(a)(16) Credit Sale

1. *Special disclosure.* If the seller is a creditor in the transaction, the transaction is a credit sale and the special credit sale disclosures (that is, the disclosures under § 1026.18(j)) must be given. This applies even if there is more than one creditor in the transaction and the creditor making the disclosures is not the seller. (See the commentary to § 1026.17(d).)

2. *Sellers who arrange credit.* If the seller of the property or services involved arranged for financing but is not a creditor as to that sale, the transaction is not a credit sale. Thus, if a seller assists the consumer in obtaining a direct loan from a financial institution and the consumer's note is payable to the financial institution, the transaction is a loan and only the financial institution is a creditor.

3. *Refinancings.* Generally, when a credit sale is refinanced within the meaning of § 1026.20(a), loan disclosures should be made. However, if a new sale of goods or services is also involved, the transaction is a credit sale.

4. *Incidental sales.* Some lenders *sell* a product or service—such as credit, property, or health insurance—as part of a loan transaction. Section 1026.4 contains the rules on whether the cost of credit life, disability or property insurance is part of the finance charge. If the insurance is financed, it may be disclosed as a separate credit-sale transaction or disclosed as part of the primary transaction; if the latter approach is taken, either loan or credit-sale disclosures may be made. (See the commentary to § 1026.17(c)(1) for further discussion of this point.)

5. *Credit extensions for educational purposes.* A credit extension for educational purposes in which an educational institution is the creditor may be treated as either a credit sale or a loan, regardless of whether the funds are given directly to the student, credited to the student's account, or disbursed to other persons on the student's behalf. The disclosure of the total sale price need not be given if the transaction is treated as a loan.

2(a)(17) Creditor

1. *General.* The definition contains four independent tests. If any one of the tests is met, the person is a creditor for purposes of that particular test.

Paragraph 2(a)(17)(i)

1. *Prerequisites.* This test is composed of two requirements, both of which must be met in order for a particular credit extension to be subject to the regulation and for the credit extension to count towards satisfaction of the numerical tests mentioned in § 1026.2(a)(17)(v).

i. *First,* there must be either or both of the following:

A. A written (rather than oral) agreement to pay in more than four installments. A letter that merely confirms an oral agreement does not constitute a written agreement for purposes of the definition.

B. A finance charge imposed for the credit. The obligation to pay the finance charge need not be in writing.

ii. *Second,* the obligation must be payable to the person in order for that person to be considered a creditor. If an obligation is made payable to *bearer,* the creditor is the one who initially accepts the obligation.

2. *Assignees.* If an obligation is initially payable to one person, that person is the creditor even if the obligation by its terms is simultaneously assigned to another person. For example:

i. An auto dealer and a bank have a business relationship in which the bank supplies the dealer with credit sale contracts that are initially made payable to the dealer and provide for the immediate assignment of the obligation to the bank. The dealer and purchaser execute the contract only after the bank approves the creditworthiness of the purchaser. Because the obligation is initially payable on its face to the dealer, the dealer is the only creditor in the transaction.

3. *Numerical tests.* The examples below illustrate how the numerical tests of § 1026.2(a)(17)(v) are applied. The examples assume that consumer credit with a finance charge or written agreement for more than 4 installments was extended in the years in

question and that the person did not extend such credit in 2006.

4. *Counting transactions.* For purposes of closed-end credit, the creditor counts each credit transaction. For open-end credit, *transactions* means accounts, so that outstanding accounts are counted instead of individual credit extensions. Normally the number of transactions is measured by the preceding calendar year; if the requisite number is met, then the person is a creditor for all transactions in the current year. However, if the person did not meet the test in the preceding year, the number of transactions is measured by the current calendar year. For example, if the person extends consumer credit 26 times in 2007, it is a creditor for purposes of the regulation for the last extension of credit in 2007 and for all extensions of consumer credit in 2008. On the other hand, if a business begins in 2007 and extends consumer credit 20 times, it is not a creditor for purposes of the regulation in 2007. If it extends consumer credit 75 times in 2008, however, it becomes a creditor for purposes of the regulation (and must begin making disclosures) after the 25th extension of credit in that year and is a creditor for all extensions of consumer credit in 2009.

5. *Relationship between consumer credit in general and credit secured by a dwelling.* Extensions of credit secured by a dwelling are counted towards the 25-extensions test. For example, if in 2007 a person extends unsecured consumer credit 23 times and consumer credit secured by a dwelling twice, it becomes a creditor for the succeeding extensions of credit, whether or not they are secured by a dwelling. On the other hand, extensions of consumer credit not secured by a dwelling are *not* counted towards the number of credit extensions secured by a dwelling. For example, if in 2007 a person extends credit not secured by a dwelling 8 times and credit secured by a dwelling 3 times, it is not a creditor.

6. *Effect of satisfying one test.* Once one of the numerical tests is satisfied, the person is also a creditor for the other type of credit. For example, in 2007 a person extends consumer credit secured by a dwelling 5 times. That person is a creditor for all succeeding credit extensions, whether they involve credit secured by a dwelling or not.

7. *Trusts.* In the case of credit extended by trusts, each individual trust is considered a separate entity for purposes of applying the criteria. For example:

i. A bank is the trustee for three trusts. Trust A makes 15 extensions of consumer credit annually; Trust B makes 10 extensions of consumer credit annually; and Trust C makes 30 extensions of consumer credit annually. Only Trust C is a creditor for purposes of the regulation.

Paragraph 2(a)(17)(ii) [Reserved]

Paragraph 2(a)(17)(iii)

1. *Card issuers subject to Subpart B.* Section 1026.2(a)(17)(iii) makes certain card issuers creditors for purposes of the open-end credit provisions of the regulation. This includes, for example, the issuers of so-called travel and entertainment cards that expect repayment at the first billing and do not impose a finance charge. Since all disclosures are to be made only as applicable, such card issuers would omit finance charge disclosures. Other provisions of the regulation regarding such areas as scope, definitions, determination of which charges are finance charges, Spanish language disclosures, record retention, and use of model forms, also apply to such card issuers.

Paragraph 2(a)(17)(iv)

1. *Card issuers subject to Subparts B and C.* Section 1026.2(a)(17)(iv) includes as creditors card issuers extending closed-end credit in which there is a finance charge or an agreement to pay in more than four installments. These card issuers are subject to the appropriate provisions of Subparts B and C, as well as to the general provisions.

2(a)(18) Downpayment

1. *Allocation.* If a consumer makes a lump-sum payment, partially to reduce the cash price and partially to pay prepaid finance charges, only the portion attributable to reducing the cash price is part of the downpayment. (See the commentary to § 1026.2(a)(23).)

2. *Pick-up payments.* i. Creditors may treat the deferred portion of the downpayment, often referred to as *pick-up payments,* in a number of ways. If the pick-up payment is treated as part of the downpayment:

A. It is subtracted in arriving at the amount financed under § 1026.18(b).

B. It may, but need not, be reflected in the payment schedule under § 1026.18(g).

ii. If the pick-up payment does not meet the definition (for example, if it is payable after the second regularly scheduled payment) or if the creditor chooses not to treat it as part of the downpayment:

A. It must be included in the amount financed.

B. It must be shown in the payment schedule.

iii. Whichever way the pick-up payment is treated, the total of payments under § 1026.18(h) must equal the sum of the payments disclosed under § 1026.18(g).

3. *Effect of existing liens.* i. *No cash payment.* In a credit sale, the ''downpayment'' may only be used to reduce the cash price. For example, when a trade-in is used as the downpayment and the existing lien on an automobile to be traded in exceeds the value of the automobile, creditors must disclose a zero on the downpayment line rather than a negative number. To illustrate, assume a consumer owes $10,000 on an existing automobile loan and that the trade-in value of the automobile is only $8,000, leaving a $2,000 deficit. The creditor should disclose a downpayment of $0, not −$2,000.

ii. *Cash payment.* If the consumer makes a cash payment, creditors may, at their option, disclose the entire cash payment as the downpayment, or apply the cash payment first to any excess lien amount and disclose any remaining cash as the downpayment. In the above example:

A. If the downpayment disclosed is equal to the cash payment, the $2,000 deficit must be reflected as an additional amount financed under § 1026.18(b)(2).

B. If the consumer provides $1,500 in cash (which does not extinguish the $2,000 deficit), the creditor may disclose a downpayment of $1,500 or of $0.

C. If the consumer provides $3,000 in cash, the creditor may disclose a downpayment of $3,000 or of $1,000.

2(a)(19) Dwelling

1. *Scope.* A dwelling need not be the consumer's *principal* residence to fit the definition, and thus a vacation or second home could be a dwelling. However, for purposes of the definition of residential mortgage transaction and the right to rescind, a dwelling must be the principal residence of the consumer. (*See* the commentary to §§ 1026.2(a)(24), 1026.15, and 1026.23.)

2. *Use as a residence.* Mobile homes, boats, and trailers are dwellings if they are in fact used as residences, just as are condominium and cooperative units. Recreational vehicles, campers, and the like not used as residences are not dwellings.

3. *Relation to exemptions.* Any transaction involving a security interest in a consumer's principal dwelling (as well as in any real property) remains subject to the regulation despite the general exemption in § 1026.3(b).

2(a)(20) Open-End Credit

1. *General.* This definition describes the characteristics of open-end credit (for which the applicable disclosure and other rules are contained in Subpart B), as distinct from closed-end credit. Open-end credit is consumer credit that is extended under a plan and meets *all 3* criteria set forth in the definition.

2. *Existence of a plan.* The definition requires that there be a plan, which connotes a contractual arrangement between the creditor and the consumer. Some creditors offer programs containing a number of different credit features. The consumer has a single account with the institution that can be accessed repeatedly via a number of sub-accounts established for the different program features and rate structures. Some features of the program might be used repeatedly (for example, an overdraft line) while others might be used infrequently (such as the part of the credit line available for secured credit). If the program as a whole is subject to prescribed terms and otherwise meets the definition of open-end credit, such a program would be considered a single, multifeatured plan.

3. *Repeated transactions.* Under this criterion, the creditor must reasonably contemplate repeated transactions. This means that the credit plan must be usable from time to time and the creditor must legitimately expect that there will be repeat business rather than a one-time credit extension. The creditor must expect repeated dealings with consumers under the credit plan as a whole and need not believe a consumer will reuse a particular feature of the plan. The determination of whether a creditor can reasonably contemplate repeated transactions requires an objective analysis. Information that much of the creditor's customer base with accounts under the plan make repeated transactions over some period of time is relevant to the determination, particularly when the plan is opened primarily for the financing of infrequently purchased products or services. A standard

based on reasonable belief by a creditor necessarily includes some margin for judgmental error. The fact that particular consumers do not return for further credit extensions does not prevent a plan from having been properly characterized as open-end. For example, if much of the customer base of a clothing store makes repeat purchases, the fact that some consumers use the plan only once would not affect the characterization of the store's plan as open-end credit. The criterion regarding repeated transactions is a question of fact to be decided in the context of the creditor's type of business and the creditor's relationship with its customers. For example, it would be more reasonable for a bank or depository institution to contemplate repeated transactions with a customer than for a seller of aluminum siding to make the same assumption about its customers.

4. *Finance charge on an outstanding balance.* The requirement that a finance charge may be computed and imposed from time to time on the outstanding balance means that there is no specific amount financed for the plan for which the finance charge, total of payments, and payment schedule can be calculated. A plan may meet the definition of open-end credit even though a finance charge is not normally imposed, provided the creditor has the right, under the plan, to impose a finance charge from time to time on the outstanding balance. For example, in some plans, a finance charge is not imposed if the consumer pays all or a specified portion of the outstanding balance within a given time period. Such a plan could meet the finance charge criterion, if the creditor has the right to impose a finance charge, even though the consumer actually pays no finance charges during the existence of the plan because the consumer takes advantage of the option to pay the balance (either in full or in installments) within the time necessary to avoid finance charges.

5. *Reusable line.* The total amount of credit that may be extended during the existence of an open-end plan is unlimited because available credit is generally replenished as earlier advances are repaid. A line of credit is self-replenishing even though the plan itself has a fixed expiration date, as long as during the plan's existence the consumer may use the line, repay, and reuse the credit. The creditor may occasionally or routinely verify credit information such as the consumer's continued income and employment status or information for security purposes but, to meet the definition of open-end credit, such verification of credit information may not be done as a condition of granting a consumer's request for a particular advance under the plan. In general, a credit line is self-replenishing if the consumer can take further advances as outstanding balances are repaid without being required to separately apply for those additional advances. A credit card account where the plan as a whole replenishes meets the self-replenishing criterion, notwithstanding the fact that a credit card issuer may verify credit information from time to time in connection with specific transactions. This criterion of unlimited credit distinguishes open-end credit from a series of advances made pursuant to a closed-end credit loan commitment. For example:

i. Under a closed-end commitment, the creditor might agree to lend a total of $10,000 in a series of advances as needed by the consumer. When a consumer has borrowed the full $10,000, no more is advanced under that particular agreement, even if there has been repayment of a portion of the debt. (*See* § 1026.2(a)(17)(iv) for disclosure requirements when a credit card is used to obtain the advances.)

ii. This criterion does not mean that the creditor must establish a specific credit limit for the line of credit or that the line of credit must always be replenished to its original amount. The creditor may reduce a credit limit or refuse to extend new credit in a particular case due to changes in the creditor's financial condition or the consumer's creditworthiness. (The rules in § 1026.40(f), however, limit the ability of a creditor to suspend credit advances for home equity plans.) While consumers should have a reasonable expectation of obtaining credit as long as they remain current and within any preset credit limits, further extensions of credit need not be an absolute right in order for the plan to meet the self-replenishing criterion.

6. *Verifications of collateral value.* Creditors that otherwise meet the requirements of § 1026.2(a)(20) extend open-end credit notwithstanding the fact that the creditor must verify collateral values to comply with Federal, state, or other applicable law or verifies the value of collateral in connection with a particular advance under the plan.

7. *Open-end real estate mortgages.* Some credit plans call for negotiated advances under so-called open-end real estate mortgages. Each such plan must be independently measured against the definition of open-end credit, regardless of the terminology used in the industry to describe the plan. The fact that a particular plan is called an open-end real estate mortgage, for example, does not, by itself, mean that it is open-end credit under the regulation.

2(a)(21) Periodic Rate

1. *Basis.* The periodic rate may be stated as a percentage (for example, 1 and ½% per month) or as a decimal equivalent (for example, .015 monthly). It may be based on any portion of a year the creditor chooses. Some creditors use 1/360 of an annual rate as their periodic rate. These creditors:

i. May disclose a 1/360 rate as a *daily* periodic rate, without further explanation, if it is in fact only applied 360 days per year. But if the creditor applies that rate for 365 days, the creditor must note that fact and, of course, disclose the true annual percentage rate.

ii. Would have to apply the rate to the balance to disclose the annual percentage rate with the degree of accuracy required in the regulation (that is, within ⅛th of 1 percentage point of the rate based on the actual 365 days in the year).

2. *Transaction charges. Periodic rate* does not include initial one-time transaction charges, even if the charge is computed as a percentage of the transaction amount.

2(a)(22) Person

1. *Joint ventures.* A joint venture is an organization and is therefore a person.

2. *Attorneys.* An attorney and his or her client are considered to be the same person for purposes of this part when the attorney is acting within the scope of the attorney-client relationship with regard to a particular transaction.

3. *Trusts.* A trust and its trustee are considered to be the same person for purposes of this part.

2(a)(23) Prepaid Finance Charge

1. *General.* Prepaid finance charges must be taken into account under § 1026.18(b) in computing the disclosed amount financed, and must be disclosed if the creditor provides an itemization of the amount financed under § 1026.18(c).

2. *Examples.* i. Common examples of prepaid finance charges include:

A. Buyer's points.
B. Service fees.
C. Loan fees.
D. Finder's fees.
E. Loan-guarantee insurance.
F. Credit-investigation fees.

ii. However, in order for these or any other finance charges to be considered prepaid, they must be either paid separately in cash or check or withheld from the proceeds. Prepaid finance charges include any portion of the finance charge paid prior to or at closing or settlement.

3. *Exclusions. Add-on* and *discount* finance charges are not prepaid finance charges for purposes of this part. Finance charges are not *prepaid* merely because they are precomputed, whether or not a portion of the charge will be rebated to the consumer upon prepayment. (*See* the commentary to § 1026.18(b).)

4. *Allocation of lump-sum payments.* In a credit sale transaction involving a lump-sum payment by the consumer and a discount or other item that is a finance charge under § 1026.4, the discount or other item is a prepaid finance charge to the extent the lump-sum payment is not applied to the cash price. For example, a seller sells property to a consumer for $10,000, requires the consumer to pay $3,000 at the time of the purchase, and finances the remainder as a closed-end credit transaction. The cash price of the property is $9,000. The seller is the creditor in the transaction and therefore the $1,000 difference between the credit and cash prices (the discount) is a finance charge. (See the commentary to § 1026.4(b)(9) and (c)(5).) If the creditor applies the entire $3,000 to the cash price and adds the $1,000 finance charge to the interest on the $6,000 to arrive at the total finance charge, all of the $3,000 lump-sum payment is a downpayment and the discount is not a prepaid finance charge. However, if the creditor only applies $2,000 of the lump-sum payment to the cash price, then $2,000 of the $3,000 is a downpayment and the $1,000 discount is a prepaid finance charge.

2(a)(24) Residential Mortgage Transaction

1. *Relation to other sections.* This term is important in five provisions in the regulation:

i. Section 1026.4(c)(7)—exclusions from the finance charge.

ii. Section 1026.15(f)—exemption from the right of rescission.

iii. Section 1026.18(q)—whether or not the obligation is assumable.

iv. Section 1026.20(b)—disclosure requirements for assumptions.

v. Section 1026.23(f)—exemption from the right of rescission.

2. *Lien status.* The definition is not limited to first lien transactions. For example, a consumer might assume a paid-down first mortgage (or borrow part of the purchase price) and borrow the balance of the purchase price from a creditor who takes a second mortgage. The second mortgage transaction is a *residential mortgage transaction* if the dwelling purchased is the consumer's principal residence.

3. *Principal dwelling.* A consumer can have only *one* principal dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of applying this definition to a particular transaction. (*See* the commentary to §§ 1026.15(a) and 1026.23(a).)

4. *Construction financing.* If a transaction meets the definition of a residential mortgage transaction and the creditor chooses to disclose it as several transactions under § 1026.17(c)(6), each one is considered to be a residential mortgage transaction, even if different creditors are involved. For example:

i. The creditor makes a construction loan to finance the initial construction of the consumer's principal dwelling, and the loan will be disbursed in five advances. The creditor gives six sets of disclosures (five for the construction phase and one for the permanent phase). Each one is a residential mortgage transaction.

ii. One creditor finances the initial construction of the consumer's principal dwelling and another creditor makes a loan to satisfy the construction loan and provide permanent financing. Both transactions are residential mortgage transactions.

5. *Acquisition.* i. A residential mortgage transaction finances the acquisition of a consumer's principal dwelling. The term does not include a transaction involving a consumer's principal dwelling if the consumer had previously purchased and acquired some interest to the dwelling, even though the consumer had not acquired full legal title.

ii. Examples of new transactions involving a previously acquired dwelling include the financing of a balloon payment due under a land sale contract and an extension of credit made to a joint owner of property to buy out the other joint owner's interest. In these instances, disclosures are not required under § 1026.18(q) (assumability policies). However, the rescission rules of §§ 1026.15 and 1026.23 do apply to these new transactions.

iii. In other cases, the disclosure and rescission rules do not apply. For example, where a buyer enters into a written agreement with the creditor holding the seller's mortgage, allowing the buyer to assume the mortgage, if the buyer had previously purchased the property and agreed with the seller to make the mortgage payments, § 1026.20(b) does not apply (assumptions involving residential mortgages).

6. *Multiple purpose transactions.* A transaction meets the definition of this section if any part of the loan proceeds will be used to finance the acquisition or initial construction of the consumer's principal dwelling. For example, a transaction to finance the initial construction of the consumer's principal dwelling is a residential mortgage transaction even if a portion of the funds will be disbursed directly to the consumer or used to satisfy a loan for the purchase of the land on which the dwelling will be built.

7. *Construction on previously acquired vacant land.* A residential mortgage transaction includes a loan to finance the construction of a consumer's principal dwelling on a vacant lot previously acquired by the consumer.

2(a)(25) Security Interest

1. *Threshold test.* The threshold test is whether a particular interest in property is recognized as a security interest under applicable law. The regulation does not determine whether a particular interest is a security interest under applicable law. If the creditor is unsure whether a particular interest is a security interest under applicable law (for example, if statutes and case law are either silent or inconclusive on the issue), the creditor may at its option consider such interests as security interests for Truth in Lending purposes. However, the regulation and the commentary do exclude specific interests, such as after-acquired property and accessories, from the scope of the definition regardless of their categorization under applicable law, and these named exclusions may not be disclosed as security interests under the regulation. (But see the discussion of exclusions elsewhere in the commentary to § 1026.2(a)(25).)

2. *Exclusions.* The general definition of security interest excludes three groups of interests: incidental interests, interests in after-acquired property, and interests that arise solely by operation of law. These interests may not be disclosed with the disclosures required under § 1026.18, but the creditor is not precluded from preserving these rights elsewhere in the contract documents, or invoking and enforcing such rights, if it is otherwise lawful to do so. If the creditor is unsure whether a particular interest is one of the excluded interests, the creditor may, at its option, consider such interests as security interests for Truth in Lending purposes.

3. *Incidental interests.* i. Incidental interests in property that are not security interests include, among other things:

A. Assignment of rents.

B. Right to condemnation proceeds.

C. Interests in accessories and replacements.

D. Interests in escrow accounts, such as for taxes and insurance.

E. Waiver of homestead or personal property rights.

ii. The notion of an *incidental interest* does not encompass an explicit security interest in an insurance policy if that policy is the primary collateral for the transaction—for example, in an insurance premium financing transaction.

4. *Operation of law.* Interests that arise solely by operation of law are excluded from the general definition. Also excluded are interests arising by operation of law that are merely repeated or referred to in the contract. However, if the creditor has an interest that arises by operation of law, such as a vendor's lien, and takes an independent security interest in the same property, such as a UCC security interest, the latter interest is a disclosable security interest unless otherwise provided.

5. *Rescission rules.* Security interests that arise solely by operation of law are security interests for purposes of rescission. Examples of such interests are mechanics' and materialmen's liens.

6. *Specificity of disclosure.* A creditor need not separately disclose multiple security interests that it may hold in the same collateral. The creditor need only disclose that the transaction is secured by the collateral, even when security interests from prior transactions remain of record and a new security interest is taken in connection with the transaction. In disclosing the fact that the transaction is secured by the collateral, the creditor also need not disclose how the security interest arose. For example, in a closed-end credit transaction, a rescission notice need not specifically state that a new security interest is ''acquired'' or an existing security interest is ''retained'' in the transaction. The acquisition or retention of a security interest in the consumer's principal dwelling instead may be disclosed in a rescission notice with a general statement such as the following: ''Your home is the security for the new transaction.''

2(b) Rules of Construction

1. [Reserved]

2. *Amount.* The numerical amount must be a dollar amount unless otherwise indicated. For example, in a closed-end transaction (Subpart C), the amount financed and the amount of any payment must be expressed as a dollar amount. In some cases, an amount should be expressed as a percentage. For example, in disclosures provided before the first transaction under an open-end plan (Subpart B), creditors are permitted to explain how the amount of any finance charge will be determined; where a cash-advance fee (which is a finance charge) is a percentage of each cash advance, the amount of the finance charge for that fee is expressed as a percentage.

Section 1026.3—Exempt Transactions

1. *Relationship to § 1026.12.* The provisions in § 1026.12(a) and (b) governing the issuance of credit cards and the limitations on liability for their unauthorized use apply to all credit cards, even if the credit cards are issued for use in connection with extensions of credit that otherwise are exempt under this section.

3(a) Business, Commercial, Agricultural, or Organizational Credit

1. *Primary purposes.* A creditor must determine in each case if the transaction is primarily for an exempt purpose. If some question exists as to the primary purpose for a credit extension, the creditor is, of course, free to make the disclosures, and the fact that disclosures are made under such circumstances is not controlling on the question of whether the transaction was exempt. (See comment 3(a)–2, however, with respect to credit cards.)

2. *Business purpose purchases.* i. *Business-purpose credit cards—extensions of credit for consumer purposes.* If a business-purpose credit card is issued to a person, the provisions of the regulation do not apply, other than as provided in §§ 1026.12(a) and 1026.12(b), even if extensions of credit for consumer purposes are occasionally made using that business-purpose credit card. For example, the billing error provisions set forth in § 1026.13 do not apply to consumer-purpose extensions of credit using a business-purpose credit card.

ii. *Consumer-purpose credit cards—extensions of credit for business purposes.* If a consumer-purpose credit card is issued to a person, the provisions of the regulation apply, even to occasional extensions of credit for business purposes made using that consumer-purpose credit card. For example, a consumer may assert a billing error with respect to any extension of credit using a consumer-purpose credit card, even if the specific extension of credit on such credit card or open-end credit plan that is the subject of the dispute was made for business purposes.

3. *Factors.* In determining whether credit to finance an acquisition—such as securities, antiques, or art—is primarily for business or commercial purposes (as opposed to a consumer purpose), the following factors should be considered:

i. *General.* A. The relationship of the borrower's primary occupation to the acquisition. The more closely related, the more likely it is to be business purpose.

B. The degree to which the borrower will personally manage the acquisition. The more personal involvement there is, the more likely it is to be business purpose.

C. The ratio of income from the acquisition to the total income of the borrower. The higher the ratio, the more likely it is to be business purpose.

D. The size of the transaction. The larger the transaction, the more likely it is to be business purpose.

E. The borrower's statement of purpose for the loan.

ii. *Business-purpose examples.* Examples of business-purpose credit include:

A. A loan to expand a business, even if it is secured by the borrower's residence or personal property.

B. A loan to improve a principal residence by putting in a business office.

C. A business account used occasionally for consumer purposes.

iii. *Consumer-purpose examples.* Examples of consumer-purpose credit include:

A. Credit extensions by a company to its employees or agents if the loans are used for personal purposes.

B. A loan secured by a mechanic's tools to pay a child's tuition.

C. A personal account used occasionally for business purposes.

4. *Non-owner-occupied rental property.* Credit extended to acquire, improve, or maintain rental property (regardless of the number of housing units) that is not owner-occupied is deemed to be for business purposes. This includes, for example, the acquisition of a warehouse that will be leased or a single-family house that will be rented to another person to live in. If the owner expects to occupy the property for more than 14 days during the coming year, the property cannot be considered non-owner-occupied and this special rule will not apply. For example, a beach house that the owner will occupy for a month in the coming summer and rent out the rest of the year is owner occupied and is not governed by this special rule. (*See* comment 3(a)–5, however, for rules relating to owner-occupied rental property.)

5. *Owner-occupied rental property.* If credit is extended to acquire, improve, or maintain rental property that is or will be owner-occupied within the coming year, different rules apply:

i. Credit extended to acquire the rental property is deemed to be for business purposes if it contains more than 2 housing units.

ii. Credit extended to improve or maintain the rental property is deemed to be for business purposes if it contains more than 4 housing units. Since the amended statute defines dwelling to include 1 to 4 housing units, this rule preserves the right of rescission for credit extended for purposes other than acquisition. Neither of these rules means that an extension of credit for property containing fewer than the requisite number of units is necessarily consumer credit. In such cases, the determination of whether it is business or consumer credit should be made by considering the factors listed in comment 3(a)–3.

6. *Business credit later refinanced.* Business-purpose credit that is exempt from the regulation may later be rewritten for consumer purposes. Such a transaction is consumer credit requiring disclosures only if the existing obligation is satisfied and replaced by a new obligation made for consumer purposes undertaken by the same obligor.

7. *Credit card renewal.* A consumer-purpose credit card that is subject to the regulation may be converted into a business-purpose credit card at the time of its renewal, and the resulting business-purpose credit card would be exempt from the regulation. Conversely, a business-purpose credit card that is exempt from the regulation may be converted into a consumer-purpose credit card at the time of its renewal, and the resulting consumer-purpose credit card would be subject to the regulation.

8. *Agricultural purpose.* An agricultural purpose includes the planting, propagating, nurturing, harvesting, catching, storing, exhibiting, marketing, transporting, processing, or manufacturing of food, beverages (including alcoholic beverages), flowers, trees, livestock, poultry, bees, wildlife, fish, or shellfish by a natural person engaged in farming, fishing, or growing crops, flowers, trees, livestock, poultry, bees, or wildlife. The exemption also applies to a transaction involving real property that includes a dwelling (for example, the purchase of a farm with a homestead) if the transaction is primarily for agricultural purposes.

9. *Organizational credit.* The exemption for transactions in which the borrower is not a natural person applies, for example, to loans to corporations, partnerships, associations, churches, unions, and fraternal organizations. The exemption applies regardless of the purpose of the credit extension and regardless of the fact that a natural person may guarantee or provide security for the credit.

10. *Land trusts.* Credit extended for consumer purposes to a land trust is considered to be credit extended to a natural person rather than credit extended to an organization. In some jurisdictions, a financial institution financing a residential real estate transaction for an individual uses a land trust mechanism. Title to the property is conveyed to the land trust for which the financial institution itself is trustee. The underlying installment note is executed by the financial institution in its capacity as trustee and payment is secured by a trust deed, reflecting title in the financial institution as trustee. In some instances, the consumer executes a personal guaranty of the indebtedness. The note provides that it is payable only out of the property specifically described in the trust deed and that the trustee has no personal liability on the note. Assuming the transactions are for personal, family, or household purposes, these transactions are subject to the regulation since in substance (if not form) consumer credit is being extended.

3(b) Credit Over Applicable Threshold Amount

1. *Threshold amount.* For purposes of § 1026.3(b), the threshold amount in effect during a particular period is the amount stated below for that period. The threshold amount is adjusted effective January 1 of each year by any annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W) that was in effect on the preceding June 1. This comment will be amended to provide the threshold amount for the upcoming year after the annual percentage change in the CPI–W that was in effect on June 1 becomes available. Any increase in the threshold amount will be rounded to the nearest $100 increment. For example, if the annual percentage increase in the CPI–W would result in a $950 increase in the threshold amount, the threshold amount will be increased by $1,000. However, if the annual percentage increase in the CPI–W would result in a $949 increase in the threshold amount, the threshold amount will be increased by $900.

i. Prior to July 21, 2011, the threshold amount is $25,000.

ii. From July 21, 2011 through December 31, 2011, the threshold amount is $50,000.

iii. From January 1, 2012 through December 31, 2012, the threshold amount is $51,800.

2. *Open-end credit.* i. *Qualifying for exemption.* An open-end account is exempt under § 1026.3(b) (unless secured by any real property, or by personal property used or expected to be used as the consumer's principal dwelling) if either of the following conditions is met:

A. The creditor makes an initial extension of credit at or after account opening that exceeds the threshold amount in effect at the time the initial extension is made. If a creditor makes an initial extension of credit after account opening that does not exceed the threshold amount in effect at the time the extension is made, the creditor must have satisfied all of the applicable requirements of this Part from the date the account was opened (or earlier, if applicable), including but not limited to the requirements of § 1026.6 (account-opening disclosures), § 1026.7 (periodic statements), § 1026.52 (limitations on fees), and § 1026.55 (limitations on increasing annual percentages rates, fees, and charges). For example:

1. Assume that the threshold amount in effect on January 1 is $50,000. On February 1, an account is opened but the creditor does not make an initial extension of credit at that time. On July 1, the creditor makes an initial extension of credit of $60,000. In this circumstance, no requirements of this Part apply to the account.

2. Assume that the threshold amount in effect on January 1 is $50,000. On February 1, an account is opened but the creditor does not make an initial extension of credit at that time. On July 1, the creditor makes an initial extension of credit of $50,000 or less. In this circumstance, the account is not exempt and the creditor must have satisfied all of the applicable requirements of this Part from the date the account was opened (or earlier, if applicable).

B. The creditor makes a firm written commitment at account opening to extend a total amount of credit in excess of the threshold amount in effect at the time the account is opened with no requirement of additional credit information for any advances on the account (except as permitted from time to time with respect to open-end accounts pursuant to § 1026.2(a)(20)).

ii. *Subsequent changes generally.* Subsequent changes to an open-end account or the threshold amount may result in the account no longer qualifying for the exemption in § 1026.3(b). In these circumstances, the creditor must begin to comply with all of the applicable requirements of this Part within a reasonable period of time after the account ceases to be exempt. Once an account ceases to be exempt, the requirements of this Part apply to any balances on the account. The creditor, however, is not required to comply with the requirements of this Part with respect to the period of time during which the account was exempt. For example, if an open-end credit account ceases to be exempt, the creditor must within a reasonable period of time provide the disclosures required by § 1026.6 reflecting the current terms of the account and begin to provide periodic statements consistent with § 1026.7. However, the creditor is not required to disclose fees or charges imposed while the account was exempt. Furthermore, if the creditor provided disclosures consistent with the requirements of this Part while the account was exempt, it is not required to provide disclosures required by § 1026.6 reflecting the current terms of the account. *See also* comment 3(b)–4.

iii. *Subsequent changes when exemption is based on initial extension of credit.* If a creditor makes an initial extension of credit that exceeds the threshold amount in effect at that time, the open-end account remains exempt under § 1026.3(b) regardless of a subsequent increase in the threshold amount, including an increase pursuant to § 1026.3(b)(1)(ii) as a result of an increase in the CPI–W. Furthermore, in these circumstances, the account remains exempt even if there are no further extensions of credit, subsequent extensions of credit do not exceed the threshold amount, the account balance is subsequently reduced below the threshold amount (such as through repayment of the extension), or the credit limit for the account is subsequently reduced below the threshold amount. However, if the initial extension of credit on an account does not exceed the threshold amount in effect at the time of the extension, the account is not exempt under § 1026.3(b) even if a subsequent extension exceeds the threshold amount or if the account balance later exceeds the threshold amount (for example, due to the subsequent accrual of interest).

iv. *Subsequent changes when exemption is based on firm commitment.* A. *General.* If a creditor makes a firm written commitment at account opening to extend a total amount of credit that exceeds the threshold amount in effect at that time, the open-end account remains exempt under § 1026.3(b) regardless of a subsequent increase in the threshold amount pursuant to § 1026.3(b)(1)(ii) as a result of an increase in the CPI–W. However, see comment 3(b)–6 with respect to the increase in the threshold amount from $25,000 to $50,000. If an open-end account is exempt under § 1026.3(b) based on a firm commitment to extend credit, the account remains exempt even if the amount of credit actually extended does not exceed the threshold amount. In contrast, if the firm commitment does not exceed the threshold amount at account opening, the account is not exempt under § 1026.3(b) even if the account balance later exceeds the threshold amount. In addition, if a creditor reduces a firm commitment, the account ceases to be exempt unless the reduced firm commitment exceeds the threshold amount in effect at the time of the reduction. For example:

1. Assume that, at account opening in year one, the threshold amount in effect is $50,000 and the account is exempt under § 1026.3(b) based on the creditor's firm commitment to extend $55,000 in credit. If during year one the creditor reduces its firm commitment to $53,000, the account remains exempt under § 1026.3(b). However, if during year one the creditor reduces its firm commitment to $40,000, the account is no longer exempt under § 1026.3(b).

2. Assume that, at account opening in year one, the threshold amount in effect is $50,000 and the account is exempt under § 1026.3(b) based on the creditor's firm commitment to extend $55,000 in credit. If the threshold amount is $56,000 on January 1 of year six as a result of increases in the CPI–W, the account remains exempt. However, if the creditor reduces its firm commitment to $54,000 on July 1 of year six, the account ceases to be exempt under § 1026.3(b).

B. *Initial extension of credit.* If an open-end account qualifies for a § 1026.3(b) exemption at account opening based on a firm commitment, that account may also subsequently qualify for a § 1026.3(b) exemption based on an initial extension of credit. However, that initial extension must be a single advance in excess of the threshold amount in effect at the time the extension is made. In addition, the account must continue to qualify for an exemption based on the firm commitment until the initial extension of credit is made. For example:

1. Assume that, at account opening in year one, the threshold amount in effect is $50,000 and the account is exempt under § 1026.3(b) based on the creditor's firm commitment to extend $55,000 in credit. The account is not used for an extension of credit during year one. On January 1 of year two, the threshold amount is increased to $51,000 pursuant to § 1026.3(b)(1)(ii) as a result of an increase in the CPI–W. On July 1 of year two, the consumer uses the account for an initial extension of $52,000. As a result of this extension of credit, the account remains exempt under § 1026.3(b) even if, after July 1 of year two, the creditor reduces the firm commitment to $51,000 or less.

2. Same facts as in paragraph iv.B.*1* above except that the consumer uses the account for an initial extension of $30,000 on July 1 of year two and for an extension of $22,000 on July 15 of year two. In these circumstances, the account is not exempt under § 1026.3(b) based on the $30,000 initial extension of credit because that extension did not exceed the applicable threshold amount ($51,000), although the account remains exempt based on the firm commitment to extend $55,000 in credit.

3. Same facts as in paragraph iv.B.*1* above except that, on April 1 of year two, the creditor reduces the firm commitment to $50,000, which is below the $51,000 threshold then in effect. Because the account ceases to qualify for a § 1026.3(b) exemption on April 1 of year two, the account does not qualify for a § 1026.3(b) exemption based on a $52,000 initial extension of credit on July 1 of year two.

3. *Closed-end credit.* i. *Qualifying for exemption.* A closed-end loan is exempt under § 1026.3(b) (unless the extension of credit is secured by any real property, or by personal property used or expected to be used as the consumer's principal dwelling; or is a private education loan as defined in § 1026.46(b)(5)), if either of the following conditions is met:

A. The creditor makes an extension of credit at consummation that exceeds the threshold amount in effect at the time of consummation. In these circumstances, the loan remains exempt under § 1026.3(b) even if the amount owed is subsequently reduced below the threshold amount (such as through repayment of the loan).

B. The creditor makes a commitment at consummation to extend a total amount of credit in excess of the threshold amount in effect at the time of consummation. In these circumstances, the loan remains exempt under § 1026.3(b) even if the total amount of credit extended does not exceed the threshold amount.

ii. *Subsequent changes.* If a creditor makes a closed-end extension of credit or commitment to extend closed-end credit that exceeds the threshold amount in effect at the time of consummation, the closed-end loan remains exempt under § 1026.3(b) regardless of a subsequent increase in the threshold amount. However, a closed-end loan is not exempt under § 1026.3(b) merely because it is used to satisfy and replace an existing exempt loan, unless the new extension of credit is itself exempt under the applicable threshold amount. For example, assume a closed-end loan that qualified for a § 1026.3(b) exemption at consummation in year one is refinanced in year ten and that the new loan amount is less than the threshold amount in effect in year ten. In these circumstances, the creditor must comply with all of the applicable requirements of this Part with respect to the year ten transaction if the original loan is satisfied and replaced by the new loan, which is not exempt under § 1026.3(b). *See also* comment 3(b)–4.

4. Addition of a security interest in real property or a dwelling after account opening or consummation. i. *Open-end credit.* For open-end accounts, if, after account opening, a security interest is taken in any real property, or in personal property used or expected to be used as the consumer's principal dwelling, a previously exempt account ceases to be exempt under § 1026.3(b) and the creditor must begin to comply with all of the applicable requirements of this Part within a reasonable period of time. See comment 3(b)–2.ii. If a security interest is taken in the consumer's principal dwelling, the creditor must also give the consumer the right to rescind the security interest consistent with § 1026.15.

ii. *Closed-end credit.* For closed-end loans, if, after consummation, a security interest is taken in any real property, or in personal property used or expected to be used as the consumer's principal dwelling, an exempt loan remains exempt under § 1026.3(b). However, the addition of a security interest in the consumer's principal dwelling is a transaction for purposes of § 1026.23 and the creditor must give the consumer the right to rescind the security interest consistent with that section. *See* § 1026.23(a)(1) and the accompanying commentary. In contrast, if a closed-end loan that is exempt under § 1026.3(b) is satisfied and replaced by a loan that is secured by any real property, or by personal property used or expected to be used as the consumer's principal dwelling, the new loan is not exempt under § 1026.3(b) and the creditor must comply with all of the applicable requirements of this Part. *See* comment 3(b)–3.

5. *Application to extensions secured by mobile homes.* Because a mobile home can be a dwelling under § 1026.2(a)(19), the exemption in § 1026.3(b) does not apply to a credit extension secured by a mobile home that is used or expected to be used as the principal dwelling of the consumer. See comment 3(b)–4.

6. *Transition rule for open-end accounts exempt prior to July 21, 2011.* Section 1026.3(b)(2) applies only to open-end accounts opened prior to July 21, 2011. Section 1026.3(b)(2) does not apply if a security interest is taken by the creditor in any real property, or in personal property used or expected to be used as the consumer's principal dwelling. If, on July 20, 2011, an open-end account is exempt under § 1026.3(b) based on a firm commitment to extend credit in excess of $25,000, the account remains exempt under § 1026.3(b)(2) until December 31, 2011 (unless the firm commitment is reduced to $25,000 or less). If the firm commitment is increased on or before December 31, 2011 to an amount in excess of $50,000, the account remains exempt under § 1026.3(b)(1) regardless of subsequent increases in the threshold amount as a result of increases in the CPI–W. If the firm commitment is not increased on or before December 31, 2011 to an amount in excess of $50,000, the account ceases to be exempt under § 1026.3(b) based on a firm commitment to extend credit. For example:

i. Assume that, on July 20, 2011, the account is exempt under § 1026.3(b) based on the creditor's firm commitment to extend $30,000 in credit. On November 1, 2011, the creditor increases the firm commitment on the account to $55,000. In these circumstances, the account remains exempt under § 1026.3(b)(1) regardless of subsequent increases in the threshold amount as a result of increases in the CPI–W.

ii. Same facts as paragraph i above except, on November 1, 2011, the creditor increases the firm commitment on the account to $40,000. In these circumstances, the account ceases to be exempt under § 1026.3(b)(2) after December 31, 2011, and the creditor must begin to comply with the applicable requirements of this Part.

3(c) Public Utility Credit

1. *Examples.* Examples of public utility services include:

i. *General.* A. Gas, water, or electrical services.

B. Cable television services.

C. Installation of new sewer lines, water lines, conduits, telephone poles, or metering equipment in an area not already serviced by the utility.

ii. *Extensions of credit not covered.* The exemption does not apply to extensions of credit, for example:

A. To purchase appliances such as gas or electric ranges, grills, or telephones.

B. To finance home improvements such as new heating or air conditioning systems.

3(d) Securities or Commodities Accounts

1. *Coverage.* This exemption does not apply to a transaction with a broker registered solely with the state, or to a separate credit extension in which the proceeds are used to purchase securities.

3(e) Home Fuel Budget Plans

1. *Definition.* Under a typical home fuel budget plan, the fuel dealer estimates the total cost of fuel for the season, bills the customer for an average monthly payment, and makes an adjustment in the final payment for any difference between the estimated and the actual cost of the fuel. Fuel is delivered as needed, no finance charge is assessed, and the customer may withdraw from the plan at any time. Under these circumstances, the arrangement is exempt from the regulation, even if a charge to cover the billing costs is imposed.

3(f) Student Loan Programs

1. *Coverage.* This exemption applies to loans made, insured, or guaranteed under Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*). This exemption does not apply to private education loans as defined by § 1026.46(b)(5).

Section 1026.4—Finance Charge

4(a) Definition

1. *Charges in comparable cash transactions.* Charges imposed uniformly in cash and credit transactions are not finance charges. In determining whether an item is a finance charge, the creditor should compare the credit transaction in question with a similar cash transaction. A creditor financing the sale of property or services may compare charges with those payable in a similar cash transaction by the seller of the property or service.

i. For example, the following items are not finance charges:

A. Taxes, license fees, or registration fees paid by both cash and credit customers.

B. Discounts that are available to cash and credit customers, such as quantity discounts.

C. Discounts available to a particular group of consumers because they meet certain criteria, such as being members of an organization or having accounts at a particular financial institution. This is the case even if an individual must pay cash to obtain the discount, provided that credit customers who are members of the group and do not qualify for the discount pay no more than the nonmember cash customers.

D. Charges for a service policy, auto club membership, or policy of insurance against latent defects offered to or required of both cash and credit customers for the same price.

ii. In contrast, the following items are finance charges:

A. Inspection and handling fees for the staged disbursement of construction-loan proceeds.

B. Fees for preparing a Truth in Lending disclosure statement, if permitted by law (for example, the Real Estate Settlement Procedures Act prohibits such charges in certain transactions secured by real property).

C. Charges for a required maintenance or service contract imposed only in a credit transaction.

iii. If the charge in a credit transaction exceeds the charge imposed in a comparable cash transaction, only the difference is a finance charge. For example:

A. If an escrow agent is used in both cash and credit sales of real estate and the agent's charge is $100 in a cash transaction and $150 in a credit transaction, only $50 is a finance charge.

2. *Costs of doing business.* Charges absorbed by the creditor as a cost of doing business are not finance charges, even though the creditor may take such costs into consideration in determining the interest rate to be charged or the cash price of the property or service sold. However, if the creditor separately imposes a charge on the consumer to cover certain costs, the charge is a finance charge if it otherwise meets the definition. For example:

i. A discount imposed on a credit obligation when it is assigned by a seller-creditor to another party is not a finance charge as long as the discount is not separately imposed on the consumer. (*See* § 1026.4(b)(6).)

ii. A tax imposed by a state or other governmental body on a creditor is not a finance charge if the creditor absorbs the tax as a cost of doing business and does not separately impose the tax on the consumer. (For additional discussion of the treatment of taxes, see other commentary to § 1026.4(a).)

3. *Forfeitures of interest.* If the creditor reduces the interest rate it pays or stops paying interest on the consumer's deposit account or any portion of it for the term of a credit transaction (including, for example, an overdraft on a checking account or a loan secured by a certificate of deposit), the interest lost is a finance charge. (See the commentary to § 1026.4(c)(6).) For example:

i. A consumer borrows $5,000 for 90 days and secures it with a $10,000 certificate of deposit paying 15% interest. The creditor charges the consumer an interest rate of 6% on the loan and stops paying interest on $5,000 of the $10,000 certificate for the term of the loan. The interest lost is a finance charge and must be reflected in the annual percentage rate on the loan.

ii. However, the consumer must be entitled to the interest that is not paid in order for the lost interest to be a finance charge. For example:

A. A consumer wishes to buy from a financial institution a $10,000 certificate of deposit paying 15% interest but has only $4,000. The financial institution offers to lend the consumer $6,000 at an interest rate of 6% but will pay the 15% interest only on the amount of the consumer's deposit, $4,000. The creditor's failure to pay interest on the $6,000 does not result in an additional finance charge on the extension of credit, provided the consumer is entitled by the deposit agreement with the financial institution to interest only on the amount of the consumer's deposit.

B. A consumer enters into a combined time deposit/credit agreement with a financial institution that establishes a time deposit account and an open-end line of credit. The line of credit may be used to borrow against the funds in the time deposit. The agreement provides for an interest rate on any credit extension of, for example, 1%. In addition, the agreement states that the creditor will pay 0% interest on the amount of the time deposit that corresponds to the amount of the credit extension(s). The interest that is not paid on the time deposit by the financial institution is not a finance charge (and therefore does not affect the annual percentage rate computation).

4. *Treatment of transaction fees on credit card plans.* Any transaction charge imposed on a cardholder by a card issuer is a finance charge, regardless of whether the issuer imposes the same, greater, or lesser charge on withdrawals of funds from an asset account such as a checking or savings account. For example:

i. Any charge imposed on a credit cardholder by a card issuer for the use of an automated teller machine (ATM) to obtain a cash advance (whether in a proprietary, shared, interchange, or other system) is a finance charge regardless of whether the card issuer imposes a charge on its debit cardholders for using the ATM to withdraw cash from a consumer asset account, such as a checking or savings account.

ii. Any charge imposed on a credit cardholder for making a purchase or obtaining a cash advance outside the United States, with a foreign merchant, or in a foreign currency is a finance charge, regardless of whether a charge is imposed on debit cardholders for such transactions. The following principles apply in determining what is a foreign transaction fee and the amount of the fee:

A. Included are (1) fees imposed when transactions are made in a foreign currency and converted to U.S. dollars; (2) fees imposed when transactions are made in U.S. dollars outside the U.S.; and (3) fees imposed when transactions are made (whether in a foreign currency or in U.S. dollars) with a foreign merchant, such as via a merchant's Web site. For example, a consumer may use a credit card to make a purchase in Bermuda, in U.S. dollars, and the card issuer may impose a fee because the transaction took place outside the United States.

B. Included are fees imposed by the card issuer and fees imposed by a third party that performs the conversion, such as a credit card network or the card issuer's corporate parent. (For example, in a transaction processed through a credit card network, the network may impose a 1 percent charge and the card-issuing bank may impose an additional 2 percent charge, for a total of a 3 percentage point foreign transaction fee being imposed on the consumer.)

C. Fees imposed by a third party are included only if they are directly passed on to the consumer. For example, if a credit card network imposes a 1 percent fee on the card issuer, but the card issuer absorbs the fee as a cost of doing business (and only passes it on to consumers in the general sense that the interest and fees are imposed on all its customers to recover its costs), then the fee is not a foreign transaction fee and need not be disclosed. In another example, if the credit card network imposes a 1 percent fee for a foreign transaction on the card issuer, and the card issuer imposes this same fee on the consumer who engaged in the foreign transaction, then the fee is a foreign transaction fee and a finance charge.

D. A card issuer is not required to disclose a fee imposed by a merchant. For example, if the merchant itself performs the currency conversion and adds a fee, this fee need not be disclosed by the card issuer. Under § 1026.9(d), a card issuer is not obligated to disclose finance charges imposed by a party honoring a credit card, such as a merchant, although the merchant is required to disclose such a finance charge if the merchant is subject to the Truth in Lending Act and Regulation Z.

E. The foreign transaction fee is determined by first calculating the dollar amount of the transaction by using a currency conversion rate outside the card issuer's and third party's control. Any amount in excess of that dollar amount is a foreign transaction fee. Conversion rates outside the card issuer's and third party's control include, for example, a rate selected from the range of rates available in the wholesale currency exchange markets, an average of the highest and lowest rates available in such markets, or a government-mandated or government-managed exchange rate (or a rate selected from a range of such rates).

F. The rate used for a particular transaction need not be the same rate that the card issuer (or third party) itself obtains in its currency conversion operations. In addition, the rate used for a particular transaction need not be the rate in effect on the date of the transaction (purchase or cash advance).

5. *Taxes.* i. Generally, a tax imposed by a state or other governmental body solely on a creditor is a finance charge if the creditor separately imposes the charge on the consumer.

ii. In contrast, a tax is not a finance charge (even if it is collected by the creditor) if applicable law imposes the tax:

A. Solely on the consumer;

B. On the creditor and the consumer jointly;

C. On the credit transaction, without indicating which party is liable for the tax; or

D. On the creditor, if applicable law directs or authorizes the creditor to pass the tax on to the consumer. (For purposes of this section, if applicable law is silent as to passing on the tax, the law is deemed not to authorize passing it on.)

iii. For example, a stamp tax, property tax, intangible tax, or any other state or local tax imposed on the consumer, or on the credit transaction, is not a finance charge even if the tax is collected by the creditor.

iv. In addition, a tax is not a finance charge if it is excluded from the finance charge by another provision of the regulation or commentary (for example, if the tax is imposed uniformly in cash and credit transactions).

4(a)(1) Charges by Third Parties

1. *Choosing the provider of a required service.* An example of a third-party charge included in the finance charge is the cost of required mortgage insurance, even if the consumer is allowed to choose the insurer.

2. *Annuities associated with reverse mortgages.* Some creditors offer annuities in connection with a reverse-mortgage transaction. The amount of the premium is a finance charge if the creditor requires the purchase of the annuity incident to the credit. Examples include the following:

i. The credit documents reflect the purchase of an annuity from a specific provider or providers.

ii. The creditor assesses an additional charge on consumers who do not purchase an annuity from a specific provider.

iii. The annuity is intended to replace in whole or in part the creditor's payments to the consumer either immediately or at some future date.

4(a)(2) Special Rule; Closing Agent Charges

1. *General.* This rule applies to charges by a third party serving as the closing agent for the particular loan. An example of a closing agent charge included in the finance charge is a courier fee where the creditor requires the use of a courier.

2. *Required closing agent.* If the creditor requires the use of a closing agent, fees charged by the closing agent are included in the finance charge only if the creditor requires the particular service, requires the imposition of the charge, or retains a portion of the charge. Fees charged by a third-party closing agent may be otherwise excluded from the finance charge under § 1026.4. For example, a fee that would be paid in a comparable cash transaction may be excluded under § 1026.4(a). A charge for conducting or attending a closing is a finance charge and may be excluded only if the charge is included in and is incidental to a lump-sum fee excluded under § 1026.4(c)(7).

4(a)(3) Special Rule; Mortgage Broker Fees

1. *General.* A fee charged by a mortgage broker is excluded from the finance charge if it is the type of fee that is also excluded when charged by the creditor. For example, to exclude an application fee from the finance charge under § 1026.4(c)(1), a mortgage broker must charge the fee to all applicants for credit, whether or not credit is extended.

2. *Coverage.* This rule applies to charges paid by consumers to a mortgage broker in connection with a consumer credit transaction secured by real property or a dwelling.

3. *Compensation by lender.* The rule requires all mortgage broker fees to be included in the finance charge. Creditors sometimes compensate mortgage brokers under a separate arrangement with those parties. Creditors may draw on amounts paid by the consumer, such as points or closing costs, to fund their payment to the broker. Compensation paid by a creditor to a mortgage broker under an agreement is not included as a separate component of a consumer's total finance charge (although this compensation may be reflected in the finance charge if it comes from amounts paid by the consumer to the creditor that are finance charges, such as points and interest).

4(b) Examples of Finance Charges

1. *Relationship to other provisions.* Charges or fees shown as examples of finance charges in § 1026.4(b) may be excludable under § 1026.4(c), (d), or (e). For example:

i. Premiums for credit life insurance, shown as an example of a finance charge under § 1026.4(b)(7), may be excluded if the requirements of § 1026.4(d)(1) are met.

ii. Appraisal fees mentioned in § 1026.4(b)(4) are excluded for real property or residential mortgage transactions under § 1026.4(c)(7).

Paragraph 4(b)(2)

1. *Checking account charges.* A checking or transaction account charge imposed in connection with a credit feature is a finance charge under § 1026.4(b)(2) to the extent the charge exceeds the charge for a similar account without a credit feature. If a charge for an account with a credit feature does not exceed the charge for an account without a credit feature, the charge is not a finance charge under § 1026.4(b)(2). To illustrate:

i. A $5 service charge is imposed on an account with an overdraft line of credit (where the institution has agreed in writing to pay an overdraft), while a $3 service charge is imposed on an account without a credit feature; the $2 difference is a finance charge. (If the difference is not related to account activity, however, it may be excludable as a participation fee. See the commentary to § 1026.4(c)(4).)

ii. A $5 service charge is imposed for each item that results in an overdraft on an account with an overdraft line of credit, while a $25 service charge is imposed for paying or returning each item on a similar account without a credit feature; the $5 charge is not a finance charge.

Paragraph 4(b)(3)

1. *Assumption fees.* The assumption fees mentioned in § 1026.4(b)(3) are finance charges only when the assumption occurs and the fee is imposed on the new buyer. The assumption fee is a finance charge in the new buyer's transaction.

Paragraph 4(b)(5)

1. *Credit loss insurance.* Common examples of the insurance against credit loss mentioned in § 1026.4(b)(5) are mortgage guaranty insurance, holder in due course insurance, and repossession insurance. Such premiums must be included in the finance charge only for the period that the creditor requires the insurance to be maintained.

2. *Residual value insurance.* Where a creditor requires a consumer to maintain residual value insurance or where the creditor is a beneficiary of a residual value insurance policy written in connection with an extension of credit (as is the case in some forms of automobile balloon-payment financing, for example), the premiums for the insurance must be included in the finance charge for the period that the insurance is to be maintained. If a creditor pays for residual-value insurance and absorbs the payment as a cost of doing business, such costs are not considered finance charges. (See comment 4(a)–2.)

Paragraphs 4(b)(7) and (b)(8)

1. *Pre-existing insurance policy.* The insurance discussed in § 1026.4(b)(7) and (b)(8) does not include an insurance policy (such as a life or an automobile collision insurance policy) that is already owned by the consumer, even if the policy is assigned to or otherwise made payable to the creditor to satisfy an insurance requirement. Such a policy is not ''written in connection with'' the transaction, as long as the insurance was not purchased for use in that credit extension, since it was previously owned by the consumer.

2. *Insurance written in connection with a transaction.* Credit insurance sold before or after an open-end (not home-secured) plan is opened is considered ''written in connection with a credit transaction.'' Insurance sold after consummation in closed-end credit transactions or after the opening of a home-equity plan subject to the requirements of § 1026.40 is not considered ''written in connection with'' the credit transaction if the insurance is written because of the consumer's default (for example, by failing to obtain or maintain required property insurance) or because the consumer requests insurance after consummation or the opening of a home-equity plan subject to the requirements of § 1026.40 (although credit-sale disclosures may be required for the insurance sold after consummation if it is financed).

3. *Substitution of life insurance.* The premium for a life insurance policy purchased and assigned to satisfy a credit life insurance requirement must be included in the finance charge, but only to the extent of the cost of the credit life insurance if purchased from the creditor or the actual cost of the policy (if that is less than the cost of the insurance available from the creditor). If the creditor does not offer the required insurance, the premium to be included in the finance charge is the cost of a policy of insurance of the type, amount, and term required by the creditor.

4. *Other insurance.* Fees for required insurance not of the types described in § 1026.4(b)(7) and (b)(8) are finance charges and are not excludable. For example, the premium for a hospitalization insurance policy, if it is required to be purchased only in a credit transaction, is a finance charge.

Paragraph 4(b)(9)

1. *Discounts for payment by other than credit.* The discounts to induce payment by other than credit mentioned in § 1026.4(b)(9) include, for example, the following situation: The seller of land offers individual tracts for $10,000 each. If the purchaser pays cash, the price is $9,000, but if the purchaser finances the tract with the seller the price is $10,000. The $1,000 difference is a finance charge for those who buy the tracts on credit.

2. *Exception for cash discounts.* i. Creditors may exclude from the finance charge discounts offered to consumers for using cash or another means of payment instead of using a credit card or an open-end plan. The discount may be in whatever amount the seller desires, either as a percentage of the regular price (as defined in section 103(z) of the Act, as amended) or a dollar amount. Pursuant to section 167(b) of the Act, this provision applies only to transactions involving an open-end credit plan or a credit card (whether open-end or closed-end credit is extended on the card). The merchant must offer the discount to prospective buyers whether or not they are cardholders or members of the open-end credit plan. The merchant may, however, make other distinctions. For example:

A. The merchant may limit the discount to payment by cash and not offer it for payment by check or by use of a debit card.

B. The merchant may establish a discount plan that allows a 15% discount for payment by cash, a 10% discount for payment by check, and a 5% discount for payment by a

particular credit card. None of these discounts is a finance charge.

ii. Pursuant to section 171(c) of the Act, discounts excluded from the finance charge under this paragraph are also excluded from treatment as a finance charge or other charge for credit under any state usury or disclosure laws.

3. *Determination of the regular price.* i. The *regular price* is critical in determining whether the difference between the price charged to cash customers and credit customers is a *discount* or a *surcharge,* as these terms are defined in amended section 103 of the Act. The *regular price* is defined in section 103 of the Act as—* * * the tag or posted price charged for the property or service if a single price is tagged or posted, or the price charged for the property or service when payment is made by use of an open-end credit account or a credit card if either (1) no price is tagged or posted, or (2) two prices are tagged or posted * * *.

ii. For example, in the sale of motor vehicle fuel, the tagged or posted price is the price displayed at the pump. As a result, the higher price (the open-end credit or credit card price) must be displayed at the pump, either alone or along with the cash price. Service station operators may designate separate pumps or separate islands as being for either cash or credit purchases and display only the appropriate prices at the various pumps. If a pump is capable of displaying on its meter either a cash or a credit price depending upon the consumer's means of payment, both the cash price and the credit price must be displayed at the pump. A service station operator may display the cash price of fuel by itself on a curb sign, as long as the sign clearly indicates that the price is limited to cash purchases.

Paragraph 4(b)(10)

1. *Definition.* Debt cancellation coverage provides for payment or satisfaction of all or part of a debt when a specified event occurs. The term ''debt cancellation coverage'' includes guaranteed automobile protection, or ''GAP,'' agreements, which pay or satisfy the remaining debt after property insurance benefits are exhausted. Debt suspension coverage provides for suspension of the obligation to make one or more payments on the date(s) otherwise required by the credit agreement, when a specified event occurs. The term ''debt suspension'' does not include loan payment deferral arrangements in which the triggering event is the bank's unilateral decision to allow a deferral of payment and the borrower's unilateral election to do so, such as by skipping or reducing one or more payments (''skip payments'').

2. *Coverage written in connection with a transaction.* Coverage sold after consummation in closed-end credit transactions or after the opening of a home-equity plan subject to the requirements of § 1026.40 is not ''written in connection with'' the credit transaction if the coverage is written because the consumer requests coverage after consummation or the opening of a home-equity plan subject to the requirements of § 1026.40 (although credit-sale disclosures may be required for the coverage sold after consummation if it is financed). Coverage sold before or after an open-end (not home-secured) plan is opened is considered ''written in connection with a credit transaction.''

4(c) Charges Excluded From the Finance Charge

Paragraph 4(c)(1)

1. *Application fees.* An application fee that is excluded from the finance charge is a charge to recover the costs associated with processing applications for credit. The fee may cover the costs of services such as credit reports, credit investigations, and appraisals. The creditor is free to impose the fee in only certain of its loan programs, such as mortgage loans. However, if the fee is to be excluded from the finance charge under § 1026.4(c)(1), it must be charged to all applicants, not just to applicants who are approved or who actually receive credit.

Paragraph 4(c)(2)

1. *Late payment charges.* i. Late payment charges can be excluded from the finance charge under § 1026.4(c)(2) whether or not the person imposing the charge continues to extend credit on the account or continues to provide property or services to the consumer. In determining whether a charge is for actual unanticipated late payment on a 30-day account, for example, factors to be considered include:

A. The terms of the account. For example, is the consumer required by the account terms to pay the account balance in full each month? If not, the charge may be a finance charge.

B. The practices of the creditor in handling the accounts. For example, regardless of the terms of the account, does the creditor allow consumers to pay the accounts over a period of time without demanding payment in full or taking other action to collect? If no effort is made to collect the full amount due, the charge may be a finance charge.

ii. section 1026.4(c)(2) applies to late payment charges imposed for failure to make payments as agreed, as well as failure to pay an account in full when due.

2. *Other excluded charges.* Charges for ''delinquency, default, or a similar occurrence'' include, for example, charges for reinstatement of credit privileges or for submitting as payment a check that is later returned unpaid.

Paragraph 4(c)(3)

1. *Assessing interest on an overdraft balance.* A charge on an overdraft balance computed by applying a rate of interest to the amount of the overdraft is not a finance charge, even though the consumer agrees to the charge in the account agreement, unless the financial institution agrees in writing that it will pay such items.

Paragraph 4(c)(4)

1. *Participation fees—periodic basis.* The participation fees described in § 1026.4(c)(4) do not necessarily have to be formal membership fees, nor are they limited to credit card plans. The provision applies to any credit plan in which payment of a fee is a condition of access to the plan itself, but it does not apply to fees imposed separately on individual closed-end transactions. The fee may be charged on a monthly, annual, or other periodic basis; a one-time, non-recurring fee imposed at the time an account is opened is not a fee that is charged on a periodic basis, and may not be treated as a participation fee.

2. *Participation fees—exclusions.* Minimum monthly charges, charges for non-use of a credit card, and other charges based on either account activity or the amount of credit available under the plan are not excluded from the finance charge by § 1026.4(c)(4). Thus, for example, a fee that is charged and then refunded to the consumer based on the extent to which the consumer uses the credit available would be a finance charge. (See the commentary to § 1026.4(b)(2). Also, see comment 14(c)–2 for treatment of certain types of fees excluded in determining the annual percentage rate for the periodic statement.)

Paragraph 4(c)(5)

1. *Seller's points.* The seller's points mentioned in § 1026.4(c)(5) include any charges imposed by the creditor upon the noncreditor seller of property for providing credit to the buyer or for providing credit on certain terms. These charges are excluded from the finance charge even if they are passed on to the buyer, for example, in the form of a higher sales price. Seller's points are frequently involved in real estate transactions guaranteed or insured by governmental agencies. A *commitment fee* paid by a noncreditor seller (such as a real estate developer) to the creditor should be treated as seller's points. Buyer's points (that is, points charged to the buyer by the creditor), however, are finance charges.

2. *Other seller-paid amounts.* Mortgage insurance premiums and other finance charges are sometimes paid at or before consummation or settlement on the borrower's behalf by a noncreditor seller. The creditor should treat the payment made by the seller as seller's points and exclude it from the finance charge if, based on the seller's payment, the consumer is not legally bound to the creditor for the charge. A creditor who gives disclosures before the payment has been made should base them on the best information reasonably available.

Paragraph 4(c)(6)

1. *Lost interest.* Certain Federal and state laws mandate a percentage differential between the interest rate paid on a deposit and the rate charged on a loan secured by that deposit. In some situations, because of usury limits the creditor must reduce the interest rate paid on the deposit and, as a result, the consumer loses some of the interest that would otherwise have been earned. Under § 1026.4(c)(6), such ''lost interest'' need not be included in the finance charge. This rule applies only to an interest reduction imposed because a rate differential is required by law and a usury limit precludes compliance by any other means. If the creditor imposes a differential that exceeds that required, only the lost interest attributable to the excess amount is a finance charge. (See the commentary to § 1026.4(a).)

4(c)(7) Real-Estate Related Fees

1. *Real estate or residential mortgage transaction charges.* The list of charges in

§ 1026.4(c)(7) applies both to residential mortgage transactions (which may include, for example, the purchase of a mobile home) and to other transactions secured by real estate. The fees are excluded from the finance charge even if the services for which the fees are imposed are performed by the creditor's employees rather than by a third party. In addition, the cost of verifying or confirming information connected to the item is also excluded. For example, credit-report fees cover not only the cost of the report but also the cost of verifying information in the report. In all cases, charges excluded under § 1026.4(c)(7) must be bona fide and reasonable.

2. *Lump-sum charges.* If a lump sum charged for several services includes a charge that is not excludable, a portion of the total should be allocated to that service and included in the finance charge. However, a lump sum charged for conducting or attending a closing (for example, by a lawyer or a title company) is excluded from the finance charge if the charge is primarily for services related to items listed in § 1026.4(c)(7) (for example, reviewing or completing documents), even if other incidental services such as explaining various documents or disbursing funds for the parties are performed. The entire charge is excluded even if a fee for the incidental services would be a finance charge if it were imposed separately.

3. *Charges assessed during the loan term.* Real estate or residential mortgage transaction charges excluded under § 1026.4(c)(7) are those charges imposed solely in connection with the initial decision to grant credit. This would include, for example, a fee to search for tax liens on the property or to determine if flood insurance is required. The exclusion does not apply to fees for services to be performed periodically during the loan term, regardless of when the fee is collected. For example, a fee for one or more determinations during the loan term of the current tax-lien status or flood-insurance requirements is a finance charge, regardless of whether the fee is imposed at closing, or when the service is performed. If a creditor is uncertain about what portion of a fee to be paid at consummation or loan closing is related to the initial decision to grant credit, the entire fee may be treated as a finance charge.

4(d) Insurance and Debt Cancellation and Debt Suspension Coverage

1. *General.* Section 1026.4(d) permits insurance premiums and charges and debt cancellation and debt suspension charges to be excluded from the finance charge. The required disclosures must be made in writing, except as provided in § 1026.4(d)(4). The rules on location of insurance and debt cancellation and debt suspension disclosures for closed-end transactions are in § 1026.17(a). For purposes of § 1026.4(d), all references to insurance also include debt cancellation and debt suspension coverage unless the context indicates otherwise.

2. *Timing of disclosures.* If disclosures are given early, for example under § 1026.17(f) or § 1026.19(a), the creditor need not redisclose if the actual premium is different at the time of consummation. If insurance disclosures are not given at the time of early disclosure and insurance is in fact written in connection with the transaction, the disclosures under § 1026.4(d) must be made in order to exclude the premiums from the finance charge.

3. *Premium rate increases.* The creditor should disclose the premium amount based on the rates currently in effect and need not designate it as an estimate even if the premium rates may increase. An increase in insurance rates after consummation of a closed-end credit transaction or during the life of an open-end credit plan does not require redisclosure in order to exclude the additional premium from treatment as a finance charge.

4. *Unit-cost disclosures.* i. *Open-end credit.* The premium or fee for insurance or debt cancellation or debt suspension for the initial term of coverage may be disclosed on a unit-cost basis in open-end credit transactions. The cost per unit should be based on the initial term of coverage, unless one of the options under comment 4(d)–12 is available.

ii. *Closed-end credit.* One of the transactions for which unit-cost disclosures (such as 50 cents per year for each $100 of the amount financed) may be used in place of the total insurance premium involves a particular kind of insurance plan. For example, a consumer with a current indebtedness of $8,000 is covered by a plan of credit life insurance coverage with a maximum of $10,000. The consumer requests an additional $4,000 loan to be covered by the same insurance plan. Since the $4,000 loan exceeds, in part, the maximum amount of indebtedness that can be covered by the plan, the creditor may properly give the insurance-cost disclosures on the $4,000 loan on a unit-cost basis.

5. *Required credit life insurance; debt cancellation or suspension coverage.* Credit life, accident, health, or loss-of-income insurance, and debt cancellation and suspension coverage described in § 1026.4(b)(10), must be voluntary in order for the premium or charges to be excluded from the finance charge. Whether the insurance or coverage is in fact required or optional is a factual question. If the insurance or coverage is required, the premiums must be included in the finance charge, whether the insurance or coverage is purchased from the creditor or from a third party. If the consumer is required to elect one of several options—such as to purchase credit life insurance, or to assign an existing life insurance policy, or to pledge security such as a certificate of deposit—and the consumer purchases the credit life insurance policy, the premium must be included in the finance charge. (If the consumer assigns a preexisting policy or pledges security instead, no premium is included in the finance charge. The security interest would be disclosed under § 1026.6(a)(4), § 1026.6(b)(5)(ii), or § 1026.18(m). See the commentary to § 1026.4(b)(7) and (b)(8).)

6. *Other types of voluntary insurance.* Insurance is not credit life, accident, health, or loss-of-income insurance if the creditor or the credit account of the consumer is not the beneficiary of the insurance coverage. If the premium for such insurance is not imposed by the creditor as an incident to or a condition of credit, it is not covered by § 1026.4.

7. *Signatures.* If the creditor offers a number of insurance options under § 1026.4(d), the creditor may provide a means for the consumer to sign or initial for each option, or it may provide for a single authorizing signature or initial with the options selected designated by some other means, such as a check mark. The insurance authorization may be signed or initialed by any consumer, as defined in § 1026.2(a)(11), or by an authorized user on a credit card account.

8. *Property insurance.* To exclude property insurance premiums or charges from the finance charge, the creditor must allow the consumer to choose the insurer and disclose that fact. This disclosure must be made whether or not the property insurance is available from or through the creditor. The requirement that an option be given does not require that the insurance be readily available from other sources. The premium or charge must be disclosed only if the consumer elects to purchase the insurance from the creditor; in such a case, the creditor must also disclose the term of the property insurance coverage if it is less than the term of the obligation.

9. *Single-interest insurance.* Blanket and specific single-interest coverage are treated the same for purposes of the regulation. A charge for either type of single-interest insurance may be excluded from the finance charge if:

i. The insurer waives any right of subrogation.

ii. The other requirements of § 1026.4(d)(2) are met. This includes, of course, giving the consumer the option of obtaining the insurance from a person of the consumer's choice. The creditor need not ascertain whether the consumer is able to purchase the insurance from someone else.

10. *Single-interest insurance defined.* The term *single-interest insurance* as used in the regulation refers only to the types of coverage traditionally included in the term *vendor's single-interest insurance* (or *VSI*), that is, protection of tangible property against normal property damage, concealment, confiscation, conversion, embezzlement, and skip. Some comprehensive insurance policies may include a variety of additional coverages, such as repossession insurance and holder-in-due-course insurance. These types of coverage do not constitute single-interest insurance for purposes of the regulation, and premiums for them do not qualify for exclusion from the finance charge under § 1026.4(d). If a policy that is primarily VSI also provides coverages that are not VSI or other property insurance, a portion of the premiums must be allocated to the nonexcludable coverages and included in the finance charge. However, such allocation is not required if the total premium in fact attributable to all of the non-VSI coverages included in the policy is $1.00 or less (or $5.00 or less in the case of a multiyear policy).

11. *Initial term.* i. The initial term of insurance or debt cancellation or debt suspension coverage determines the period for which a premium amount must be

disclosed, unless one of the options discussed under comment 4(d)–12 is available. For purposes of § 1026.4(d), the initial term is the period for which the insurer or creditor is obligated to provide coverage, even though the consumer may be allowed to cancel the coverage or coverage may end due to nonpayment before that term expires.

ii. For example: A. The initial term of a property insurance policy on an automobile that is written for one year is one year even though premiums are paid monthly and the term of the credit transaction is four years.

B. The initial term of an insurance policy is the full term of the credit transaction if the consumer pays or finances a single premium in advance.

12. *Initial term; alternative.* i. *General.* A creditor has the option of providing cost disclosures on the basis of one year of insurance or debt cancellation or debt suspension coverage instead of a longer initial term (provided the premium or fee is clearly labeled as being for one year) if:

A. The initial term is indefinite or not clear, or

B. The consumer has agreed to pay a premium or fee that is assessed periodically but the consumer is under no obligation to continue the coverage, whether or not the consumer has made an initial payment.

ii. *Open-end plans.* For open-end plans, a creditor also has the option of providing unit-cost disclosure on the basis of a period that is less than one year if the consumer has agreed to pay a premium or fee that is assessed periodically, for example monthly, but the consumer is under no obligation to continue the coverage.

iii. *Examples.* To illustrate:

A. A credit life insurance policy providing coverage for a 30-year mortgage loan has an initial term of 30 years, even though premiums are paid monthly and the consumer is not required to continue the coverage. Disclosures may be based on the initial term, but the creditor also has the option of making disclosures on the basis of coverage for an assumed initial term of one year.

13. *Loss-of-income insurance.* The loss-of-income insurance mentioned in § 1026.4(d) includes involuntary unemployment insurance, which provides that some or all of the consumer's payments will be made if the consumer becomes unemployed involuntarily.

4(d)(3) Voluntary Debt Cancellation or Debt Suspension Fees

1. *General.* Fees charged for the specialized form of debt cancellation agreement known as guaranteed automobile protection (''GAP'') agreements must be disclosed according to § 1026.4(d)(3) rather than according to § 1026.4(d)(2) for property insurance.

2. *Disclosures.* Creditors can comply with § 1026.4(d)(3) by providing a disclosure that refers to debt cancellation or debt suspension coverage whether or not the coverage is considered insurance. Creditors may use the model credit insurance disclosures only if the debt cancellation or debt suspension coverage constitutes insurance under state law. (See Model Clauses and Samples at G–16 and H–17 in Appendix G and Appendix H to part 1026 for guidance on how to provide the disclosure required by § 1026.4(d)(3)(iii) for debt suspension products.)

3. *Multiple events.* If debt cancellation or debt suspension coverage for two or more events is provided at a single charge, the entire charge may be excluded from the finance charge if at least one of the events is accident or loss of life, health, or income and the conditions specified in § 1026.4(d)(3) or, as applicable, § 1026.4(d)(4), are satisfied.

4. *Disclosures in programs combining debt cancellation and debt suspension features.* If the consumer's debt can be cancelled under certain circumstances, the disclosure may be modified to reflect that fact. The disclosure could, for example, state (in addition to the language required by § 1026.4(d)(3)(iii)) that ''In some circumstances, my debt may be cancelled.'' However, the disclosure would not be permitted to list the specific events that would result in debt cancellation.

4(d)(4) Telephone Purchases

1. *Affirmative request.* A creditor would not satisfy the requirement to obtain a consumer's affirmative request if the ''request'' was a response to a script that uses leading questions or negative consent. A question asking whether the consumer wishes to enroll in the credit insurance or debt cancellation or suspension plan and seeking a yes-or-no response (such as ''Do you want to enroll in this optional debt cancellation plan?'') would not be considered leading.

4(e) Certain Security Interest Charges

1. *Examples.* i. *Excludable charges.* Sums must be actually paid to public officials to be excluded from the finance charge under § 1026.4(e)(1) and (e)(3). Examples are charges or other fees required for filing or recording security agreements, mortgages, continuation statements, termination statements, and similar documents, as well as intangible property or other taxes even when the charges or fees are imposed by the state solely on the creditor and charged to the consumer (if the tax must be paid to record a security agreement). (See comment 4(a)–5 regarding the treatment of taxes, generally.)

ii. *Charges not excludable.* If the obligation is between the creditor and a third party (an assignee, for example), charges or other fees for filing or recording security agreements, mortgages, continuation statements, termination statements, and similar documents relating to that obligation are not excludable from the finance charge under this section.

2. *Itemization.* The various charges described in § 1026.4(e)(1) and (e)(3) may be totaled and disclosed as an aggregate sum, or they may be itemized by the specific fees and taxes imposed. If an aggregate sum is disclosed, a general term such as security interest fees or filing fees may be used.

3. *Notary fees.* In order for a notary fee to be excluded under § 1026.4(e)(1), all of the following conditions must be met:

i. The document to be notarized is one used to perfect, release, or continue a security interest.

ii. The document is required by law to be notarized.

iii. A notary is considered a public official under applicable law.

iv. The amount of the fee is set or authorized by law.

4. *Nonfiling insurance.* The exclusion in § 1026.4(e)(2) is available only if nonfiling insurance is purchased. If the creditor collects and simply retains a fee as a sort of ''self-insurance'' against nonfiling, it may not be excluded from the finance charge. If the nonfiling insurance premium exceeds the amount of the fees excludable from the finance charge under § 1026.4(e)(1), only the excess is a finance charge. For example:

i. The fee for perfecting a security interest is $5.00 and the fee for releasing the security interest is $3.00. The creditor charges $10.00 for nonfiling insurance. Only $8.00 of the $10.00 is excludable from the finance charge.

4(f) Prohibited Offsets

1. *Earnings on deposits or investments.* The rule that the creditor shall not deduct any earnings by the consumer on deposits or investments applies whether or not the creditor has a security interest in the property.

Subpart B—Open-End Credit

Section 1026.5—General Disclosure Requirements

5(a) Form of Disclosures

5(a)(1) General

1. *Clear and conspicuous standard.* The ''clear and conspicuous'' standard generally requires that disclosures be in a reasonably understandable form. Disclosures for credit card applications and solicitations under § 1026.60, highlighted account-opening disclosures under § 1026.6(b)(1), highlighted disclosure on checks that access a credit card under § 1026.9(b)(3), highlighted change-in-terms disclosures under § 1026.9(c)(2)(iv)(D), and highlighted disclosures when a rate is increased due to delinquency, default or for a penalty under § 1026.9(g)(3)(ii) must also be readily noticeable to the consumer.

2. *Clear and conspicuous—reasonably understandable form.* Except where otherwise provided, the reasonably understandable form standard does not require that disclosures be segregated from other material or located in any particular place on the disclosure statement, or that numerical amounts or percentages be in any particular type size. For disclosures that are given orally, the standard requires that they be given at a speed and volume sufficient for a consumer to hear and comprehend them. (See comment 5(b)(1)(ii)–1.) Except where otherwise provided, the standard does not prohibit:

i. Pluralizing required terminology (''finance charge'' and ''annual percentage rate'').

ii. Adding to the required disclosures such items as contractual provisions, explanations of contract terms, state disclosures, and translations.

iii. Sending promotional material with the required disclosures.

iv. Using commonly accepted or readily understandable abbreviations (such as ''mo.'' for ''month'' or ''TX'' for ''Texas'') in making any required disclosures.

v. Using codes or symbols such as ''APR'' (for annual percentage rate), ''FC'' (for finance charge), or ''Cr'' (for credit balance), so long as a legend or description of the code or symbol is provided on the disclosure statement.

3. *Clear and conspicuous—readily noticeable standard.* To meet the readily noticeable standard, disclosures for credit card applications and solicitations under § 1026.60, highlighted account-opening disclosures under § 1026.6(b)(1), highlighted disclosures on checks that access a credit card account under § 1026.9(b)(3), highlighted change-in-terms disclosures under § 1026.9(c)(2)(iv)(D), and highlighted disclosures when a rate is increased due to delinquency, default or penalty pricing under § 1026.9(g)(3)(ii) must be given in a minimum of 10-point font. (See special rule for font size requirements for the annual percentage rate for purchases under §§ 1026.60(b)(1) and 1026.6(b)(2)(i).)

4. *Integrated document.* The creditor may make both the account-opening disclosures (§ 1026.6) and the periodic-statement disclosures (§ 1026.7) on more than one page, and use both the front and the reverse sides, except where otherwise indicated, so long as the pages constitute an integrated document. An integrated document would not include disclosure pages provided to the consumer at different times or disclosures interspersed on the same page with promotional material. An integrated document would include, for example:

i. Multiple pages provided in the same envelope that cover related material and are folded together, numbered consecutively, or clearly labeled to show that they relate to one another; or

ii. A brochure that contains disclosures and explanatory material about a range of services the creditor offers, such as credit, checking account, and electronic fund transfer features.

5. *Disclosures covered.* Disclosures that must meet the ''clear and conspicuous'' standard include all required communications under this subpart. Therefore, disclosures made by a person other than the card issuer, such as disclosures of finance charges imposed at the time of honoring a consumer's credit card under § 1026.9(d), and notices, such as the correction notice required to be sent to the consumer under § 1026.13(e), must also be clear and conspicuous.

Paragraph 5(a)(1)(ii)(A)

1. *Electronic disclosures.* Disclosures that need not be provided in writing under § 1026.5(a)(1)(ii)(A) may be provided in writing, orally, or in electronic form. If the consumer requests the service in electronic form, such as on the creditor's Web site, the specified disclosures may be provided in electronic form without regard to the consumer consent or other provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

Paragraph 5(a)(1)(iii)

1. *Disclosures not subject to E-Sign Act.* See the commentary to § 1026.5(a)(1)(ii)(A) regarding disclosures (in addition to those specified under § 1026.5(a)(1)(iii)) that may be provided in electronic form without regard to the consumer consent or other provisions of the E-Sign Act.

5(a)(2) Terminology

1. *When disclosures must be more conspicuous.* For home-equity plans subject to § 1026.40, the terms *finance charge* and *annual percentage rate,* when required to be used with a number, must be disclosed more conspicuously than other required disclosures, except in the cases provided in § 1026.5(a)(2)(ii). At the creditor's option, *finance charge* and *annual percentage rate* may also be disclosed more conspicuously than the other required disclosures even when the regulation does not so require. The following examples illustrate these rules:

i. In disclosing the annual percentage rate as required by § 1026.6(a)(1)(ii), the term *annual percentage rate* is subject to the *more conspicuous* rule.

ii. In disclosing the amount of the finance charge, required by § 1026.7(a)(6)(i), the term *finance charge* is subject to the *more conspicuous* rule.

iii. Although neither *finance charge* nor *annual percentage rate* need be emphasized when used as part of general informational material or in textual descriptions of other terms, emphasis is permissible in such cases. For example, when the terms appear as part of the explanations required under § 1026.6(a)(1)(iii) and (a)(1)(iv), they may be equally conspicuous as the disclosures required under §§ 1026.6(a)(1)(ii) and 1026.7(a)(7).

2. *Making disclosures more conspicuous.* In disclosing the terms *finance charge* and *annual percentage rate* more conspicuously for home-equity plans subject to § 1026.40, only the words *finance charge* and *annual percentage rate* should be accentuated. For example, if the term *total finance charge* is used, only *finance charge* should be emphasized. The disclosures may be made more conspicuous by, for example:

i. Capitalizing the words when other disclosures are printed in lower case.

ii. Putting them in bold print or a contrasting color.

iii. Underlining them.

iv. Setting them off with asterisks.

v. Printing them in larger type.

3. *Disclosure of figures—exception to more conspicuous rule.* For home-equity plans subject to § 1026.40, the terms *annual percentage rate* and *finance charge* need not be more conspicuous than figures (including, for example, numbers, percentages, and dollar signs).

4. *Consistent terminology.* Language used in disclosures required in this subpart must be close enough in meaning to enable the consumer to relate the different disclosures; however, the language need not be identical.

5(b) Time of Disclosures

5(b)(1) Account-Opening Disclosures

5(b)(1)(i) General Rule

1. *Disclosure before the first transaction.* When disclosures must be furnished ''before the first transaction,'' account-opening disclosures must be delivered before the consumer becomes obligated on the plan. Examples include:

i. *Purchases.* The consumer makes the first purchase, such as when a consumer opens a credit plan and makes purchases contemporaneously at a retail store, except when the consumer places a telephone call to make the purchase and opens the plan contemporaneously. (See commentary to § 1026.5(b)(1)(iii) below.)

ii. *Advances.* The consumer receives the first advance. If the consumer receives a cash advance check at the same time the account-opening disclosures are provided, disclosures are still timely if the consumer can, after receiving the disclosures, return the cash advance check to the creditor without obligation (for example, without paying finance charges).

2. *Reactivation of suspended account.* If an account is temporarily suspended (for example, because the consumer has exceeded a credit limit, or because a credit card is reported lost or stolen) and then is reactivated, no new account-opening disclosures are required.

3. *Reopening closed account.* If an account has been closed (for example, due to inactivity, cancellation, or expiration) and then is reopened, new account-opening disclosures are required. No new account-opening disclosures are required, however, when the account is closed merely to assign it a new number (for example, when a credit card is reported lost or stolen) and the ''new'' account then continues on the same terms.

4. *Converting closed-end to open-end credit.* If a closed-end credit transaction is converted to an open-end credit account under a written agreement with the consumer, account-opening disclosures under § 1026.6 must be given before the consumer becomes obligated on the open-end credit plan. (See the commentary to § 1026.17 on converting open-end credit to closed-end credit.)

5. *Balance transfers.* A creditor that solicits the transfer by a consumer of outstanding balances from an existing account to a new open-end plan must furnish the disclosures required by § 1026.6 so that the consumer has an opportunity, after receiving the disclosures, to contact the creditor before the balance is transferred and decline the transfer. For example, assume a consumer responds to a card issuer's solicitation for a credit card account subject to § 1026.60 that offers a range of balance transfer annual percentage rates, based on the consumer's creditworthiness. If the creditor opens an account for the consumer, the creditor would comply with the timing rules of this section by providing the consumer with the annual percentage rate (along with the fees and other required disclosures) that would apply to the balance transfer in time for the consumer to contact the creditor and withdraw the request. A creditor that permits consumers to withdraw the request by telephone has met this timing standard if the creditor does not effect the balance transfer until 10 days after the creditor has sent account-opening disclosures to the consumer, assuming the consumer has not contacted the creditor to withdraw the request. Card issuers that are subject to the requirements of § 1026.60 may

establish procedures that comply with both §§ 1026.60 and 1026.6 in a single disclosure statement.

6. *Substitution or replacement of credit card accounts.* i. *Generally.* When a card issuer substitutes or replaces an existing credit card account with another credit card account, the card issuer must either provide notice of the terms of the new account consistent with § 1026.6(b) or provide notice of the changes in the terms of the existing account consistent with § 1026.9(c)(2). Whether a substitution or replacement results in the opening of a new account or a change in the terms of an existing account for purposes of the disclosure requirements in §§ 1026.6(b) and 1026.9(c)(2) is determined in light of all the relevant facts and circumstances. For additional requirements and limitations related to the substitution or replacement of credit card accounts, see §§ 1026.12(a) and 1026.55(d) and comments 12(a)(1)–1 through –8, 12(a)(2)–1 through –9, 55(b)(3)–3, and 55(d)–1 through –3.

ii. *Relevant facts and circumstances.* Listed below are facts and circumstances that are relevant to whether a substitution or replacement results in the opening of a new account or a change in the terms of an existing account for purposes of the disclosure requirements in §§ 1026.6(b) and 1026.9(c)(2). When most of the facts and circumstances listed below are present, the substitution or replacement likely constitutes the opening of a new account for which § 1026.6(b) disclosures are appropriate. When few of the facts and circumstances listed below are present, the substitution or replacement likely constitutes a change in the terms of an existing account for which § 1026.9(c)(2) disclosures are appropriate.

A. Whether the card issuer provides the consumer with a new credit card;

B. Whether the card issuer provides the consumer with a new account number;

C. Whether the account provides new features or benefits after the substitution or replacement (such as rewards on purchases);

D. Whether the account can be used to conduct transactions at a greater or lesser number of merchants after the substitution or replacement (such as when a retail card is replaced with a cobranded general purpose credit card that can be used at a wider number of merchants);

E. Whether the card issuer implemented the substitution or replacement on an individualized basis (such as in response to a consumer's request); and

F. Whether the account becomes a different type of open-end plan after the substitution or replacement (such as when a charge card is replaced by a credit card).

iii. *Replacement as a result of theft or unauthorized use.* Notwithstanding paragraphs i and ii above, a card issuer that replaces a credit card or provides a new account number because the consumer has reported the card stolen or because the account appears to have been used for unauthorized transactions is not required to provide a notice under §§ 1026.6(b) or 1026.9(c)(2) unless the card issuer has changed a term of the account that is subject to §§ 1026.6(b) or 1026.9(c)(2).

5(b)(1)(ii) Charges Imposed as Part of an Open-End (Not Home-Secured) Plan

1. *Disclosing charges before the fee is imposed.* Creditors may disclose charges imposed as part of an open-end (not home-secured) plan orally or in writing at any time before a consumer agrees to pay the fee or becomes obligated for the charge, unless the charge is specified under § 1026.6(b)(2). (Charges imposed as part of an open-end (not home-secured plan) that are not specified under § 1026.6(b)(2) may alternatively be disclosed in electronic form; see the commentary to § 1026.5(a)(1)(ii)(A).) Creditors must provide such disclosures at a time and in a manner that a consumer would be likely to notice them. For example, if a consumer telephones a card issuer to discuss a particular service, a creditor would meet the standard if the creditor clearly and conspicuously discloses the fee associated with the service that is the topic of the telephone call orally to the consumer. Similarly, a creditor providing marketing materials in writing to a consumer about a particular service would meet the standard if the creditor provided a clear and conspicuous written disclosure of the fee for that service in those same materials. A creditor that provides written materials to a consumer about a particular service but provides a fee disclosure for another service not promoted in such materials would not meet the standard. For example, if a creditor provided marketing materials promoting payment by Internet, but included the fee for a replacement card on such materials with no explanation, the creditor would not be disclosing the fee at a time and in a manner that the consumer would be likely to notice the fee.

5(b)(1)(iii) Telephone Purchases

1. *Return policies.* In order for creditors to provide disclosures in accordance with the timing requirements of this paragraph, consumers must be permitted to return merchandise purchased at the time the plan was established without paying mailing or return-shipment costs. Creditors may impose costs to return subsequent purchases of merchandise under the plan, or to return merchandise purchased by other means such as a credit card issued by another creditor. A reasonable return policy would be of sufficient duration that the consumer is likely to have received the disclosures and had sufficient time to make a decision about the financing plan before his or her right to return the goods expires. Return policies need not provide a right to return goods if the consumer consumes or damages the goods, or for installed appliances or fixtures, provided there is a reasonable repair or replacement policy to cover defective goods or installations. If the consumer chooses to reject the financing plan, creditors comply with the requirements of this paragraph by permitting the consumer to pay for the goods with another reasonable form of payment acceptable to the merchant and keep the goods although the creditor cannot require the consumer to do so.

5(b)(1)(iv) Membership Fees

1. *Membership fees.* See § 1026.60(b)(2) and related commentary for guidance on fees for issuance or availability of a credit or charge card.

2. *Rejecting the plan.* If a consumer has paid or promised to pay a membership fee including an application fee excludable from the finance charge under § 1026.4(c)(1) before receiving account-opening disclosures, the consumer may, after receiving the disclosures, reject the plan and not be obligated for the membership fee, application fee, or any other fee or charge. A consumer who has received the disclosures and uses the account, or makes a payment on the account after receiving a billing statement, is deemed not to have rejected the plan.

3. *Using the account.* A consumer uses an account by obtaining an extension of credit after receiving the account-opening disclosures, such as by making a purchase or obtaining an advance. A consumer does not ''use'' the account by activating the account. A consumer also does not ''use'' the account when the creditor assesses fees on the account (such as start-up fees or fees associated with credit insurance or debt cancellation or suspension programs agreed to as a part of the application and before the consumer receives account-opening disclosures). For example, the consumer does not ''use'' the account when a creditor sends a billing statement with start-up fees, there is no other activity on the account, the consumer does not pay the fees, and the creditor subsequently assesses a late fee or interest on the unpaid fee balances. A consumer also does not ''use'' the account by paying an application fee excludable from the finance charge under § 1026.4(c)(1) prior to receiving the account-opening disclosures.

4. *Home-equity plans.* Creditors offering home-equity plans subject to the requirements of § 1026.40 are subject to the requirements of § 1026.40(h) regarding the collection of fees.

5(b)(2) Periodic Statements

5(b)(2)(i) Statement Required

1. *Periodic statements not required.* Periodic statements need not be sent in the following cases:

i. If the creditor adjusts an account balance so that at the end of the cycle the balance is less than $1—so long as no finance charge has been imposed on the account for that cycle.

ii. If a statement was returned as undeliverable. If a new address is provided, however, within a reasonable time before the creditor must send a statement, the creditor must resume sending statements. Receiving the address at least 20 days before the end of a cycle would be a reasonable amount of time to prepare the statement for that cycle. For example, if an address is received 22 days before the end of the June cycle, the creditor must send the periodic statement for the June cycle. (*See* § 1026.13(a)(7).)

2. *Termination of draw privileges.* When a consumer's ability to draw on an open-end account is terminated without being converted to closed-end credit under a written agreement, the creditor must continue to provide periodic statements to those consumers entitled to receive them under § 1026.5(b)(2)(i), for example, when the draw period of an open-end credit plan

ends and consumers are paying off outstanding balances according to the account agreement or under the terms of a workout agreement that is not converted to a closed-end transaction. In addition, creditors must continue to follow all of the other open-end credit requirements and procedures in subpart B.

3. *Uncollectible accounts.* An account is deemed uncollectible for purposes of § 1026.5(b)(2)(i) when a creditor has ceased collection efforts, either directly or through a third party.

4. *Instituting collection proceedings.* Creditors institute a delinquency collection proceeding by filing a court action or initiating an adjudicatory process with a third party. Assigning a debt to a debt collector or other third party would not constitute instituting a collection proceeding.

5(b)(2)(ii) Timing Requirements

1. *Mailing or delivery of periodic statements.* A creditor is not required to determine the specific date on which a periodic statement is mailed or delivered to an individual consumer for purposes of § 1026.5(b)(2)(ii). A creditor complies with § 1026.5(b)(2)(ii) if it has adopted reasonable procedures designed to ensure that periodic statements are mailed or delivered to consumers no later than a certain number of days after the closing date of the billing cycle and adds that number of days to the 21-day or 14-day period required by § 1026.5(b)(2)(ii) when determining, as applicable, the payment due date for purposes of § 1026.5(b)(2)(ii)(A), the date on which any grace period expires for purposes of § 1026.5(b)(2)(ii)(B)(*1*), or the date after which the payment will be treated as late for purposes of § 1026.5(b)(2)(ii)(B)(*2*). For example:

A. If a creditor has adopted reasonable procedures designed to ensure that periodic statements for a credit card account under an open-end (not home-secured) consumer credit plan or an account under an open-end consumer credit plan that provides a grace period are mailed or delivered to consumers no later than three days after the closing date of the billing cycle, the payment due date for purposes of § 1026.5(b)(2)(ii)(A) and the date on which any grace period expires for purposes of § 1026.5(b)(2)(ii)(B)(*1*) must be no less than 24 days after the closing date of the billing cycle. Similarly, in these circumstances, the limitations in § 1026.5(b)(2)(ii)(A) and (b)(2)(ii)(B)(*1*) on treating a payment as late and imposing finance charges apply for 24 days after the closing date of the billing cycle.

B. If a creditor has adopted reasonable procedures designed to ensure that periodic statements for an account under an open-end consumer credit plan that does not provide a grace period are mailed or delivered to consumers no later than five days after the closing date of the billing cycle, the date on which a payment must be received in order to avoid being treated as late for purposes of § 1026.5(b)(2)(ii)(B)(*2*) must be no less than 19 days after the closing date of the billing cycle. Similarly, in these circumstances, the limitation in § 1026.5(b)(2)(ii)(B)(*2*) on treating a payment as late for any purpose applies for 19 days after the closing date of the billing cycle.

2. *Treating a payment as late for any purpose.* Treating a payment as late for any purpose includes increasing the annual percentage rate as a penalty, reporting the consumer as delinquent to a credit reporting agency, assessing a late fee or any other fee, initiating collection activities, or terminating benefits (such as rewards on purchases) based on the consumer's failure to make a payment within a specified amount of time or by a specified date. The prohibitions in § 1026.5(b)(2)(ii)(A)(*2*) and (b)(2)(B)(*2*)(*ii*) on treating a payment as late for any purpose apply only during the 21-day or 14-day period (as applicable) following mailing or delivery of the periodic statement stating the due date for that payment and only if the required minimum periodic payment is received within that period. For example:

i. Assume that, for a credit card account under an open-end (not home-secured) consumer credit plan, a periodic statement mailed on April 4 states that a required minimum periodic payment of $50 is due on April 25. If the card issuer does not receive any payment on or before April 25, § 1026.5(b)(2)(ii)(A)(*2*) does not prohibit the card issuer from treating the required minimum periodic payment as late.

ii. Same facts as in paragraph i above. On April 20, the card issuer receives a payment of $30 and no additional payment is received on or before April 25. Section 1026.5(b)(2)(ii)(A)(*2*) does not prohibit the card issuer from treating the required minimum periodic payment as late.

iii. Same facts as in paragraph i above. On May 4, the card issuer has not received the $50 required minimum periodic payment that was due on April 25. The periodic statement mailed on May 4 states that a required minimum periodic payment of $150 is due on May 25. Section 1026.5(b)(2)(ii)(A)(*2*) does not permit the card issuer to treat the $150 required minimum periodic payment as late until April 26. However, the card issuer may continue to treat the $50 required minimum periodic payment as late during this period.

iv. Assume that, for an account under an open-end consumer credit plan that does not provide a grace period, a periodic statement mailed on September 10 states that a required minimum periodic payment of $100 is due on September 24. If the creditor does not receive any payment on or before September 24, § 1026.5(b)(2)(ii)(B)(*2*)(*ii*) does not prohibit the creditor from treating the required minimum periodic payment as late.

3. *Grace periods.* i. *Definition of grace period.* For purposes of § 1026.5(b)(2)(ii)(B), ''grace period'' means a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate. A deferred interest or similar promotional program under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time is not a grace period for purposes of § 1026.5(b)(2)(ii)(B). Similarly, a period following the payment due date during which a late payment fee will not be imposed is not a grace period for purposes of § 1026.5(b)(2)(ii)(B). *See* comments 7(b)(11)–1, 7(b)(11)–2, and 54(a)(1)–2.

ii. *Applicability of § 1026.5(b)(2)(ii)(B)(1).* Section 1026.5(b)(2)(ii)(B)(*1*) applies if an account is eligible for a grace period when the periodic statement is mailed or delivered. Section 1026.5(b)(2)(ii)(B)(*1*) does not require the creditor to provide a grace period or prohibit the creditor from placing limitations and conditions on a grace period to the extent consistent with § 1026.5(b)(2)(ii)(B) and § 1026.54. *See* comment 54(a)(1)–1. Furthermore, the prohibition in § 1026.5(b)(2)(ii)(B)(*1*)(*ii*) applies only during the 21-day period following mailing or delivery of the periodic statement and applies only when the creditor receives a payment within that 21-day period that satisfies the terms of the grace period.

iii. *Example.* Assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date for the account is the twenty-fifth of the month. Assume also that, under the terms of the account, the balance at the end of a billing cycle must be paid in full by the following payment due date in order for the account to remain eligible for the grace period. At the end of the April billing cycle, the balance on the account is $500. The grace period applies to the $500 balance because the balance for the March billing cycle was paid in full on April 25. Accordingly, § 1026.5(b)(2)(ii)(B)(*1*)(*i*) requires the creditor to have reasonable procedures designed to ensure that the periodic statement reflecting the $500 balance is mailed or delivered on or before May 4. Furthermore, § 1026.5(b)(2)(ii)(B)(*1*)(*ii*) requires the creditor to have reasonable procedures designed to ensure that the creditor does not impose finance charges as a result of the loss of the grace period if a $500 payment is received on or before May 25. However, if the creditor receives a payment of $300 on April 25, § 1026.5(b)(2)(ii)(B)(*1*)(*ii*) would not prohibit the creditor from imposing finance charges as a result of the loss of the grace period (to the extent permitted by § 1026.54).

4. *Application of § 1026.5(b)(2)(ii) to charge card and charged-off accounts.* i. *Charge card accounts.* For purposes of § 1026.5(b)(2)(ii)(A)(*1*), the payment due date for a credit card account under an open-end (not home-secured) consumer credit plan is the date the card issuer is required to disclose on the periodic statement pursuant to § 1026.7(b)(11)(i)(A). Because § 1026.7(b)(11)(ii) provides that § 1026.7(b)(11)(i) does not apply to periodic statements provided solely for charge card accounts, § 1026.5(b)(2)(ii)(A)(*1*) also does not apply to the mailing or delivery of periodic statements provided solely for such accounts. However, in these circumstances, § 1026.5(b)(2)(ii)(A)(*2*) requires the card issuer to have reasonable procedures designed to ensure that a payment is not treated as late for any purpose during the 21-day period following mailing or delivery of the statement. A card issuer that complies with § 1026.5(b)(2)(ii)(A) as discussed above with respect to a charge card account has also complied with § 1026.5(b)(2)(ii)(B)(*2*). Section 1026.5(b)(2)(ii)(B)(*1*) does not apply

to charge card accounts because, for purposes of § 1026.5(b)(2)(ii)(B), a grace period is a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate and, consistent with § 1026.2(a)(15)(iii), charge card accounts do not impose a finance charge based on a periodic rate.

ii. *Charged-off accounts.* For purposes of § 1026.5(b)(2)(ii)(A)(*1*), the payment due date for a credit card account under an open-end (not home-secured) consumer credit plan is the date the card issuer is required to disclose on the periodic statement pursuant to § 1026.7(b)(11)(i)(A). Because § 1026.7(b)(11)(ii) provides that § 1026.7(b)(11)(i) does not apply to periodic statements provided for charged-off accounts where full payment of the entire account balance is due immediately, § 1026.5(b)(2)(ii)(A)(*1*) also does not apply to the mailing or delivery of periodic statements provided solely for such accounts. Furthermore, although § 1026.5(b)(2)(ii)(A)(*2*) requires the card issuer to have reasonable procedures designed to ensure that a payment is not treated as late for any purpose during the 21-day period following mailing or delivery of the statement, § 1026.5(b)(2)(ii)(A)(*2*) does not prohibit a card issuer from continuing to treat prior payments as late during that period. *See* comment 5(b)(2)(ii)–2. Similarly, although § 1026.5(b)(2)(ii)(B)(*2*) applies to open-end consumer credit accounts in these circumstances, § 1026.5(b)(2)(ii)(B)(*2*)(*ii*) does not prohibit a creditor from continuing treating prior payments as late during the 14-day period following mailing or delivery of a periodic statement. Section 1026.5(b)(2)(ii)(B)(*1*) does not apply to charged-off accounts where full payment of the entire account balance is due immediately because such accounts do not provide a grace period.

5. *Consumer request to pick up periodic statements.* When a consumer initiates a request, the creditor may permit, but may not require, the consumer to pick up periodic statements. If the consumer wishes to pick up a statement, the statement must be made available in accordance with § 1026.5(b)(2)(ii).

6. *Deferred interest and similar promotional programs.* See comment 7(b)–1.iv.

5(c) Basis of Disclosures and Use of Estimates

1. *Legal obligation.* The disclosures should reflect the credit terms to which the parties are legally bound at the time of giving the disclosures.

i. The legal obligation is determined by applicable state or other law.

ii. The fact that a term or contract may later be deemed unenforceable by a court on the basis of equity or other grounds does not, by itself, mean that disclosures based on that term or contract did not reflect the legal obligation.

iii. The legal obligation normally is presumed to be contained in the contract that evidences the agreement. But this may be rebutted if another agreement between the parties legally modifies that contract.

2. *Estimates—obtaining information.* Disclosures may be estimated when the exact information is unknown at the time disclosures are made. Information is unknown if it is not reasonably available to the creditor at the time disclosures are made. The reasonably available standard requires that the creditor, acting in good faith, exercise due diligence in obtaining information. In using estimates, the creditor is not required to disclose the basis for the estimated figures, but may include such explanations as additional information. The creditor normally may rely on the representations of other parties in obtaining information. For example, the creditor might look to insurance companies for the cost of insurance.

3. *Estimates—redisclosure.* If the creditor makes estimated disclosures, redisclosure is not required for that consumer, even though more accurate information becomes available before the first transaction. For example, in an open-end plan to be secured by real estate, the creditor may estimate the appraisal fees to be charged; such an estimate might reasonably be based on the prevailing market rates for similar appraisals. If the exact appraisal fee is determinable after the estimate is furnished but before the consumer receives the first advance under the plan, no new disclosure is necessary.

5(d) Multiple Creditors; Multiple Consumers

1. *Multiple creditors.* Under § 1026.5(d):

i. Creditors must choose which of them will make the disclosures.

ii. A single, complete set of disclosures must be provided, rather than partial disclosures from several creditors.

iii. All disclosures for the open-end credit plan must be given, even if the disclosing creditor would not otherwise have been obligated to make a particular disclosure.

2. *Multiple consumers.* Disclosures may be made to either obligor on a joint account. Disclosure responsibilities are not satisfied by giving disclosures to only a surety or guarantor for a principal obligor or to an authorized user. In rescindable transactions, however, separate disclosures must be given to each consumer who has the right to rescind under § 1026.15.

3. *Card issuer and person extending credit not the same person.* Section 127(c)(4)(D) of the Truth in Lending Act (15 U.S.C. 1637(c)(4)(D)) contains rules pertaining to charge card issuers with plans that allow access to an open-end credit plan that is maintained by a person other than the charge card issuer. These rules are not implemented in Regulation Z (although they were formerly implemented in § 1026.60(f)). However, the statutory provisions remain in effect and may be used by charge card issuers with plans meeting the specified criteria.

5(e) Effect of Subsequent Events

1. *Events causing inaccuracies.* Inaccuracies in disclosures are not violations if attributable to events occurring after disclosures are made. For example, when the consumer fails to fulfill a prior commitment to keep the collateral insured and the creditor then provides the coverage and charges the consumer for it, such a change does not make the original disclosures inaccurate. The creditor may, however, be required to provide a new disclosure(s) under § 1026.9(c).

2. *Use of inserts.* When changes in a creditor's plan affect required disclosures, the creditor may use inserts with outdated disclosure forms. Any insert:

i. Should clearly refer to the disclosure provision it replaces.

ii. Need not be physically attached or affixed to the basic disclosure statement.

iii. May be used only until the supply of outdated forms is exhausted.

Section 1026.6—Account-Opening Disclosures

6(a) Rules Affecting Home-Equity Plans

6(a)(1) Finance Charge

Paragraph 6(a)(1)(i)

1. *When finance charges accrue.* Creditors are not required to disclose a specific date when finance charges will begin to accrue. Creditors may provide a general explanation such as that the consumer has 30 days from the closing date to pay the new balance before finance charges will accrue on the account.

2. *Grace periods.* In disclosing whether or not a grace period exists, the creditor need not use ''free period,'' ''free-ride period,'' ''grace period'' or any other particular descriptive phrase or term. For example, a statement that ''the finance charge begins on the date the transaction is posted to your account'' adequately discloses that no grace period exists. In the same fashion, a statement that ''finance charges will be imposed on any new purchases only if they are not paid in full within 25 days after the close of the billing cycle'' indicates that a grace period exists in the interim.

Paragraph 6(a)(1)(ii)

1. *Range of balances.* The range of balances disclosure is inapplicable:

i. If only one periodic rate may be applied to the entire account balance.

ii. If only one periodic rate may be applied to the entire balance for a feature (for example, cash advances), even though the balance for another feature (purchases) may be subject to two rates (a 1.5% monthly periodic rate on purchase balances of $0–$500, and a 1% monthly periodic rate for balances above $500). In this example, the creditor must give a range of balances disclosure for the purchase feature.

2. *Variable-rate disclosures—coverage.* i. *Examples.* This section covers open-end credit plans under which rate changes are specifically set forth in the account agreement and are tied to an index or formula. A creditor would use variable-rate disclosures for plans involving rate changes such as the following:

A. Rate changes that are tied to the rate the creditor pays on its six-month certificates of deposit.

B. Rate changes that are tied to Treasury bill rates.

C. Rate changes that are tied to changes in the creditor's commercial lending rate.

ii. An open-end credit plan in which the employee receives a lower rate contingent upon employment (that is, with the rate to be increased upon termination of employment) is not a variable-rate plan.

3. *Variable-rate plan—rate(s) in effect.* In disclosing the rate(s) in effect at the time of

the account-opening disclosures (as is required by § 1026.6(a)(1)(ii)), the creditor may use an insert showing the current rate; may give the rate as of a specified date and then update the disclosure from time to time, for example, each calendar month; or may disclose an estimated rate under § 1026.5(c).

4. *Variable-rate plan—additional disclosures required.* In addition to disclosing the rates in effect at the time of the account-opening disclosures, the disclosures under § 1026.6(a)(1)(ii) also must be made.

5. *Variable-rate plan—index.* The index to be used must be clearly identified; the creditor need not give, however, an explanation of how the index is determined or provide instructions for obtaining it.

6. *Variable-rate plan—circumstances for increase.* i. Circumstances under which the rate(s) may increase include, for example:

A. An increase in the Treasury bill rate.

B. An increase in the Federal Reserve discount rate.

ii. The creditor must disclose when the increase will take effect; for example:

A. ''An increase will take effect on the day that the Treasury bill rate increases,'' or

B. ''An increase in the Federal Reserve discount rate will take effect on the first day of the creditor's billing cycle.''

7. *Variable-rate plan—limitations on increase.* In disclosing any limitations on rate increases, limitations such as the maximum increase per year or the maximum increase over the duration of the plan must be disclosed. When there are no limitations, the creditor may, but need not, disclose that fact. (A maximum interest rate must be included in dwelling-secured open-end credit plans under which the interest rate may be changed. *See* § 1026.30 and the commentary to that section.) Legal limits such as usury or rate ceilings under state or Federal statutes or regulations need not be disclosed. Examples of limitations that must be disclosed include:

i. ''The rate on the plan will not exceed 25% annual percentage rate.''

ii. ''Not more than ½ percent increase in the annual percentage rate per year will occur.''

8. *Variable-rate plan—effects of increase.* Examples of effects of rate increases that must be disclosed include:

i. Any requirement for additional collateral if the annual percentage rate increases beyond a specified rate.

ii. Any increase in the scheduled minimum periodic payment amount.

9. *Variable-rate plan—change-in-terms notice not required.* No notice of a change in terms is required for a rate increase under a variable-rate plan as defined in comment 6(a)(1)(ii)–2.

10. *Discounted variable-rate plans.* In some variable-rate plans, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. Typically, this initial rate is lower than the rate would be if it were calculated using the index or formula.

i. For example, a creditor may calculate interest rates according to a formula using the six-month Treasury bill rate plus a 2 percent margin. If the current Treasury bill rate is 10 percent, the creditor may forgo the 2 percent spread and charge only 10 percent for a limited time, instead of setting an initial rate of 12 percent, or the creditor may disregard the index or formula and set the initial rate at 9 percent.

ii. When creditors use an initial rate that is not calculated using the index or formula for later rate adjustments, the account-opening disclosure statement should reflect:

A. The initial rate (expressed as a periodic rate and a corresponding annual percentage rate), together with a statement of how long the initial rate will remain in effect;

B. The current rate that would have been applied using the index or formula (also expressed as a periodic rate and a corresponding annual percentage rate); and

C. The other variable-rate information required in § 1026.6(a)(1)(ii).

iii. In disclosing the current periodic and annual percentage rates that would be applied using the index or formula, the creditor may use any of the disclosure options described in comment 6(a)(1)(ii)–3.

11. *Increased penalty rates.* If the initial rate may increase upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit, the creditor must disclose the initial rate and the increased penalty rate that may apply. If the penalty rate is based on an index and an increased margin, the issuer must disclose the index and the margin. The creditor must also disclose the specific event or events that may result in the increased rate, such as ''22% APR, if 60 days late.'' If the penalty rate cannot be determined at the time disclosures are given, the creditor must provide an explanation of the specific event or events that may result in the increased rate. At the creditor's option, the creditor may disclose the period for which the increased rate will remain in effect, such as ''until you make three timely payments.'' The creditor need not disclose an increased rate that is imposed when credit privileges are permanently terminated.

Paragraph 6(a)(1)(iii)

1. *Explanation of balance computation method.* A shorthand phrase such as ''previous balance method'' does not suffice in explaining the balance computation method. (See Model Clauses G–1 and G–1(A) to part 1026.)

2. *Allocation of payments.* Creditors may, but need not, explain how payments and other credits are allocated to outstanding balances. For example, the creditor need not disclose that payments are applied to late charges, overdue balances, and finance charges before being applied to the principal balance; or in a multifeatured plan, that payments are applied first to finance charges, then to purchases, and then to cash advances. (*See* comment 7–1 for definition of multifeatured plan.)

Paragraph 6(a)(1)(iv)

1. *Finance charges.* In addition to disclosing the periodic rate(s) under § 1026.6(a)(1)(ii), creditors must disclose any other type of finance charge that may be imposed, such as minimum, fixed, transaction, and activity charges; required insurance; or appraisal or credit report fees (unless excluded from the finance charge under § 1026.4(c)(7)). Creditors are not required to disclose the fact that no finance charge is imposed when the outstanding balance is less than a certain amount or the balance below which no finance charge will be imposed.

6(a)(2) Other Charges

1. *General; examples of other charges.* Under § 1026.6(a)(2), significant charges related to the plan (that are not finance charges) must also be disclosed. For example:

i. Late-payment and over-the-credit-limit charges.

ii. Fees for providing documentary evidence of transactions requested under § 1026.13 (billing error resolution).

iii. Charges imposed in connection with residential mortgage transactions or real estate transactions such as title, appraisal, and credit-report fees (see § 1026.4(c)(7)).

iv. A tax imposed on the credit transaction by a state or other governmental body, such as a documentary stamp tax on cash advances. (*See* the commentary to § 1026.4(a)).

v. A membership or participation fee for a package of services that includes an open-end credit feature, unless the fee is required whether or not the open-end credit feature is included. For example, a membership fee to join a credit union is not an ''other charge,'' even if membership is required to apply for credit. For example, if the primary benefit of membership in an organization is the opportunity to apply for a credit card, and the other benefits offered (such as a newsletter or a member information hotline) are merely incidental to the credit feature, the membership fee would be disclosed as an ''other charge.''

vi. Charges imposed for the termination of an open-end credit plan.

2. *Exclusions.* The following are examples of charges that are not ''other charges'':

i. Fees charged for documentary evidence of transactions for income tax purposes.

ii. Amounts payable by a consumer for collection activity after default; attorney's fees, whether or not automatically imposed; foreclosure costs; post-judgment interest rates imposed by law; and reinstatement or reissuance fees.

iii. Premiums for voluntary credit life or disability insurance, or for property insurance, that are not part of the finance charge.

iv. Application fees under § 1026.4(c)(1).

v. A monthly service charge for a checking account with overdraft protection that is applied to all checking accounts, whether or not a credit feature is attached.

vi. Charges for submitting as payment a check that is later returned unpaid (See commentary to § 1026.4(c)(2)).

vii. Charges imposed on a cardholder by an institution other than the card issuer for the use of the other institution's ATM in a shared or interchange system. (*See* also comment 7(a)(2)–2.)

viii. Taxes and filing or notary fees excluded from the finance charge under § 1026.4(e).

ix. A fee to expedite delivery of a credit card, either at account opening or during the life of the account, provided delivery of the

card is also available by standard mail service (or other means at least as fast) without paying a fee for delivery.

x. A fee charged for arranging a single payment on the credit account, upon the consumer's request (regardless of how frequently the consumer requests the service), if the credit plan provides that the consumer may make payments on the account by another reasonable means, such as by standard mail service, without paying a fee to the creditor.

6(a)(3) Home-Equity Plan Information

1. *Additional disclosures required.* For home-equity plans, creditors must provide several of the disclosures set forth in § 1026.40(d) along with the disclosures required under § 1026.6. Creditors also must disclose a list of the conditions that permit the creditor to terminate the plan, freeze or reduce the credit limit, and implement specified modifications to the original terms. (*See* comment 40(d)(4)(iii)–1.)

2. *Form of disclosures.* The home-equity disclosures provided under this section must be in a form the consumer can keep, and are governed by § 1026.5(a)(1). The segregation standard set forth in § 1026.40(a) does not apply to home-equity disclosures provided under § 1026.6.

3. *Disclosure of payment and variable-rate examples.* i. The payment-example disclosure in § 1026.40(d)(5)(iii) and the variable-rate information in § 1026.40(d)(12)(viii), (d)(12)(x), (d)(12)(xi), and (d)(12)(xii) need not be provided with the disclosures under § 1026.6 if the disclosures under § 1026.40(d) were provided in a form the consumer could keep; and the disclosures of the payment example under § 1026.40(d)(5)(iii), the maximum-payment example under § 1026.40(d)(12)(x) and the historical table under § 1026.40(d)(12)(xi) included a representative payment example for the category of payment options the consumer has chosen.

ii. For example, if a creditor offers three payment options (one for each of the categories described in the commentary to § 1026.40(d)(5)), describes all three options in its early disclosures, and provides all of the disclosures in a retainable form, that creditor need not provide the § 1026.40(d)(5)(iii) or (d)(12) disclosures again when the account is opened. If the creditor showed only one of the three options in the early disclosures (which would be the case with a separate disclosure form rather than a combined form, as discussed under § 1026.40(a)), the disclosures under § 1026.40(d)(5)(iii), (d)(12)(viii), (d)(12)(x), (d)(12)(xi) and (d)(12)(xii) must be given to any consumer who chooses one of the other two options. If the § 1026.40(d)(5)(iii) and (d)(12) disclosures are provided with the second set of disclosures, they need not be transaction-specific, but may be based on a representative example of the category of payment option chosen.

4. *Disclosures for the repayment period.* The creditor must provide disclosures about both the draw and repayment phases when giving the disclosures under § 1026.6. Specifically, the creditor must make the disclosures in § 1026.6(a)(3), state the corresponding annual percentage rate, and provide the variable-rate information required in § 1026.6(a)(1)(ii) for the repayment phase. To the extent the corresponding annual percentage rate, the information in § 1026.6(a)(1)(ii), and any other required disclosures are the same for the draw and repayment phase, the creditor need not repeat such information, as long as it is clear that the information applies to both phases.

6(a)(4) Security Interests

1. *General.* Creditors are not required to use specific terms to describe a security interest, or to explain the type of security or the creditor's rights with respect to the collateral.

2. *Identification of property.* Creditors sufficiently identify collateral by type by stating, for example, *motor vehicle* or *household appliances.* (Creditors should be aware, however, that the Federal credit practices rules, as well as some state laws, prohibit certain security interests in household goods.) The creditor may, at its option, provide a more specific identification (for example, a model and serial number).

3. *Spreader clause.* If collateral for preexisting credit with the creditor will secure the plan being opened, the creditor must disclose that fact. (Such security interests may be known as ''spreader'' or ''dragnet'' clauses, or as ''cross-collateralization'' clauses.) The creditor need not specifically identify the collateral; a reminder such as ''collateral securing other loans with us may also secure this loan'' is sufficient. At the creditor's option, a more specific description of the property involved may be given.

4. *Additional collateral.* If collateral is required when advances reach a certain amount, the creditor should disclose the information available at the time of the account-opening disclosures. For example, if the creditor knows that a security interest will be taken in household goods if the consumer's balance exceeds $1,000, the creditor should disclose accordingly. If the creditor knows that security will be required if the consumer's balance exceeds $1,000, but the creditor does not know what security will be required, the creditor must disclose on the initial disclosure statement that security will be required if the balance exceeds $1,000, and the creditor must provide a change-in-terms notice under § 1026.9(c) at the time the security is taken. (See comment 6(a)(4)–2.)

5. *Collateral from third party.* Security interests taken in connection with the plan must be disclosed, whether the collateral is owned by the consumer or a third party.

6(a)(5) Statement of Billing Rights

1. *See* the commentary to Model Forms G–3, G–3(A), G–4, and G–4(A).

6(b) Rules Affecting Open-End (Not Home-Secured) Plans

6(b)(1) Form of Disclosures; Tabular Format for Open-End (Not Home-Secured) Plans

1. *Relation to tabular summary for applications and solicitations.* See commentary to § 1026.60(a), (b), and (c) regarding format and content requirements, except for the following:

i. Creditors must use the accuracy standard for annual percentage rates in § 1026.6(b)(4)(ii)(G).

ii. Generally, creditors must disclose the specific rate for each feature that applies to the account. If the rates on an open-end (not home-secured) plan vary by state and the creditor is providing the account-opening table in person at the time the plan is established in connection with financing the purchase of goods or services the creditor may, at its option, disclose in the account-opening table (A) the rate applicable to the consumer's account, or (B) the range of rates, if the disclosure includes a statement that the rate varies by state and refers the consumer to the account agreement or other disclosure provided with the account-opening table where the rate applicable to the consumer's account is disclosed.

iii. Creditors must explain whether or not a grace period exists for all features on the account. The row heading ''Paying Interest'' must be used if any one feature on the account does not have a grace period.

iv. Creditors must name the balance computation method used for each feature of the account and state that an explanation of the balance computation method(s) is provided in the account-opening disclosures.

v. Creditors must state that consumers' billing rights are provided in the account-opening disclosures.

vi. If fees on an open-end (not home-secured) plan vary by state and the creditor is providing the account-opening table in person at the time the plan is established in connection with financing the purchase of goods or services the creditor may, at its option, disclose in the account-opening table (A) the specific fee applicable to the consumer's account, or (B) the range of fees, if the disclosure includes a statement that the amount of the fee varies by state and refers the consumer to the account agreement or other disclosure provided with the account-opening table where the fee applicable to the consumer's account is disclosed.

vii. Creditors that must disclose the amount of available credit must state the initial credit limit provided on the account.

viii. Creditors must disclose directly beneath the table the circumstances under which an introductory rate may be revoked and the rate that will apply after the introductory rate is revoked. Issuers of credit card accounts under an open-end (not home-secured) consumer credit plan are subject to limitations on the circumstances under which an introductory rate may be revoked. (See comment 60(b)(1)–5 for guidance on how a card issuer may disclose the circumstances under which an introductory rate may be revoked.)

ix. The applicable forms providing safe harbors for account-opening tables are under Appendix G–17 to part 1026.

2. *Clear and conspicuous standard.* See comment 5(a)(1)–1 for the clear and conspicuous standard applicable to § 1026.6 disclosures.

3. *Terminology.* Section 1026.6(b)(1) generally requires that the headings, content, and format of the tabular disclosures be substantially similar, but need not be identical, to the tables in Appendix G to part

1026; but see § 1026.5(a)(2) for terminology requirements applicable to § 1026.6(b).

6(b)(2) Required Disclosures for Account-Opening Table for Open-End (Not Home-Secured) Plans

6(b)(2)(iii) Fixed Finance Charge; Minimum Interest Charge

1. Example of brief statement. See Samples G–17(B), G–17(C), and G–17(D) for guidance on how to provide a brief description of a minimum interest charge.

6(b)(2)(v) Grace Period

1. *Grace period.* Creditors must state any conditions on the applicability of the grace period. A creditor, however, may not disclose under § 1026.6(b)(2)(v) the limitations on the imposition of finance charges as a result of a loss of a grace period in § 1026.54, or the impact of payment allocation on whether interest is charged on transactions as a result of a loss of a grace period. Some creditors may offer a grace period on all types of transactions under which interest will not be charged on transactions if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. In these circumstances, § 1026.6(b)(2)(v) requires that the creditor disclose the grace period and the conditions for its applicability using the following language, or substantially similar language, as applicable: ''Your due date is [at least] ___ days after the close of each billing cycle. We will not charge you any interest on your account if you pay your entire balance by the due date each month.'' However, other creditors may offer a grace period on all types of transactions under which interest may be charged on transactions even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. In these circumstances, § 1026.6(b)(2)(v) requires the creditor to amend the above disclosure language to describe accurately the conditions on the applicability of the grace period.

2. *No grace period.* Creditors may use the following language to describe that no grace period is offered, as applicable: ''We will begin charging interest on [applicable transactions] on the transaction date.''

3. *Grace period on some features.* Some creditors do not offer a grace period on cash advances and balance transfers, but offer a grace period for all purchases under which interest will not be charged on purchases if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. In these circumstances, § 1026.6(b)(2)(v) requires that the creditor disclose the grace period for purchases and the conditions for its applicability, and the lack of a grace period for cash advances and balance transfers using the following language, or substantially similar language, as applicable: ''Your due date is [at least] ___ days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date.'' However, other creditors may offer a grace period on all purchases under which interest may be charged on purchases even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. In these circumstances, § 1026.6(a)(2)(v) requires the creditor to amend the above disclosure language to describe accurately the conditions on the applicability of the grace period. Also, some creditors may not offer a grace period on cash advances and balance transfers, and will begin charging interest on these transactions from a date other than the transaction date, such as the posting date. In these circumstances, § 1026.6(a)(2)(v) requires the creditor to amend the above disclosure language to be accurate.

6(b)(2)(vi) Balance Computation Method

1. *Use of same balance computation method for all features.* In cases where the balance for each feature is computed using the same balance computation method, a single identification of the name of the balance computation method is sufficient. In this case, a creditor may use an appropriate name listed in § 1026.60(g) (*e.g.*, ''*average daily balance (including new purchases)*'') to satisfy the requirement to disclose the name of the method for all features on the account, even though the name only refers to purchases. For example, if a creditor uses the average daily balance method including new transactions for all features, a creditor may use the name ''*average daily balance (including new purchases)*'' listed in § 1026.60(g)(i) to satisfy the requirement to disclose the name of the balance computation method for all features. As an alternative, in this situation, a creditor may revise the balance computation names listed in § 1026.60(g) to refer more broadly to all new credit transactions, such as using the language ''new transactions'' or ''current transactions'' (*e.g., ''average daily balance (including new transactions)''),* rather than simply referring to new purchases when the same method is used to calculate the balances for all features of the account. *See* Samples G–17(B) and G–17(C) for guidance on how to disclose the balance computation method where the same method is used for all features on the account.

2. *Use of balance computation names in § 1026.60(g) for balances other than purchases.* The names of the balance computation methods listed in § 1026.60(g) describe balance computation methods for purchases. When a creditor is disclosing the name of the balance computation methods separately for each feature, in using the names listed in § 1026.60(g) to satisfy the requirements of § 1026.6(b)(2)(vi) for features other than purchases, a creditor must revise the names listed in § 1026.60(g) to refer to the other features. For example, when disclosing the name of the balance computation method applicable to cash advances, a creditor must revise the name listed in § 1026.60(g)(i) to disclose it as ''*average daily balance (including new cash advances)*'' when the balance for cash advances is figured by adding the outstanding balance (including new cash advances and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. Similarly, a creditor must revise the name listed in § 1026.60(g)(ii) to disclose it as ''*average daily balance (excluding new cash advances)*'' when the balance for cash advances is figured by adding the outstanding balance (excluding new cash advances and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. *See* comment 6(b)(2)(vi)–1 for guidance on the use of one balance computation name when the same balance computation method is used for all features on the account.

6(b)(2)(xiii) Available Credit

1. *Right to reject the plan.* Creditors may use the following language to describe consumers' right to reject a plan after receiving account-opening disclosures: ''You may still reject this plan, provided that you have not yet used the account or paid a fee after receiving a billing statement. If you do reject the plan, you are not responsible for any fees or charges.''

6(b)(3) Disclosure of Charges Imposed as Part of Open-End (Not Home-Secured) Plans

1. *When finance charges accrue.* Creditors are not required to disclose a specific date when a cost that is a finance charge under § 1026.4 will begin to accrue.

2. *Grace periods.* In disclosing in the account agreement or disclosure statement whether or not a grace period exists, the creditor need not use any particular descriptive phrase or term. However, the descriptive phrase or term must be sufficiently similar to the disclosures provided pursuant to §§ 1026.60(b)(5) and 1026.6(b)(2)(v) to satisfy a creditor's duty to provide consistent terminology under § 1026.5(a)(2).

3. *No finance charge imposed below certain balance.* Creditors are not required to disclose the fact that no finance charge is imposed when the outstanding balance is less than a certain amount or the balance below which no finance charge will be imposed.

Paragraph 6(b)(3)(ii)

1. *Failure to use the plan as agreed.* Late payment fees, over-the-limit fees, and fees for payments returned unpaid are examples of charges resulting from consumers' failure to use the plan as agreed.

2. *Examples of fees that affect the plan.* Examples of charges the payment, or nonpayment, of which affects the consumer's account are:

i. *Access to the plan.* Fees for using the card at the creditor's ATM to obtain a cash advance, fees to obtain additional cards including replacements for lost or stolen cards, fees to expedite delivery of cards or other credit devices, application and membership fees, and annual or other participation fees identified in § 1026.4(c)(4).

ii. *Amount of credit extended.* Fees for increasing the credit limit on the account, whether at the consumer's request or unilaterally by the creditor.

iii. *Timing or method of billing or payment.* Fees to pay by telephone or via the Internet.

3. *Threshold test.* If the creditor is unsure whether a particular charge is a cost imposed as part of the plan, the creditor may at its option consider such charges as a cost imposed as part of the plan for purposes of the Truth in Lending Act.

Paragraph 6(b)(3)(iii)(B)

1. *Fees for package of services.* A fee to join a credit union is an example of a fee for a package of services that is not imposed as part of the plan, even if the consumer must join the credit union to apply for credit. In contrast, a membership fee is an example of a fee for a package of services that is considered to be imposed as part of a plan where the primary benefit of membership in the organization is the opportunity to apply for a credit card, and the other benefits offered (such as a newsletter or a member information hotline) are merely incidental to the credit feature.

6(b)(4) Disclosure of Rates for Open-End (Not Home-Secured) Plans

6(b)(4)(i)(B) Range of Balances

1. *Range of balances.* Creditors are not required to disclose the range of balances:

i. If only one periodic interest rate may be applied to the entire account balance.

ii. If only one periodic interest rate may be applied to the entire balance for a feature (for example, cash advances), even though the balance for another feature (purchases) may be subject to two rates (a 1.5% monthly periodic interest rate on purchase balances of $0–$500, and a 1% periodic interest rate for balances above $500). In this example, the creditor must give a range of balances disclosure for the purchase feature.

6(b)(4)(i)(D) Balance Computation Method

1. *Explanation of balance computation method.* Creditors do not provide a sufficient explanation of a balance computation method by using a shorthand phrase such as ''previous balance method'' or the name of a balance computation method listed in § 1026.60(g). (*See* Model Clauses G–1(A) in Appendix G to part 1026. *See* § 1026.6(b)(2)(vi) regarding balance computation descriptions in the account-opening summary.)

2. *Allocation of payments.* Creditors may, but need not, explain how payments and other credits are allocated to outstanding balances.

6(b)(4)(ii) Variable-Rate Accounts

1. *Variable-rate disclosures—coverage.* i. *Examples.* Examples of open-end plans that permit the rate to change and are considered variable-rate plans include:

A. Rate changes that are tied to the rate the creditor pays on its six-month certificates of deposit.

B. Rate changes that are tied to Treasury bill rates.

C. Rate changes that are tied to changes in the creditor's commercial lending rate.

ii. Examples of open-end plans that permit the rate to change and are not considered variable-rate include:

A. Rate changes that are invoked under a creditor's contract reservation to increase the rate without reference to such an index or formula (for example, a plan that simply provides that the creditor reserves the right to raise its rates).

B. Rate changes that are triggered by a specific event such as an open-end credit plan in which the employee receives a lower rate contingent upon employment, and the rate increases upon termination of employment.

2. *Variable-rate plan—circumstances for increase.* i. The following are examples that comply with the requirement to disclose circumstances under which the rate(s) may increase:

A. ''The Treasury bill rate increases.''

B. ''The Federal Reserve discount rate increases.''

ii. Disclosing the frequency with which the rate may increase includes disclosing when the increase will take effect; for example:

A. ''An increase will take effect on the day that the Treasury bill rate increases.''

B. ''An increase in the Federal Reserve discount rate will take effect on the first day of the creditor's billing cycle.''

3. *Variable-rate plan—limitations on increase.* In disclosing any limitations on rate increases, limitations such as the maximum increase per year or the maximum increase over the duration of the plan must be disclosed. When there are no limitations, the creditor may, but need not, disclose that fact. Legal limits such as usury or rate ceilings under state or Federal statutes or regulations need not be disclosed. Examples of limitations that must be disclosed include:

i. ''The rate on the plan will not exceed 25% annual percentage rate.''

ii. ''Not more than ½; of 1% increase in the annual percentage rate per year will occur.''

4. *Variable-rate plan—effects of increase.* Examples of effects of rate increases that must be disclosed include:

i. Any requirement for additional collateral if the annual percentage rate increases beyond a specified rate.

ii. Any increase in the scheduled minimum periodic payment amount.

5. *Discounted variable-rate plans.* In some variable-rate plans, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. Typically, this initial rate is lower than the rate would be if it were calculated using the index or formula.

i. For example, a creditor may calculate interest rates according to a formula using the six-month Treasury bill rate plus a 2 percent margin. If the current Treasury bill rate is 10 percent, the creditor may forgo the 2 percent spread and charge only 10 percent for a limited time, instead of setting an initial rate of 12 percent, or the creditor may disregard the index or formula and set the initial rate at 9 percent.

ii. When creditors disclose in the account-opening disclosures an initial rate that is not calculated using the index or formula for later rate adjustments, the disclosure should reflect:

A. The initial rate (expressed as a periodic rate and a corresponding annual percentage rate), together with a statement of how long the initial rate will remain in effect;

B. The current rate that would have been applied using the index or formula (also expressed as a periodic rate and a corresponding annual percentage rate); and

C. The other variable-rate information required by § 1026.6(b)(4)(ii).

6(b)(4)(iii) Rate Changes Not Due to Index or Formula

1. *Events that cause the initial rate to change.* i. *Changes based on expiration of time period.* If the initial rate will change at the expiration of a time period, creditors that disclose the initial rate in the account-opening disclosure must identify the expiration date and the fact that the initial rate will end at that time.

ii. *Changes based on specified contract terms.* If the account agreement provides that the creditor may change the initial rate upon the occurrence of a specified event or events, the creditor must identify the events or events. Examples include the consumer not making the required minimum payment when due, or the termination of an employee preferred rate when the employment relationship is terminated.

2. *Rate that will apply after initial rate changes.* i. *Increased margins.* If the initial rate is based on an index and the rate may increase due to a change in the margin applied to the index, the creditor must disclose the increased margin. If more than one margin could apply, the creditor may disclose the highest margin.

ii. *Risk-based pricing.* In some plans, the amount of the rate change depends on how the creditor weighs the occurrence of events specified in the account agreement that authorize the creditor to change rates, as well as other factors. Creditors must state the increased rate that may apply. At the creditor's option, the creditor may state the possible rates as a range, or by stating only the highest rate that could be assessed. The creditor must disclose the period for which the increased rate will remain in effect, such as ''until you make three timely payments,'' or if there is no limitation, the fact that the increased rate may remain indefinitely.

3. *Effect of rate change on balances.* Creditors must disclose information to consumers about the balance to which the new rate will apply and the balance to which the current rate at the time of the change will apply. Card issuers subject to § 1026.55 may be subject to certain restrictions on the application of increased rates to certain balances.

6(b)(5) Additional Disclosures for Open-End (Not Home-Secured) Plans

6(b)(5)(i) Voluntary Credit Insurance, Debt Cancellation or Debt Suspension

1. *Timing.* Under § 1026.4(d), disclosures required to exclude the cost of voluntary credit insurance or debt cancellation or debt suspension coverage from the finance charge must be provided before the consumer agrees to the purchase of the insurance or coverage. Creditors comply with § 1026.6(b)(5)(i) if they provide those disclosures in accordance with § 1026.4(d). For example, if the disclosures required by § 1026.4(d) are provided at application, creditors need not repeat those disclosures at account opening.

6(b)(5)(ii) Security Interests

1. *General.* Creditors are not required to use specific terms to describe a security interest, or to explain the type of security or the creditor's rights with respect to the collateral.

2. *Identification of property.* Creditors sufficiently identify collateral by type by stating, for example, *motor vehicle* or *household appliances.* (Creditors should be aware, however, that the Federal credit practices rules, as well as some state laws, prohibit certain security interests in household goods.) The creditor may, at its option, provide a more specific identification (for example, a model and serial number.)

3. *Spreader clause.* If collateral for preexisting credit with the creditor will secure the plan being opened, the creditor must disclose that fact. (Such security interests may be known as ''spreader'' or ''dragnet'' clauses, or as ''cross-collateralization'' clauses.) The creditor need not specifically identify the collateral; a reminder such as ''collateral securing other loans with us may also secure this loan'' is sufficient. At the creditor's option, a more specific description of the property involved may be given.

4. *Additional collateral.* If collateral is required when advances reach a certain amount, the creditor should disclose the information available at the time of the account-opening disclosures. For example, if the creditor knows that a security interest will be taken in household goods if the consumer's balance exceeds $1,000, the creditor should disclose accordingly. If the creditor knows that security will be required if the consumer's balance exceeds $1,000, but the creditor does not know what security will be required, the creditor must disclose on the initial disclosure statement that security will be required if the balance exceeds $1,000, and the creditor must provide a change-in-terms notice under § 1026.9(c) at the time the security is taken. (See comment 6(b)(5)(ii)–2.)

5. *Collateral from third party.* Security interests taken in connection with the plan must be disclosed, whether the collateral is owned by the consumer or a third party.

6(b)(5)(iii) Statement of Billing Rights

1. See the commentary to Model Forms G–3(A) and G–4(A).

Section 1026.7—Periodic Statement

1. *Multifeatured plans.* Some plans involve a number of different features, such as purchases, cash advances, or overdraft checking. Groups of transactions subject to different finance charge terms because of the dates on which the transactions took place are treated like different features for purposes of disclosures on the periodic statements. The commentary includes additional guidance for multifeatured plans.

7(a) Rules Affecting Home-Equity Plans

7(a)(1) Previous Balance

1. *Credit balances.* If the previous balance is a credit balance, it must be disclosed in such a way so as to inform the consumer that it is a credit balance, rather than a debit balance.

2. *Multifeatured plans.* In a multifeatured plan, the previous balance may be disclosed either as an aggregate balance for the account or as separate balances for each feature (for example, a previous balance for purchases and a previous balance for cash advances). If separate balances are disclosed, a total previous balance is optional.

3. *Accrued finance charges allocated from payments.* Some open-end credit plans provide that the amount of the finance charge that has accrued since the consumer's last payment is directly deducted from each new payment, rather than being separately added to each statement and reflected as an increase in the obligation. In such a plan, the previous balance need not reflect finance charges accrued since the last payment.

7(a)(2) Identification of Transactions

1. *Multifeatured plans.* In identifying transactions under § 1026.7(a)(2) for multifeatured plans, creditors may, for example, choose to arrange transactions by feature (such as disclosing sale transactions separately from cash advance transactions) or in some other clear manner, such as by arranging the transactions in general chronological order.

2. *Automated teller machine (ATM) charges imposed by other institutions in shared or interchange systems.* A charge imposed on the cardholder by an institution other than the card issuer for the use of the other institution's ATM in a shared or interchange system and included by the terminal-operating institution in the amount of the transaction need not be separately disclosed on the periodic statement.

7(a)(3) Credits

1. *Identification—sufficiency.* The creditor need not describe each credit by type (returned merchandise, rebate of finance charge, *etc.*)—''credit'' would suffice—except if the creditor is using the periodic statement to satisfy the billing-error correction notice requirement. (See the commentary to § 1026.13(e) and (f).)

2. *Format.* A creditor may list credits relating to credit extensions (payments, rebates, *etc.*) together with other types of credits (such as deposits to a checking account), as long as the entries are identified so as to inform the consumer which type of credit each entry represents.

3. *Date.* If only one date is disclosed (that is, the crediting date as required by the regulation), no further identification of that date is necessary. More than one date may be disclosed for a single entry, as long as it is clear which date represents the date on which credit was given.

4. *Totals.* A total of amounts credited during the billing cycle is not required.

7(a)(4) Periodic Rates

1. *Disclosure of periodic rates—whether or not actually applied.* Except as provided in § 1026.7(a)(4)(ii), any periodic rate that may be used to compute finance charges (and its corresponding annual percentage rate) must be disclosed whether or not it is applied during the billing cycle. For example:

i. If the consumer's account has both a purchase feature and a cash advance feature, the creditor must disclose the rate for each, even if the consumer only makes purchases on the account during the billing cycle.

ii. If the rate varies (such as when it is tied to a particular index), the creditor must disclose each rate in effect during the cycle for which the statement was issued.

2. *Disclosure of periodic rates required only if imposition possible.* With regard to the periodic rate disclosure (and its corresponding annual percentage rate), only rates that *could have* been imposed during the billing cycle reflected on the periodic statement need to be disclosed. For example:

i. If the creditor is changing rates effective during the next billing cycle (because of a variable-rate plan), the rates required to be disclosed under § 1026.7(a)(4) are only those in effect during the billing cycle reflected on the periodic statement. For example, if the monthly rate applied during May was 1.5%, but the creditor will increase the rate to 1.8% effective June 1, 1.5% (and its corresponding annual percentage rate) is the only required disclosure under § 1026.7(a)(4) for the periodic statement reflecting the May account activity.

ii. If rates applicable to a particular type of transaction changed after a certain date and the old rate is only being applied to transactions that took place prior to that date, the creditor need not continue to disclose the old rate for those consumers that have no outstanding balances to which that rate could be applied.

3. *Multiple rates—same transaction.* If two or more periodic rates are applied to the same balance for the *same* type of transaction (for example, if the finance charge consists of a monthly periodic rate of 1.5% applied to the outstanding balance and a required credit life insurance component calculated at 0.1% per month on the same outstanding balance), the creditor may do either of the following:

i. Disclose each periodic rate, the range of balances to which it is applicable, and the corresponding annual percentage rate for each. (For example, 1.5% monthly, 18% annual percentage rate; 0.1% monthly, 1.2% annual percentage rate.)

ii. Disclose one composite periodic rate (that is, 1.6% per month) along with the applicable range of balances and the corresponding annual percentage rate.

4. *Corresponding annual percentage rate.* In disclosing the annual percentage rate that corresponds to each periodic rate, the creditor may use ''corresponding annual percentage rate,'' ''nominal annual percentage rate,'' ''corresponding nominal annual percentage rate,'' or similar phrases.

5. *Rate same as actual annual percentage rate.* When the corresponding rate is the same as the annual percentage rate disclosed under § 1026.7(a)(7), the creditor need disclose only one annual percentage rate, but must use the phrase ''annual percentage rate.''

6. *Range of balances.* See comment 6(a)(1)(ii)–1. A creditor is not required to adjust the range of balances disclosure to reflect the balance below which only a minimum charge applies.

7(a)(5) Balance on Which Finance Charge Computed

1. *Limitation to periodic rates.* Section 1026.7(a)(5) only requires disclosure of the balance(s) to which a periodic rate was applied and does not apply to balances on

which other kinds of finance charges (such as transaction charges) were imposed. For example, if a consumer obtains a $1,500 cash advance subject to both a 1% transaction fee and a 1% monthly periodic rate, the creditor need only disclose the balance subject to the monthly rate (which might include portions of earlier cash advances not paid off in previous cycles).

2. *Split rates applied to balance ranges.* If split rates were applied to a balance because different portions of the balance fall within two or more balance ranges, the creditor need not separately disclose the portions of the balance subject to such different rates since the range of balances to which the rates apply has been separately disclosed. For example, a creditor could disclose a balance of $700 for purchases even though a monthly periodic rate of 1.5% applied to the first $500, and a monthly periodic rate of 1% to the remainder. This option to disclose a combined balance does not apply when the finance charge is computed by applying the split rates to each day's balance (in contrast, for example, to applying the rates to the average daily balance). In that case, the balances must be disclosed using any of the options that are available if two or more daily rates are imposed. (*See* comment 7(a)(5)–5.)

3. *Monthly rate on average daily balance.* Creditors may apply a monthly periodic rate to an average daily balance.

4. *Multifeatured plans.* In a multifeatured plan, the creditor must disclose a separate balance (or balances, as applicable) to which a periodic rate was applied for each feature or group of features subject to different periodic rates or different balance computation methods. Separate balances are not required, however, merely because a grace period is available for some features but not others. A total balance for the entire plan is optional. This does not affect how many balances the creditor must disclose—or may disclose—within each feature. (*See*, for example, comment 7(a)(5)–5.)

5. *Daily rate on daily balances.* If the finance charge is computed on the balance each day by application of one or more daily periodic rates, the balance on which the finance charge was computed may be disclosed in any of the following ways for each feature:

i. If a single daily periodic rate is imposed, the balance to which it is applicable may be stated as:

A. A balance for each day in the billing cycle.

B. A balance for each day in the billing cycle on which the balance in the account changes.

C. The sum of the daily balances during the billing cycle.

D. The average daily balance during the billing cycle, in which case the creditor shall explain that the average daily balance is or can be multiplied by the number of days in the billing cycle and the periodic rate applied to the product to determine the amount of the finance charge.

ii. If two or more daily periodic rates may be imposed, the balances to which the rates are applicable may be stated as:

A. A balance for each day in the billing cycle.

B. A balance for each day in the billing cycle on which the balance in the account changes.

C. Two or more average daily balances, each applicable to the daily periodic rates imposed for the time that those rates were in effect, as long as the creditor explains that the finance charge is or may be determined by (*1*) multiplying each of the average balances by the number of days in the billing cycle (or if the daily rate varied during the cycle, by multiplying by the number of days the applicable rate was in effect), (*2*) multiplying each of the results by the applicable daily periodic rate, and (*3*) adding these products together.

6. *Explanation of balance computation method.* See the commentary to 6(a)(1)(iii).

7. *Information to compute balance.* In connection with disclosing the finance charge balance, the creditor need not give the consumer all of the information necessary to compute the balance if that information is not otherwise required to be disclosed. For example, if current purchases are included from the date they are posted to the account, the posting date need not be disclosed.

8. *Non-deduction of credits.* The creditor need not specifically identify the total dollar amount of credits not deducted in computing the finance charge balance. Disclosure of the amount of credits not deducted is accomplished by listing the credits (§ 1026.7(a)(3)) and indicating which credits will not be deducted in determining the balance (for example, ''credits after the 15th of the month are not deducted in computing the finance charge.'').

9. *Use of one balance computation method explanation when multiple balances disclosed.* Sometimes the creditor will disclose more than one balance to which a periodic rate was applied, even though each balance was computed using the same balance computation method. For example, if a plan involves purchases and cash advances that are subject to different rates, more than one balance must be disclosed, even though the same computation method is used for determining the balance for each feature. In these cases, one explanation of the balance computation method is sufficient. Sometimes the creditor separately discloses the portions of the balance that are subject to different rates because different portions of the balance fall within two or more balance ranges, even when a combined balance disclosure would be permitted under comment 7(a)(5)–2. In these cases, one explanation of the balance computation method is also sufficient (assuming, of course, that all portions of the balance were computed using the same method).

7(a)(6) Amount of Finance Charge and Other Charges

7(a)(6)(i) Finance Charges

1. *Total.* A total finance charge amount for the plan is not required.

2. *Itemization—types of finance charges.* Each type of finance charge (such as periodic rates, transaction charges, and minimum charges) imposed during the cycle must be separately itemized; for example, disclosure of only a combined finance charge attributable to both a minimum charge and transaction charges would not be permissible. Finance charges of the same type may be disclosed, however, individually or as a total. For example, five transaction charges of $1 may be listed separately or as $5.

3. *Itemization—different periodic rates.* Whether different periodic rates are applicable to different types of transactions or to different balance ranges, the creditor may give the finance charge attributable to each rate or may give a total finance charge amount. For example, if a creditor charges 1.5% per month on the first $500 of a balance and 1% per month on amounts over $500, the creditor may itemize the two components ($7.50 and $1.00) of the $8.50 charge, or may disclose $8.50.

4. *Multifeatured plans.* In a multifeatured plan, in disclosing the amount of the finance charge attributable to the application of periodic rates no total periodic rate disclosure for the entire plan need be given.

5. *Finance charges not added to account.* A finance charge that is not included in the new balance because it is payable to a third party (such as required life insurance) must still be shown on the periodic statement as a finance charge.

6. *Finance charges other than periodic rates.* See comment 6(a)(1)(iv)–1 for examples.

7. *Accrued finance charges allocated from payments.* Some plans provide that the amount of the finance charge that has accrued since the consumer's last payment is directly deducted from each new payment, rather than being separately added to each statement and therefore reflected as an increase in the obligation. In such a plan, no disclosure is required of finance charges that have accrued since the last payment.

8. *Start-up fees.* Points, loan fees, and similar finance charges relating to the opening of the account that are paid prior to the issuance of the first periodic statement need not be disclosed on the periodic statement. If, however, these charges are financed as part of the plan, including charges that are paid out of the first advance, the charges must be disclosed as part of the finance charge on the first periodic statement. However, they need not be factored into the annual percentage rate. (*See* § 1026.14(c)(3).)

7(a)(6)(ii) Other Charges

1. *Identification.* In identifying any *other charges* actually imposed during the billing cycle, the type is adequately described as *late charge* or *membership fee,* for example. Similarly, *closing costs* or *settlement costs,* for example, may be used to describe charges imposed in connection with real estate transactions that are excluded from the finance charge under § 1026.4(c)(7), if the same term (such as *closing costs*) was used in the initial disclosures and if the creditor chose to itemize and individually disclose the costs included in that term. Even though the taxes and filing or notary fees excluded from the finance charge under § 1026.4(e) are not required to be disclosed as *other charges* under § 1026.6(a)(2), these charges may be included in the amount shown as *closing costs* or *settlement costs* on the periodic statement, if the charges were itemized and

disclosed as part of the *closing costs* or *settlement costs* on the initial disclosure statement. (*See* comment 6(a)(2)–1 for examples of *other charges.*)

2. *Date.* The date of imposing or debiting *other charges* need not be disclosed.

3. *Total.* Disclosure of the total amount of other charges is optional.

4. *Itemization—types of other charges.* Each type of *other charge* (such as late-payment charges, over-the-credit-limit charges, and membership fees) imposed during the cycle must be separately itemized; for example, disclosure of only a total of *other charges* attributable to both an over-the-credit-limit charge and a late-payment charge would not be permissible. *Other charges* of the same type may be disclosed, however, individually or as a total. For example, three fees of $3 for providing copies related to the resolution of a billing error could be listed separately or as $9.

7(a)(7) Annual Percentage Rate

1. *Plans subject to the requirements of § 1026.40.* For home-equity plans subject to the requirements of § 1026.40, creditors are not required to disclose an effective annual percentage rate. Creditors that state an annualized rate in addition to the corresponding annual percentage rate required by § 1026.7(a)(4) must calculate that rate in accordance with § 1026.14(c).

2. *Labels.* Creditors that choose to disclose an annual percentage rate calculated under § 1026.14(c) and label the figure as ''annual percentage rate'' must label the periodic rate expressed as an annualized rate as the ''corresponding APR,'' ''nominal APR,'' or a similar phrase as provided in comment 7(a)(4)–4. Creditors also comply with the label requirement if the rate calculated under § 1026.14(c) is described as the ''effective APR'' or something similar. For those creditors, the periodic rate expressed as an annualized rate could be labeled ''annual percentage rate,'' consistent with the requirement under § 1026.7(b)(4). If the two rates represent different values, creditors must label the rates differently to meet the clear and conspicuous standard under § 1026.5(a)(1).

7(a)(8) Grace Period

1. *Terminology.* Although the creditor is required to indicate any time period the consumer may have to pay the balance outstanding without incurring additional finance charges, no specific wording is required, so long as the language used is consistent with that used on the account-opening disclosure statement. For example, ''To avoid additional finance charges, pay the new balance before ____'' would suffice.

7(a)(9) Address for Notice of Billing Errors

1. *Terminology.* The periodic statement should indicate the general purpose for the address for billing-error inquiries, although a detailed explanation or particular wording is not required.

2. *Telephone number.* A telephone number, email address, or Web site location may be included, but the mailing address for billing-error inquiries, which is the required disclosure, must be clear and conspicuous. The address is deemed to be clear and conspicuous if a precautionary instruction is included that telephoning or notifying the creditor by email or Web site will not preserve the consumer's billing rights, unless the creditor has agreed to treat billing error notices provided by electronic means as written notices, in which case the precautionary instruction is required only for telephoning.

7(a)(10) Closing Date of Billing Cycle; New Balance

1. *Credit balances.* See comment 7(a)(1)–1.

2. *Multifeatured plans.* In a multifeatured plan, the new balance may be disclosed for each feature or for the plan as a whole. If separate new balances are disclosed, a total new balance is optional.

3. *Accrued finance charges allocated from payments.* Some plans provide that the amount of the finance charge that has accrued since the consumer's last payment is directly deducted from each new payment, rather than being separately added to each statement and therefore reflected as an increase in the obligation. In such a plan, the new balance need not reflect finance charges accrued since the last payment.

7(b) Rules Affecting Open-End (Not Home-Secured) Plans

1. *Deferred interest or similar transactions.* Creditors offer a variety of payment plans for purchases that permit consumers to avoid interest charges if the purchase balance is paid in full by a certain date. ''Deferred interest'' has the same meaning as in § 1026.16(h)(2) and associated commentary. The following provides guidance for a deferred interest or similar plan where, for example, no interest charge is imposed on a $500 purchase made in January if the $500 balance is paid by July 31.

i. *Annual percentage rates.* Under § 1026.7(b)(4), creditors must disclose each annual percentage rate that may be used to compute the interest charge. Under some plans with a deferred interest or similar feature, if the deferred interest balance is not paid by a certain date, July 31 in this example, interest charges applicable to the billing cycles between the date of purchase in January and July 31 may be imposed. Annual percentage rates that may apply to the deferred interest balance ($500 in this example) if the balance is not paid in full by July 31 must appear on periodic statements for the billing cycles between the date of purchase and July 31. However, if the consumer does not pay the deferred interest balance by July 31, the creditor is not required to identify, on the periodic statement disclosing the interest charge for the deferred interest balance, annual percentage rates that have been disclosed in previous billing cycles between the date of purchase and July 31.

ii. *Balances subject to periodic rates.* Under § 1026.7(b)(5), creditors must disclose the balances subject to interest during a billing cycle. The deferred interest balance ($500 in this example) is not subject to interest for billing cycles between the date of purchase and July 31 in this example. Periodic statements sent for those billing cycles should not include the deferred interest balance in the balance disclosed under § 1026.7(b)(5). This amount must be separately disclosed on periodic statements and identified by a term other than the term used to identify the balance disclosed under § 1026.7(b)(5) (such as ''deferred interest balance''). During any billing cycle in which an interest charge on the deferred interest balance is debited to the account, the balance disclosed under § 1026.7(b)(5) should include the deferred interest balance for that billing cycle.

iii. *Amount of interest charge.* Under § 1026.7(b)(6)(ii), creditors must disclose interest charges imposed during a billing cycle. For some deferred interest purchases, the creditor may impose interest from the date of purchase if the deferred interest balance ($500 in this example) is not paid in full by July 31 in this example, but otherwise will not impose interest for billing cycles between the date of purchase and July 31. Periodic statements for billing cycles preceding July 31 in this example should not include in the interest charge disclosed under § 1026.7(b)(6)(ii) the amounts a consumer may owe if the deferred interest balance is not paid in full by July 31. In this example, the February periodic statement should not identify as interest charges interest attributable to the $500 January purchase. This amount must be separately disclosed on periodic statements and identified by a term other than ''interest charge'' (such as ''contingent interest charge'' or ''deferred interest charge''). The interest charge on a deferred interest balance should be reflected on the periodic statement under § 1026.7(b)(6)(ii) for the billing cycle in which the interest charge is debited to the account.

iv. *Due date to avoid obligation for finance charges under a deferred interest or similar program.* Section 1026.7(b)(14) requires disclosure on periodic statements of the date by which any outstanding balance subject to a deferred interest or similar program must be paid in full in order to avoid the obligation for finance charges on such balance. This disclosure must appear on the front of any page of each periodic statement issued during the deferred interest period beginning with the first periodic statement issued during the deferred interest period that reflects the deferred interest or similar transaction.

7(b)(1) Previous Balance

1. *Credit balances.* If the previous balance is a credit balance, it must be disclosed in such a way so as to inform the consumer that it is a credit balance, rather than a debit balance.

2. *Multifeatured plans.* In a multifeatured plan, the previous balance may be disclosed either as an aggregate balance for the account or as separate balances for each feature (for example, a previous balance for purchases and a previous balance for cash advances). If separate balances are disclosed, a total previous balance is optional.

3. *Accrued finance charges allocated from payments.* Some open-end credit plans provide that the amount of the finance charge that has accrued since the consumer's last payment is directly deducted from each new payment, rather than being separately added to each statement and reflected as an increase

in the obligation. In such a plan, the previous balance need not reflect finance charges accrued since the last payment.

7(b)(2) Identification of Transactions

1. *Multifeatured plans.* Creditors may, but are not required to, arrange transactions by feature (such as disclosing purchase transactions separately from cash advance transactions). Pursuant to § 1026.7(b)(6), however, creditors must group all fees and all interest separately from transactions and may not disclose any fees or interest charges with transactions.

2. *Automated teller machine (ATM) charges imposed by other institutions in shared or interchange systems.* A charge imposed on the cardholder by an institution other than the card issuer for the use of the other institution's ATM in a shared or interchange system and included by the terminal-operating institution in the amount of the transaction need not be separately disclosed on the periodic statement.

7(b)(3) Credits

1. *Identification—sufficiency.* The creditor need not describe each credit by type (returned merchandise, rebate of finance charge, *etc.*)—''credit'' would suffice—except if the creditor is using the periodic statement to satisfy the billing-error correction notice requirement. (*See* the commentary to § 1026.13(e) and (f).) Credits may be distinguished from transactions in any way that is clear and conspicuous, for example, by use of debit and credit columns or by use of plus signs and/or minus signs.

2. *Date.* If only one date is disclosed (that is, the crediting date as required by the regulation), no further identification of that date is necessary. More than one date may be disclosed for a single entry, as long as it is clear which date represents the date on which credit was given.

3. *Totals.* A total of amounts credited during the billing cycle is not required.

7(b)(4) Periodic Rates

1. *Disclosure of periodic interest rates—whether or not actually applied.* Except as provided in § 1026.7(b)(4)(ii), any periodic interest rate that may be used to compute finance charges, expressed as and labeled ''Annual Percentage Rate,'' must be disclosed whether or not it is applied during the billing cycle. For example:

i. If the consumer's account has both a purchase feature and a cash advance feature, the creditor must disclose the annual percentage rate for each, even if the consumer only makes purchases on the account during the billing cycle.

ii. If the annual percentage rate varies (such as when it is tied to a particular index), the creditor must disclose each annual percentage rate in effect during the cycle for which the statement was issued.

2. *Disclosure of periodic interest rates required only if imposition possible.* With regard to the periodic interest rate disclosure (and its corresponding annual percentage rate), only rates that could have been imposed during the billing cycle reflected on the periodic statement need to be disclosed. For example:

i. If the creditor is changing annual percentage rates effective during the next billing cycle (either because it is changing terms or because of a variable-rate plan), the annual percentage rates required to be disclosed under § 1026.7(b)(4) are only those in effect during the billing cycle reflected on the periodic statement. For example, if the annual percentage rate applied during May was 18%, but the creditor will increase the rate to 21% effective June 1, 18% is the only required disclosure under § 1026.7(b)(4) for the periodic statement reflecting the May account activity.

ii. If the consumer has an overdraft line that might later be expanded upon the consumer's request to include secured advances, the rates for the secured advance feature need not be given until such time as the consumer has requested and received access to the additional feature.

iii. If annual percentage rates applicable to a particular type of transaction changed after a certain date and the old rate is only being applied to transactions that took place prior to that date, the creditor need not continue to disclose the old rate for those consumers that have no outstanding balances to which that rate could be applied.

3. *Multiple rates—same transaction.* If two or more periodic rates are applied to the same balance for the same type of transaction (for example, if the interest charge consists of a monthly periodic interest rate of 1.5% applied to the outstanding balance and a required credit life insurance component calculated at 0.1% per month on the same outstanding balance), creditors must disclose the periodic interest rate, expressed as an 18% annual percentage rate and the range of balances to which it is applicable. Costs attributable to the credit life insurance component must be disclosed as a fee under § 1026.7(b)(6)(iii).

4. *Fees.* Creditors that identify fees in accordance with § 1026.7(b)(6)(iii) need not identify the periodic rate at which a fee would accrue if the fee remains unpaid. For example, assume a fee is imposed for a late payment in the previous cycle and that the fee, unpaid, would be included in the purchases balance and accrue interest at the rate for purchases. The creditor need not separately disclose that the purchase rate applies to the portion of the purchases balance attributable to the unpaid fee.

5. *Ranges of balances. See* comment 6(b)(4)(i)(B)–1. A creditor is not required to adjust the range of balances disclosure to reflect the balance below which only a minimum charge applies.

6. *Deferred interest transactions. See* comment 7(b)–1.i.

7(b)(5) Balance on Which Finance Charge Computed

1. *Split rates applied to balance ranges.* If split rates were applied to a balance because different portions of the balance fall within two or more balance ranges, the creditor need not separately disclose the portions of the balance subject to such different rates since the range of balances to which the rates apply has been separately disclosed. For example, a creditor could disclose a balance of $700 for purchases even though a monthly periodic rate of 1.5% applied to the first $500, and a monthly periodic rate of 1% to the remainder. This option to disclose a combined balance does not apply when the interest charge is computed by applying the split rates to each day's balance (in contrast, for example, to applying the rates to the average daily balance). In that case, the balances must be disclosed using any of the options that are available if two or more daily rates are imposed. (*See* comment 7(b)(5)–4.)

2. *Monthly rate on average daily balance.* Creditors may apply a monthly periodic rate to an average daily balance.

3. *Multifeatured plans.* In a multifeatured plan, the creditor must disclose a separate balance (or balances, as applicable) to which a periodic rate was applied for each feature. Separate balances are not required, however, merely because a grace period is available for some features but not others. A total balance for the entire plan is optional. This does not affect how many balances the creditor must disclose—or may disclose—within each feature. (See, for example, comments 7(b)(5)–4 and 7(b)(4)–5.)

4. *Daily rate on daily balance.* If a finance charge is computed on the balance each day by application of one or more daily periodic interest rates, the balance on which the interest charge was computed may be disclosed in any of the following ways for each feature:

i. If a single daily periodic interest rate is imposed, the balance to which it is applicable may be stated as:

A. A balance for each day in the billing cycle.

B. A balance for each day in the billing cycle on which the balance in the account changes.

C. The sum of the daily balances during the billing cycle.

D. The average daily balance during the billing cycle, in which case the creditor may, at its option, explain that the average daily balance is or can be multiplied by the number of days in the billing cycle and the periodic rate applied to the product to determine the amount of interest.

ii. If two or more daily periodic interest rates may be imposed, the balances to which the rates are applicable may be stated as:

A. A balance for each day in the billing cycle.

B. A balance for each day in the billing cycle on which the balance in the account changes.

C. Two or more average daily balances, each applicable to the daily periodic interest rates imposed for the time that those rates were in effect. The creditor may, at its option, explain that interest is or may be determined by (*1*) multiplying each of the average balances by the number of days in the billing cycle (or if the daily rate varied during the cycle, by multiplying by the number of days the applicable rate was in effect), (*2*) multiplying each of the results by the applicable daily periodic rate, and (*3*) adding these products together.

5. *Information to compute balance.* In connection with disclosing the interest charge balance, the creditor need not give the consumer all of the information necessary to compute the balance if that information is not otherwise required to be disclosed. For example, if current purchases are included from the date they are posted to the account, the posting date need not be disclosed.

6. *Non-deduction of credits.* The creditor need not specifically identify the total dollar amount of credits not deducted in computing the finance charge balance. Disclosure of the amount of credits not deducted is accomplished by listing the credits (§ 1026.7(b)(3)) and indicating which credits will not be deducted in determining the balance (for example, ''credits after the 15th of the month are not deducted in computing the interest charge.'').

7. *Use of one balance computation method explanation when multiple balances disclosed.* Sometimes the creditor will disclose more than one balance to which a periodic rate was applied, even though each balance was computed using the same balance computation method. For example, if a plan involves purchases and cash advances that are subject to different rates, more than one balance must be disclosed, even though the same computation method is used for determining the balance for each feature. In these cases, one explanation or a single identification of the name of the balance computation method is sufficient. Sometimes the creditor separately discloses the portions of the balance that are subject to different rates because different portions of the balance fall within two or more balance ranges, even when a combined balance disclosure would be permitted under comment 7(b)(5)–1. In these cases, one explanation or a single identification of the name of the balance computation method is also sufficient (assuming, of course, that all portions of the balance were computed using the same method). In these cases, a creditor may use an appropriate name listed in § 1026.60(g) (*e.g.,* ''*average daily balance (including new purchases)*'') as the single identification of the name of the balance computation method applicable to all features, even though the name only refers to purchases. For example, if a creditor uses the average daily balance method including new transactions for all features, a creditor may use the name ''*average daily balance (including new purchases)*'' listed in § 1026.60(g)(i) to satisfy the requirement to disclose the name of the balance computation method for all features. As an alternative, in this situation, a creditor may revise the balance computation names listed in § 1026.60(g) to refer more broadly to all new credit transactions, such as using the language ''new transactions'' or ''current transactions'' (*e.g.,* ''*average daily balance (including new transactions)*''), rather than simply referring to new purchases, when the same method is used to calculate the balances for all features of the account.

8. *Use of balance computation names in § 1026.60(g) for balances other than purchases.* The names of the balance computation methods listed in § 1026.60(g) describe balance computation methods for purchases. When a creditor is disclosing the name of the balance computation methods separately for each feature, in using the names listed in § 1026.60(g) to satisfy the requirements of § 1026.7(b)(5) for features other than purchases, a creditor must revise the names listed in § 1026.60(g) to refer to the other features. For example, when disclosing the name of the balance computation method applicable to cash advances, a creditor must revise the name listed in § 1026.60(g)(i) to disclose it as ''*average daily balance (including new cash advances)*'' when the balance for cash advances is figured by adding the outstanding balance (including new cash advances and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. Similarly, a creditor must revise the name listed in § 1026.60(g)(ii) to disclose it as ''*average daily balance (excluding new cash advances)*'' when the balance for cash advances is figured by adding the outstanding balance (excluding new cash advances and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. *See* comment 7(b)(5)–7 for guidance on the use of one balance computation method explanation or name when multiple balances are disclosed.

7(b)(6) Charges Imposed

1. *Examples of charges. See* commentary to § 1026.6(b)(3).

2. *Fees.* Costs attributable to periodic rates other than interest charges shall be disclosed as a fee. For example, if a consumer obtains credit life insurance that is calculated at 0.1% per month on an outstanding balance and a monthly interest rate of 1.5% applies to the same balance, the creditor must disclose the dollar cost attributable to interest as an ''interest charge'' and the credit insurance cost as a ''fee.''

3. *Total fees and interest charged for calendar year to date.* i. *Monthly statements.* Some creditors send monthly statements but the statement periods do not coincide with the calendar month. For creditors sending monthly statements, the following comply with the requirement to provide calendar year-to-date totals.

A. A creditor may disclose calendar-year-to-date totals at the end of the calendar year by separately aggregating finance charges attributable to periodic interest rates and fees for 12 monthly cycles, starting with the period that begins during January and finishing with the period that begins during December. For example, if statement periods begin on the 10th day of each month, the statement covering December 10, 2011 through January 9, 2012, may disclose the separate year-to-date totals for interest charged and fees imposed from January 10, 2011, through January 9, 2012. Alternatively, the creditor could provide a statement for the cycle ending January 9, 2012, showing the separate year-to-date totals for interest charged and fees imposed January 1, 2011, through December 31, 2011.

B. A creditor may disclose calendar-year-to-date totals at the end of the calendar year by separately aggregating finance charges attributable to periodic interest rates and fees for 12 monthly cycles, starting with the period that begins during December and finishing with the period that begins during November. For example, if statement periods begin on the 10th day of each month, the statement covering November 10, 2011 through December 9, 2011, may disclose the separate year-to-date totals for interest charged and fees imposed from December 10, 2010, through December 9, 2011.

ii. *Quarterly statements.* Creditors issuing quarterly statements may apply the guidance set forth for monthly statements to comply with the requirement to provide calendar year-to-date totals on quarterly statements.

4. *Minimum charge in lieu of interest.* A minimum charge imposed if a charge would otherwise have been determined by applying a periodic rate to a balance except for the fact that such charge is smaller than the minimum must be disclosed as a fee. For example, assume a creditor imposes a minimum charge of $1.50 in lieu of interest if the calculated interest for a billing period is less than that minimum charge. If the interest calculated on a consumer's account for a particular billing period is 50 cents, the minimum charge of $1.50 would apply. In this case, the entire $1.50 would be disclosed as a fee; the periodic statement would reflect the $1.50 as a fee, and $0 in interest.

5. *Adjustments to year-to-date totals.* In some cases, a creditor may provide a statement for the current period reflecting that fees or interest charges imposed during a previous period were waived or reversed and credited to the account. Creditors may, but are not required to, reflect the adjustment in the year-to-date totals, nor, if an adjustment is made, to provide an explanation about the reason for the adjustment. Such adjustments should not affect the total fees or interest charges imposed for the current statement period.

6. *Acquired accounts.* An institution that acquires an account or plan must include, as applicable, fees and charges imposed on the account or plan prior to the acquisition in the aggregate disclosures provided under § 1026.7(b)(6) for the acquired account or plan. Alternatively, the institution may provide separate totals reflecting activity prior and subsequent to the account or plan acquisition. For example, a creditor that acquires an account or plan on August 12 of a given calendar year may provide one total for the period from January 1 to August 11 and a separate total for the period beginning on August 12.

7. *Account upgrades.* A creditor that upgrades, or otherwise changes, a consumer's plan to a different open-end credit plan must include, as applicable, fees and charges imposed for that portion of the calendar year prior to the upgrade or change in the consumer's plan in the aggregate disclosures provided pursuant to § 1026.7(b)(6) for the new plan. For example, assume a consumer has incurred $125 in fees for the calendar year to date for a retail credit card account, which is then replaced by a cobranded credit card account also issued by the creditor. In this case, the creditor must reflect the $125 in fees incurred prior to the replacement of the retail credit card account in the calendar year-to-date totals provided for the cobranded credit card account. Alternatively, the institution may provide two separate totals reflecting activity prior and subsequent to the plan upgrade or change.

7(b)(7) Change-in-Terms and Increased Penalty Rate Summary for Open-End (Not Home-Secured) Plan

1. *Location of summary tables.* If a change-in-terms notice required by § 1026.9(c)(2) is provided on or with a periodic statement, a

tabular summary of key changes must appear on the front of the statement. Similarly, if a notice of a rate increase due to delinquency or default or as a penalty required by § 1026.9(g)(1) is provided on or with a periodic statement, information required to be provided about the increase, presented in a table, must appear on the front of the statement.

7(b)(8) Grace Period

1. *Terminology.* In describing the grace period, the language used must be consistent with that used on the account-opening disclosure statement. (*See* § 1026.5(a)(2)(i).)

2. *Deferred interest transactions. See* comment 7(b)–1.iv.

3. *Limitation on the imposition of finance charges in § 1026.54.* Section 1026.7(b)(8) does not require a card issuer to disclose the limitations on the imposition of finance charges as a result of a loss of a grace period in § 1026.54, or the impact of payment allocation on whether interest is charged on transactions as a result of a loss of a grace period.

7(b)(9) Address for Notice of Billing Errors

1. *Terminology.* The periodic statement should indicate the general purpose for the address for billing-error inquiries, although a detailed explanation or particular wording is not required.

2. *Telephone number.* A telephone number, email address, or Web site location may be included, but the mailing address for billing-error inquiries, which is the required disclosure, must be clear and conspicuous. The address is deemed to be clear and conspicuous if a precautionary instruction is included that telephoning or notifying the creditor by email or Web site will not preserve the consumer's billing rights, unless the creditor has agreed to treat billing error notices provided by electronic means as written notices, in which case the precautionary instruction is required only for telephoning.

7(b)(10) Closing Date of Billing Cycle; New Balance

1. *Credit balances. See* comment 7(b)(1)–1.

2. *Multifeatured plans.* In a multifeatured plan, the new balance may be disclosed for each feature or for the plan as a whole. If separate new balances are disclosed, a total new balance is optional.

3. *Accrued finance charges allocated from payments.* Some plans provide that the amount of the finance charge that has accrued since the consumer's last payment is directly deducted from each new payment, rather than being separately added to each statement and therefore reflected as an increase in the obligation. In such a plan, the new balance need not reflect finance charges accrued since the last payment.

7(b)(11) Due Date; Late Payment Costs

1. *Informal periods affecting late payments.* Although the terms of the account agreement may provide that a card issuer may assess a late payment fee if a payment is not received by a certain date, the card issuer may have an informal policy or practice that delays the assessment of the late payment fee for payments received a brief period of time after the date upon which a card issuer has the contractual right to impose the fee. A card issuer must disclose the due date according to the legal obligation between the parties, and need not consider the end of an informal ''courtesy period'' as the due date under § 1026.7(b)(11).

2. *Assessment of late payment fees.* Some state or other laws require that a certain number of days must elapse following a due date before a late payment fee may be imposed. In addition, a card issuer may be restricted by the terms of the account agreement from imposing a late payment fee until a payment is late for a certain number of days following a due date. For example, assume a payment is due on March 10 and the account agreement or state law provides that a late payment fee cannot be assessed before March 21. A card issuer must disclose the due date under the terms of the legal obligation (March 10 in this example), and not a date different than the due date, such as when the card issuer is restricted by the account agreement or state or other law from imposing a late payment fee unless a payment is late for a certain number of days following the due date (March 21 in this example). Consumers' rights under state law to avoid the imposition of late payment fees during a specified period following a due date are unaffected by the disclosure requirement. In this example, the card issuer would disclose March 10 as the due date for purposes of § 1026.7(b)(11), but could not, under state law, assess a late payment fee before March 21.

3. *Fee or rate triggered by multiple events.* If a late payment fee or penalty rate is triggered after multiple events, such as two late payments in six months, the card issuer may, but is not required to, disclose the late payment and penalty rate disclosure each month. The disclosures must be included on any periodic statement for which a late payment could trigger the late payment fee or penalty rate, such as after the consumer made one late payment in this example. For example, if a cardholder has already made one late payment, the disclosure must be on each statement for the following five billing cycles.

4. *Range of late fees or penalty rates.* A card issuer that imposes a range of late payment fees or rates on a credit card account under an open-end (not home-secured) consumer credit plan may state the highest fee or rate along with an indication lower fees or rates could be imposed. For example, a phrase indicating the late payment fee could be ''up to $29'' complies with this requirement.

5. *Penalty rate in effect.* If the highest penalty rate has previously been triggered on an account, the card issuer may, but is not required to, delete the amount of the penalty rate and the warning that the rate may be imposed for an untimely payment, as not applicable. Alternatively, the card issuer may, but is not required to, modify the language to indicate that the penalty rate has been increased due to previous late payments (if applicable).

6. *Same day each month.* The requirement that the due date be the same day each month means that the due date must generally be the same numerical date. For example, a consumer's due date could be the 25th of every month. In contrast, a due date that is the same relative date but not numerical date each month, such as the third Tuesday of the month, generally would not comply with this requirement. However, a consumer's due date may be the last day of each month, even though that date will not be the same numerical date. For example, if a consumer's due date is the last day of each month, it will fall on February 28th (or February 29th in a leap year) and on August 31st.

7. *Change in due date.* A creditor may adjust a consumer's due date from time to time provided that the new due date will be the same numerical date each month on an ongoing basis. For example, a creditor may choose to honor a consumer's request to change from a due date that is the 20th of each month to the 5th of each month, or may choose to change a consumer's due date from time to time for operational reasons. See comment 2(a)(4)–3 for guidance on transitional billing cycles.

8. *Billing cycles longer than one month.* The requirement that the due date be the same day each month does not prohibit billing cycles that are two or three months, provided that the due date for each billing cycle is on the same numerical date of the month. For example, a creditor that establishes two-month billing cycles could send a consumer periodic statements disclosing due dates of January 25, March 25, and May 25.

9. *Payment due date when the creditor does not accept or receive payments by mail.* If the due date in a given month falls on a day on which the creditor does not receive or accept payments by mail and the creditor is required to treat a payment received the next business day as timely pursuant to § 1026.10(d), the creditor must disclose the due date according to the legal obligation between the parties, not the date as of which the creditor is permitted to treat the payment as late. For example, assume that the consumer's due date is the 4th of every month and the creditor does not accept or receive payments by mail on Thursday, July 4. Pursuant to § 1026.10(d), the creditor may not treat a mailed payment received on the following business day, Friday, July 5, as late for any purpose. The creditor must nonetheless disclose July 4 as the due date on the periodic statement and may not disclose a July 5 due date.

7(b)(12) Repayment Disclosures

1. *Rounding.* In disclosing on the periodic statement the minimum payment total cost estimate, the estimated monthly payment for repayment in 36 months, the total cost estimate for repayment in 36 months, and the savings estimate for repayment in 36 months under § 1026.7(b)(12)(i) or (b)(12)(ii) as applicable, a card issuer, at its option, must either round these disclosures to the nearest whole dollar or to the nearest cent. Nonetheless, an issuer's rounding for all of these disclosures must be consistent. An issuer may round all of these disclosures to the nearest whole dollar when disclosing them on the periodic statement, or may round all of these disclosures to the nearest cent. An issuer may not, however, round some of the disclosures to the nearest whole

dollar, while rounding other disclosures to the nearest cent.

Paragraph 7(b)(12)(i)(F)

1. *Minimum payment repayment estimate disclosed on the periodic statement is three years or less.* Section 1026.7(b)(12)(i)(F)(*2*)(*i*) provides that a credit card issuer is not required to provide the disclosures related to repayment in 36 months if the minimum payment repayment estimate disclosed under § 1026.7(b)(12)(i)(B) after rounding is 3 years or less. For example, if the minimum payment repayment estimate is 2 years 6 months to 3 years 5 months, issuers would be required under § 1026.7(b)(12)(i)(B) to disclose that it would take 3 years to pay off the balance in full if making only the minimum payment. In these cases, an issuer would not be required to disclose the 36-month disclosures on the periodic statement because the minimum payment repayment estimate disclosed to the consumer on the periodic statement (after rounding) is 3 years or less.

7(b)(12)(iv) Provision of Information About Credit Counseling Services

1. *Approved organizations.* Section 1026.7(b)(12)(iv)(A) requires card issuers to provide information regarding at least three organizations that have been approved by the United States Trustee or a bankruptcy administrator pursuant to 11 U.S.C. 111(a)(1) to provide credit counseling services in, at the card issuer's option, either the state in which the billing address for the account is located or the state specified by the consumer. A card issuer does not satisfy the requirements in § 1026.7(b)(12)(iv)(A) by providing information regarding providers that have been approved pursuant to 11 U.S.C. 111(a)(2) to offer personal financial management courses.

2. *Information regarding approved organizations.* i. *Provision of information obtained from United States Trustee or bankruptcy administrator.* A card issuer complies with the requirements of § 1026.7(b)(12)(iv)(A) if, through the toll-free number disclosed pursuant to § 1026.7(b)(12)(i) or (b)(12)(ii), it provides the consumer with information obtained from the United States Trustee or a bankruptcy administrator, such as information obtained from the Web site operated by the United States Trustee. Section 1026.7(b)(12)(iv)(A) does not require a card issuer to provide information that is not available from the United States Trustee or a bankruptcy administrator. If, for example, the Web site address for an organization approved by the United States Trustee is not available from the Web site operated by the United States Trustee, a card issuer is not required to provide a Web site address for that organization. However, § 1026.7(b)(12)(iv)(B) requires the card issuer to, at least annually, update the information it provides for consistency with the information provided by the United States Trustee or a bankruptcy administrator.

ii. *Provision of information consistent with request of approved organization.* If requested by an approved organization, a card issuer may at its option provide, in addition to the name of the organization obtained from the United States Trustee or a bankruptcy administrator, another name used by that organization through the toll-free number disclosed pursuant to § 1026.7(b)(12)(i) or (b)(12)(ii). In addition, if requested by an approved organization, a card issuer may at its option provide through the toll-free number disclosed pursuant to § 1026.7(b)(12)(i) or (b)(12)(ii) a street address, telephone number, or Web site address for the organization that is different than the street address, telephone number, or Web site address obtained from the United States Trustee or a bankruptcy administrator. However, if requested by an approved organization, a card issuer must not provide information regarding that organization through the toll-free number disclosed pursuant to § 1026.7(b)(12)(i) or (b)(12)(ii).

iii. *Information regarding approved organizations that provide credit counseling services in a language other than English.* A card issuer may at its option provide through the toll-free number disclosed pursuant to § 1026.7(b)(12)(i) or (b)(12)(ii) information regarding approved organizations that provide credit counseling services in languages other than English. In the alternative, a card issuer may at its option state that such information is available from the Web site operated by the United States Trustee. Disclosing this Web site address does not by itself constitute a statement that organizations have been approved by the United States Trustee for purposes of comment 7(b)(12)(iv)–2.iv.

iv. *Statements regarding approval by the United States Trustee or a bankruptcy administrator.* Section 1026.7(b)(12)(iv) does not require a card issuer to disclose through the toll-free number disclosed pursuant to § 1026.7(b)(12)(i) or (b)(12)(ii) that organizations have been approved by the United States Trustee or a bankruptcy administrator. However, if a card issuer chooses to make such a disclosure, § 1026.7(b)(12)(iv) requires that the card issuer also disclose that:

A. The United States Trustee or a bankruptcy administrator has determined that the organizations meet the minimum requirements for nonprofit pre-bankruptcy budget and credit counseling;

B. The organizations may provide other credit counseling services that have not been reviewed by the United States Trustee or a bankruptcy administrator; and

C. The United States Trustee or the bankruptcy administrator does not endorse or recommend any particular organization.

3. *Automated response systems or devices.* At their option, card issuers may use toll-free telephone numbers that connect consumers to automated systems, such as an interactive voice response system, through which consumers may obtain the information required by § 1026.7(b)(12)(iv) by inputting information using a touch-tone telephone or similar device.

4. *Toll-free telephone number.* A card issuer may provide a toll-free telephone number that is designed to handle customer service calls generally, so long as the option to receive the information required by § 1026.7(b)(12)(iv) is prominently disclosed to the consumer. For automated systems, the option to receive the information required by § 1026.7(b)(12)(iv) is prominently disclosed to the consumer if it is listed as one of the options in the first menu of options given to the consumer, such as ''Press or say '3' if you would like information about credit counseling services.'' If the automated system permits callers to select the language in which the call is conducted and in which information is provided, the menu to select the language may precede the menu with the option to receive information about accessing credit counseling services.

5. *Third parties.* At their option, card issuers may use a third party to establish and maintain a toll-free telephone number for use by the issuer to provide the information required by § 1026.7(b)(12)(iv).

6. *Web site address.* When making the repayment disclosures on the periodic statement pursuant to § 1026.7(b)(12), a card issuer at its option may also include a reference to a Web site address (in addition to the toll-free telephone number) where its customers may obtain the information required by § 1026.7(b)(12)(iv), so long as the information provided on the Web site complies with § 1026.7(b)(12)(iv). The Web site address disclosed must take consumers directly to the Web page where information about accessing credit counseling may be obtained. In the alternative, the card issuer may disclose the Web site address for the Web page operated by the United States Trustee where consumers may obtain information about approved credit counseling organizations. Disclosing this Web site address does not by itself constitute a statement that organizations have been approved by the United States Trustee for purposes of comment 7(b)(12)(iv)–2.iv.

7. *Advertising or marketing information.* If a consumer requests information about credit counseling services, the card issuer may not provide advertisements or marketing materials to the consumer (except for providing the name of the issuer) prior to providing the information required by § 1026.7(b)(12)(iv). Educational materials that do not solicit business are not considered advertisements or marketing materials for this purpose. Examples:

i. *Toll-free telephone number.* As described in comment 7(b)(12)(iv)–4, an issuer may provide a toll-free telephone number that is designed to handle customer service calls generally, so long as the option to receive the information required by § 1026.7(b)(12)(iv) through that toll-free telephone number is prominently disclosed to the consumer. Once the consumer selects the option to receive the information required by § 1026.7(b)(12)(iv), the issuer may not provide advertisements or marketing materials to the consumer (except for providing the name of the issuer) prior to providing the required information.

ii. *Web page.* If the issuer discloses a link to a Web site address as part of the disclosures pursuant to comment 7(b)(12)(iv)–6, the issuer may not provide advertisements or marketing materials (except for providing the name of the issuer) on the Web page accessed by the address prior to providing the information required by § 1026.7(b)(12)(iv).

7(b)(12)(v) Exemptions

1. *Billing cycle where paying the minimum payment due for that billing cycle will pay the outstanding balance on the account for that billing cycle.* Under § 1026.7(b)(12)(v)(C), a card issuer is exempt from the repayment disclosure requirements set forth in § 1026.7(b)(12) for a particular billing cycle where paying the minimum payment due for that billing cycle will pay the outstanding balance on the account for that billing cycle. For example, if the entire outstanding balance on an account for a particular billing cycle is $20 and the minimum payment is $20, an issuer would not need to comply with the repayment disclosure requirements for that particular billing cycle. In addition, this exemption would apply to a charged-off account where payment of the entire account balance is due immediately.

7(b)(13) Format Requirements

1. *Combined deposit account and credit account statements.* Some financial institutions provide information about deposit account and open-end credit account activity on one periodic statement. For purposes of providing disclosures on the front of the first page of the periodic statement pursuant to § 1026.7(b)(13), the first page of such a combined statement shall be the page on which credit transactions first appear.

Section 1026.8—Identifying Transactions on Periodic Statements

8(a) Sale Credit

1. *Sale credit.* The term ''sale credit'' refers to a purchase in which the consumer uses a credit card or otherwise directly accesses an open-end line of credit (see comment 8(b)–1 if access is by means of a check) to obtain goods or services from a merchant, whether or not the merchant is the card issuer or creditor. ''Sale credit'' includes:

i. The purchase of funds-transfer services (such as a wire transfer) from an intermediary.

ii. The purchase of services from the card issuer or creditor. For the purchase of services that are costs imposed as part of the plan under § 1026.6(b)(3), card issuers and creditors comply with the requirements for identifying transactions under this section by disclosing the fees in accordance with the requirements of § 1026.7(b)(6). For the purchases of services that are not costs imposed as part of the plan, card issuers and creditors may, at their option, identify transactions under this section or in accordance with the requirements of § 1026.7(b)(6).

2. *Amount—transactions not billed in full.* If sale transactions are not billed in full on any single statement, but are billed periodically in precomputed installments, the first periodic statement reflecting the transaction must show either the full amount of the transaction together with the date the transaction actually took place; or the amount of the first installment that was debited to the account together with the date of the transaction or the date on which the first installment was debited to the account. In any event, subsequent periodic statements should reflect each installment due, together with either any other identifying information required by § 1026.8(a) (such as the seller's name and address in a three-party situation) or other appropriate identifying information relating the transaction to the first billing. The debiting date for the particular installment, or the date the transaction took place, may be used as the date of the transaction on these subsequent statements.

3. *Date—when a transaction takes place.* i. If the consumer conducts the transaction in person, the date of the transaction is the calendar date on which the consumer made the purchase or order, or secured the advance.

ii. For transactions billed to the account on an ongoing basis (other than installments to pay a precomputed amount), the date of the transaction is the date on which the amount is debited to the account. This might include, for example, monthly insurance premiums.

iii. For mail, Internet, or telephone orders, a creditor may disclose as the transaction date either the invoice date, the debiting date, or the date the order was placed by telephone or via the Internet.

iv. In a foreign transaction, the debiting date may be considered the transaction date.

4. *Date—sufficiency of description.* i. If the creditor discloses only the date of the transaction, the creditor need not identify it as the ''transaction date.'' If the creditor discloses more than one date (for example, the transaction date and the posting date), the creditor must identify each.

ii. The month and day sufficiently identify the transaction date, unless the posting of the transaction is delayed so long that the year is needed for a clear disclosure to the consumer.

5. *Same or related persons.* i. For purposes of identifying transactions, the term *same or related persons* refers to, for example:

A. Franchised or licensed sellers of a creditor's product or service.

B. Sellers who assign or sell open-end sales accounts to a creditor or arrange for such credit under a plan that allows the consumer to use the credit only in transactions with that seller.

ii. A seller is not related to the creditor merely because the seller and the creditor have an agreement authorizing the seller to honor the creditor's credit card.

6. *Brief identification—sufficiency of description.* The ''brief identification'' provision in § 1026.8(a)(1)(i) requires a designation that will enable the consumer to reconcile the periodic statement with the consumer's own records. In determining the sufficiency of the description, the following rules apply:

i. While item-by-item descriptions are not necessary, reasonable precision is required. For example, ''merchandise,'' ''miscellaneous,'' ''second-hand goods,'' or ''promotional items'' would not suffice.

ii. A reference to a department in a sales establishment that accurately conveys the identification of the types of property or services available in the department is sufficient—for example, ''jewelry,'' or ''sporting goods.''

iii. A number or symbol that is related to an identification list printed elsewhere on the statement that reasonably identifies the transaction with the creditor is sufficient.

7. *Seller's name—sufficiency of description.* The requirement contemplates that the seller's name will appear on the periodic statement in essentially the same form as it appears on transaction documents provided to the consumer at the time of the sale. The seller's name may also be disclosed as, for example:

i. A more complete spelling of the name that was alphabetically abbreviated on the receipt or other credit document.

ii. An alphabetical abbreviation of the name on the periodic statement even if the name appears in a more complete spelling on the receipt or other credit document. Terms that merely indicate the form of a business entity, such as ''Inc.,'' ''Co.,'' or ''Ltd.,'' may always be omitted.

8. *Location of transaction.* i. If the seller has multiple stores or branches within a city, the creditor need not identify the specific branch at which the sale occurred.

ii. When no meaningful address is available because the consumer did not make the purchase at any fixed location of the seller, the creditor may omit the address, or may provide some other identifying designation, such as ''aboard plane,'' ''ABC Airways Flight,'' ''customer's home,'' ''telephone order,'' ''internet order'' or ''mail order.''

8(b) Nonsale credit.

1. *Nonsale credit.* The term ''nonsale credit'' refers to any form of loan credit including, for example:

i. A cash advance.

ii. An advance on a credit plan that is accessed by overdrafts on a checking account.

iii. The use of a ''supplemental credit device'' in the form of a check or draft or the use of the overdraft credit plan accessed by a debit card, even if such use is in connection with a purchase of goods or services.

iv. Miscellaneous debits to remedy mispostings, returned checks, and similar entries.

2. *Amount—overdraft credit plans.* If credit is extended under an overdraft credit plan tied to a checking account or by means of a debit card tied to an overdraft credit plan:

i. The amount to be disclosed is that of the credit extension, not the face amount of the check or the total amount of the debit/credit transaction.

ii. The creditor may disclose the amount of the credit extensions on a cumulative daily basis, rather than the amount attributable to each check or each use of the debit card that accesses the credit plan.

3. *Date of transaction.* See comment 8(a)–4.

4. *Nonsale transaction—sufficiency of identification.* The creditor sufficiently identifies a nonsale transaction by describing the type of advance it represents, such as cash advance, loan, overdraft loan, or any readily understandable trade name for the credit program.

Section 1026.9—Subsequent Disclosure Requirements

9(a) Furnishing Statement of Billing Rights

9(a)(1) Annual Statement

1. *General.* The creditor may provide the annual billing rights statement:

i. By sending it in one billing period per year to each consumer that gets a periodic statement for that period; or

ii. By sending a copy to all of its accountholders sometime during the calendar year but not necessarily all in one billing period (for example, sending the annual notice in connection with renewal cards or when imposing annual membership fees).

2. *Substantially similar.* See the commentary to Model Forms G–3 and G–3(A) in Appendix G to part 1026.

9(a)(2) Alternative Summary Statement

1. *Changing from long-form to short form statement and vice versa.* If the creditor has been sending the long-form annual statement, and subsequently decides to use the alternative summary statement, the first summary statement must be sent no later than 12 months after the last long-form statement was sent. Conversely, if the creditor wants to switch to the long-form, the first long-form statement must be sent no later than 12 months after the last summary statement.

2. *Substantially similar.* See the commentary to Model Forms G–4 and G–4(A) in Appendix G to part 1026.

9(b) Disclosures for Supplemental Credit Access Devices and Additional Features

1. *Credit access device—examples. Credit access device* includes, for example, a blank check, payee-designated check, blank draft or order, or authorization form for issuance of a check; it does not include a check issued payable to a consumer representing loan proceeds or the disbursement of a cash advance.

2. *Credit account feature—examples.* A new credit account *feature* would include, for example:

i. The addition of overdraft checking to an existing account (although the regular checks that could trigger the overdraft feature are not themselves ''devices'').

ii. The option to use an existing credit card to secure cash advances, when previously the card could only be used for purchases.

Paragraph 9(b)(2)

1. *Different finance charge terms.* Except as provided in § 1026.9(b)(3) for checks that access a credit card account, if the finance charge terms are different from those previously disclosed, the creditor may satisfy the requirement to give the finance charge terms either by giving a complete set of new account-opening disclosures reflecting the terms of the added device or feature or by giving only the finance charge disclosures for the added device or feature.

9(b)(3) Checks That Access a Credit Card Account

9(b)(3)(i) Disclosures

1. *Front of the page containing the checks.* The following would comply with the requirement that the tabular disclosures provided pursuant to § 1026.9(b)(3) appear on the front of the page containing the checks:

i. Providing the tabular disclosure on the front of the first page on which checks appear, for an offer where checks are provided on multiple pages;

ii. Providing the tabular disclosure on the front of a mini-book or accordion booklet containing the checks; or

iii. Providing the tabular disclosure on the front of the solicitation letter, when the checks are printed on the front of the same page as the solicitation letter even if the checks can be separated by the consumer from the solicitation letter using perforations.

2. *Combined disclosures for checks and other transactions subject to the same terms.* A card issuer may include in the tabular disclosure provided pursuant to § 1026.9(b)(3) disclosures regarding the terms offered on non-check transactions, provided that such transactions are subject to the same terms that are required to be disclosed pursuant to § 1026.9(b)(3)(i) for the checks that access a credit card account. However, a card issuer may not include in the table information regarding additional terms that are not required disclosures for checks that access a credit card account pursuant to § 1026.9(b)(3).

Paragraph 9(b)(3)(i)(D)

1. *Grace period.* A creditor may not disclose under § 1026.9(b)(3)(i)(D) the limitations on the imposition of finance charges as a result of a loss of a grace period in § 1026.54, or the impact of payment allocation on whether interest is charged on transactions as a result of a loss of a grace period. Some creditors may offer a grace period on credit extended by the use of an access check under which interest will not be charged on the check transactions if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. In these circumstances, § 1026.9(b)(3)(i)(D) requires that the creditor disclose the grace period using the following language, or substantially similar language, as applicable: ''Your due date is [at least] __ days after the close of each billing cycle. We will not charge you any interest on check transactions if you pay your entire balance by the due date each month.'' However, other creditors may offer a grace period on check transactions under which interest may be charged on check transactions even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. In these circumstances, § 1026.9(b)(3)(i)(D) requires the creditor to amend the above disclosure language to describe accurately the conditions on the applicability of the grace period. Creditors may use the following language to describe that no grace period on check transactions is offered, as applicable: ''We will begin charging interest on these checks on the transaction date.''

9(c) Change in Terms

9(c)(1) Rules Affecting Home-Equity Plans

1. *Changes initially disclosed.* No notice of a change in terms need be given if the specific change is set forth initially, such as: rate increases under a properly disclosed variable-rate plan, a rate increase that occurs when an employee has been under a preferential rate agreement and terminates employment, or an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum. The rules in § 1026.40(f) relating to home-equity plans limit the ability of a creditor to change the terms of such plans.

2. *State law issues.* Examples of issues not addressed by § 1026.9(c) because they are controlled by state or other applicable law include:

i. The types of changes a creditor may make. (But see § 1026.40(f))

ii. How changed terms affect existing balances, such as when a periodic rate is changed and the consumer does not pay off the entire existing balance before the new rate takes effect.

3. *Change in billing cycle.* Whenever the creditor changes the consumer's billing cycle, it must give a change-in-terms notice if the change either affects any of the terms required to be disclosed under § 1026.6(a) or increases the minimum payment, unless an exception under § 1026.9(c)(1)(ii) applies; for example, the creditor must give advance notice if the creditor initially disclosed a 25-day grace period on purchases and the consumer will have fewer days during the billing cycle change.

9(c)(1)(i) Written Notice Required

1. *Affected consumers.* Change-in-terms notices need only go to those consumers who may be affected by the change. For example, a change in the periodic rate for check overdraft credit need not be disclosed to consumers who do not have that feature on their accounts.

2. *Timing—effective date of change.* The rule that the notice of the change in terms be provided at least 15 days before the change takes effect permits mid-cycle changes when there is clearly no retroactive effect, such as the imposition of a transaction fee. Any change in the balance computation method, in contrast, would need to be disclosed at least 15 days prior to the billing cycle in which the change is to be implemented.

3. *Timing—advance notice not required.* Advance notice of 15 days is not necessary—that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change—in two circumstances:

i. If there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default.

ii. If the consumer agrees to the particular change. This provision is intended for use in the unusual instance when a consumer substitutes collateral or when the creditor can advance additional credit only if a change relatively unique to that consumer is made, such as the consumer's providing additional security or paying an increased minimum payment amount. Therefore, the following are not ''agreements'' between the consumer and the creditor for purposes of § 1026.9(c)(1)(i): The consumer's general acceptance of the creditor's contract reservation of the right to change terms; the consumer's use of the account (which might imply acceptance of its terms under state law); and the consumer's acceptance of a unilateral term change that is not particular to that consumer, but rather is of general

applicability to consumers with that type of account.

4. *Form of change-in-terms notice.* A complete new set of the initial disclosures containing the changed term complies with § 1026.9(c)(1)(i) if the change is highlighted in some way on the disclosure statement, or if the disclosure statement is accompanied by a letter or some other insert that indicates or draws attention to the term change.

5. *Security interest change—form of notice.* A copy of the security agreement that describes the collateral securing the consumer's account may be used as the notice, when the term change is the addition of a security interest or the addition or substitution of collateral.

6. *Changes to home-equity plans entered into on or after November 7, 1989.* Section 1026.9(c)(1) applies when, by written agreement under § 1026.40(f)(3)(iii), a creditor changes the terms of a home-equity plan—entered into on or after November 7, 1989—at or before its scheduled expiration, for example, by renewing a plan on terms different from those of the original plan. In disclosing the change:

i. If the index is changed, the maximum annual percentage rate is increased (to the limited extent permitted by § 1026.30), or a variable-rate feature is added to a fixed-rate plan, the creditor must include the disclosures required by § 1026.40(d)(12)(x) and (d)(12)(xi), unless these disclosures are unchanged from those given earlier.

ii. If the minimum payment requirement is changed, the creditor must include the disclosures required by § 1026.40(d)(5)(iii) (and, in variable-rate plans, the disclosures required by § 1026.40(d)(12)(x) and (d)(12)(xi)) unless the disclosures given earlier contained representative examples covering the new minimum payment requirement. (See the commentary to § 1026.40(d)(5)(iii), (d)(12)(x) and (d)(12)(xi) for a discussion of representative examples.)

iii. When the terms are changed pursuant to a written agreement as described in § 1026.40(f)(3)(iii), the advance-notice requirement does not apply.

9(c)(1)(ii) Notice not Required

1. *Changes not requiring notice.* The following are examples of changes that do not require a change-in-terms notice:

i. A change in the consumer's credit limit.

ii. A change in the name of the credit card or credit card plan.

iii. The substitution of one insurer for another.

iv. A termination or suspension of credit privileges. (But see § 1026.40(f).)

v. Changes arising merely by operation of law; for example, if the creditor's security interest in a consumer's car automatically extends to the proceeds when the consumer sells the car.

2. *Skip features.* If a credit program allows consumers to skip or reduce one or more payments during the year, or involves temporary reductions in finance charges, no notice of the change in terms is required either prior to the reduction or upon resumption of the higher rates or payments if these features are explained on the initial disclosure statement (including an explanation of the terms upon resumption). For example, a merchant may allow consumers to skip the December payment to encourage holiday shopping, or a teachers' credit union may not require payments during summer vacation. Otherwise, the creditor must give notice prior to resuming the original schedule or rate, even though no notice is required prior to the reduction. The change-in-terms notice may be combined with the notice offering the reduction. For example, the periodic statement reflecting the reduction or skip feature may also be used to notify the consumer of the resumption of the original schedule or rate, either by stating explicitly when the higher payment or charges resume, or by indicating the duration of the skip option. Language such as ''You may skip your October payment,'' or ''We will waive your finance charges for January,'' may serve as the change-in-terms notice.

9(c)(1)(iii) Notice to Restrict Credit

1. *Written request for reinstatement.* If a creditor requires the request for reinstatement of credit privileges to be in writing, the notice under § 1026.9(c)(1)(iii) must state that fact.

2. *Notice not required.* A creditor need not provide a notice under this paragraph if, pursuant to the commentary to § 1026.40(f)(2), a creditor freezes a line or reduces a credit line rather than terminating a plan and accelerating the balance.

9(c)(2) Rules Affecting Open-End (Not Home-Secured) Plans

1. *Changes initially disclosed.* Except as provided in § 1026.9(g)(1), no notice of a change in terms need be given if the specific change is set forth initially consistent with any applicable requirements, such as rate or fee increases upon expiration of a specific period of time that were disclosed in accordance with § 1026.9(c)(2)(v)(B) or rate increases under a properly disclosed variable-rate plan in accordance with § 1026.9(c)(2)(v)(C). In contrast, notice must be given if the contract allows the creditor to increase a rate or fee at its discretion.

2. *State law issues.* Some issues are not addressed by § 1026.9(c)(2) because they are controlled by state or other applicable laws. These issues include the types of changes a creditor may make, to the extent otherwise permitted by this part.

3. *Change in billing cycle.* Whenever the creditor changes the consumer's billing cycle, it must give a change-in-terms notice if the change affects any of the terms described in § 1026.9(c)(2)(i), unless an exception under § 1026.9(c)(2)(v) applies; for example, the creditor must give advance notice if the creditor initially disclosed a 28-day grace period on purchases and the consumer will have fewer days during the billing cycle change. *See also* § 1026.7(b)(11)(i)(A) regarding the general requirement that the payment due date for a credit card account under an open-end (not home-secured) consumer credit plan must be the same day each month.

4. *Relationship to § 1026.9(b).* If a creditor adds a feature to the account on the type of terms otherwise required to be disclosed under § 1026.6, the creditor must satisfy: The requirement to provide the finance charge disclosures for the added feature under § 1026.9(b); and any applicable requirement to provide a change-in-terms notice under § 1026.9(c), including any advance notice that must be provided. For example, if a creditor adds a balance transfer feature to an account more than 30 days after account-opening disclosures are provided, it must give the finance charge disclosures for the balance transfer feature under § 1026.9(b) as well as comply with the change-in-terms notice requirements under § 1026.9(c), including providing notice of the change at least 45 days prior to the effective date of the change. Similarly, if a creditor makes a balance transfer offer on finance charge terms that are higher than those previously disclosed for balance transfers, it would also generally be required to provide a change-in-terms notice at least 45 days in advance of the effective date of the change. A creditor may provide a single notice under § 1026.9(c) to satisfy the notice requirements of both paragraphs (b) and (c) of § 1026.9. For checks that access a credit card account subject to the disclosure requirements in § 1026.9(b)(3), a creditor is not subject to the notice requirements under § 1026.9(c) even if the applicable rate or fee is higher than those previously disclosed for such checks. Thus, for example, the creditor need not wait 45 days before applying the new rate or fee for transactions made using such checks, but the creditor must make the required disclosures on or with the checks in accordance with § 1026.9(b)(3).

9(c)(2)(i) Changes Where Written Advance Notice is Required

1. *Affected consumers.* Change-in-terms notices need only go to those consumers who may be affected by the change. For example, a change in the periodic rate for check overdraft credit need not be disclosed to consumers who do not have that feature on their accounts. If a single credit account involves multiple consumers that may be affected by the change, the creditor should refer to § 1026.5(d) to determine the number of notices that must be given.

2. *Timing—effective date of change.* The rule that the notice of the change in terms be provided at least 45 days before the change takes effect permits mid-cycle changes when there is clearly no retroactive effect, such as the imposition of a transaction fee. Any change in the balance computation method, in contrast, would need to be disclosed at least 45 days prior to the billing cycle in which the change is to be implemented.

3. *Changes agreed to by the consumer. See also* comment 5(b)(1)(i)–6.

4. *Form of change-in-terms notice.* Except if § 1026.9(c)(2)(iv) applies, a complete new set of the initial disclosures containing the changed term complies with § 1026.9(c)(2)(i) if the change is highlighted on the disclosure statement, or if the disclosure statement is accompanied by a letter or some other insert that indicates or draws attention to the term being changed.

5. *Security interest change—form of notice.* A creditor must provide a description of any security interest it is acquiring under § 1026.9(c)(2)(iv). A copy of the security agreement that describes the collateral securing the consumer's account may also be

used as the notice, when the term change is the addition of a security interest or the addition or substitution of collateral.

6. *Examples. See* comment 55(a)–1 and 55(b)–3 for examples of how a card issuer that is subject to § 1026.55 may comply with the timing requirements for notices required by § 1026.9(c)(2)(i).

9(c)(2)(iii) Charges not Covered by § 1026.6(b)(1) and (b)(2)

1. *Applicability.* Generally, if a creditor increases any component of a charge, or introduces a new charge, that is imposed as part of the plan under § 1026.6(b)(3) but is not required to be disclosed as part of the account-opening summary table under § 1026.6(b)(1) and (b)(2), the creditor must either, at its option (i) provide at least 45 days' written advance notice before the change becomes effective to comply with the requirements of § 1026.9(c)(2)(i), or (ii) provide notice orally or in writing, or electronically if the consumer requests the service electronically, of the amount of the charge to an affected consumer before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that a consumer would be likely to notice the disclosure. (*See* the commentary under § 1026.5(a)(1)(iii) regarding disclosure of such changes in electronic form.) For example, a fee for expedited delivery of a credit card is a charge imposed as part of the plan under § 1026.6(b)(3) but is not required to be disclosed in the account-opening summary table under § 1026.6(b)(1) and (b)(2). If a creditor changes the amount of that expedited delivery fee, the creditor may provide written advance notice of the change to affected consumers at least 45 days before the change becomes effective. Alternatively, the creditor may provide oral or written notice, or electronic notice if the consumer requests the service electronically, of the amount of the charge to an affected consumer before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that the consumer would be likely to notice the disclosure. (*See* comment 5(b)(1)(ii)–1 for examples of disclosures given at a time and in a manner that the consumer would be likely to notice them.)

9(c)(2)(iv) Disclosure Requirements

1. *Changing margin for calculating a variable rate.* If a creditor is changing a margin used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new margin) in the table described in § 1026.9(c)(2)(iv), and include a reminder that the rate is a variable rate. For example, if a creditor is changing the margin for a variable rate that uses the prime rate as an index, the creditor must disclose in the table the new rate (as calculated using the new margin) and indicate that the rate varies with the market based on the prime rate.

2. *Changing index for calculating a variable rate.* If a creditor is changing the index used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new index) and indicate that the rate varies and how the rate is determined, as explained in § 1026.6(b)(2)(i)(A). For example, if a creditor is changing from using a prime rate to using the LIBOR in calculating a variable rate, the creditor would disclose in the table the new rate (using the new index) and indicate that the rate varies with the market based on the LIBOR.

3. *Changing from a variable rate to a non-variable rate.* If a creditor is changing a rate applicable to a consumer's account from a variable rate to a non-variable rate, the creditor generally must provide a notice as otherwise required under § 1026.9(c) even if the variable rate at the time of the change is higher than the non-variable rate. However, a creditor is not required to provide a notice under § 1026.9(c) if the creditor provides the disclosures required by § 1026.9(c)(2)(v)(B) or (c)(2)(v)(D) in connection with changing a variable rate to a lower non-variable rate. Similarly, a creditor is not required to provide a notice under § 1026.9(c) when changing a variable rate to a lower non-variable rate in order to comply with 50 U.S.C. app. 527 or a similar Federal or state statute or regulation. Finally, a creditor is not required to provide a notice under § 1026.9(c) when changing a variable rate to a lower non-variable rate in order to comply with § 1026.55(b)(4).

4. *Changing from a non-variable rate to a variable rate.* If a creditor is changing a rate applicable to a consumer's account from a non-variable rate to a variable rate, the creditor generally must provide a notice as otherwise required under § 1026.9(c) even if the non-variable rate is higher than the variable rate at the time of the change. However, a creditor is not required to provide a notice under § 1026.9(c) if the creditor provides the disclosures required by § 1026.9(c)(2)(v)(B) or (c)(2)(v)(D) in connection with changing a non-variable rate to a lower variable rate. Similarly, a creditor is not required to provide a notice under § 1026.9(c) when changing a non-variable rate to a lower variable rate in order to comply with 50 U.S.C. app. 527 or a similar Federal or state statute or regulation. Finally, a creditor is not required to provide a notice under § 1026.9(c) when changing a non-variable rate to a lower variable rate in order to comply with § 1026.55(b)(4). *See* comment 55(b)(2)–4 regarding the limitations in § 1026.55(b)(2) on changing the rate that applies to a protected balance from a non-variable rate to a variable rate.

5. *Changes in the penalty rate, the triggers for the penalty rate, or how long the penalty rate applies.* If a creditor is changing the amount of the penalty rate, the creditor must also redisclose the triggers for the penalty rate and the information about how long the penalty rate applies even if those terms are not changing. Likewise, if a creditor is changing the triggers for the penalty rate, the creditor must redisclose the amount of the penalty rate and information about how long the penalty rate applies. If a creditor is changing how long the penalty rate applies, the creditor must redisclose the amount of the penalty rate and the triggers for the penalty rate, even if they are not changing.

6. *Changes in fees.* If a creditor is changing part of how a fee that is disclosed in a tabular format under § 1026.6(b)(1) and (b)(2) is determined, the creditor must redisclose all relevant information related to that fee regardless of whether this other information is changing. For example, if a creditor currently charges a cash advance fee of ''Either $5 or 3% of the transaction amount, whichever is greater(Max: $100),'' and the creditor is only changing the minimum dollar amount from $5 to $10, the issuer must redisclose the other information related to how the fee is determined. For example, the creditor in this example would disclose the following: ''Either $10 or 3% of the transaction amount, whichever is greater (Max: $100).''

7. *Combining a notice described in § 1026.9(c)(2)(iv) with a notice described in § 1026.9(g)(3).* If a creditor is required to provide a notice described in § 1026.9(c)(2)(iv) and a notice described in § 1026.9(g)(3) to a consumer, the creditor may combine the two notices. This would occur if penalty pricing has been triggered, and other terms are changing on the consumer's account at the same time.

8. *Content.* Sample G–20 contains an example of how to comply with the requirements in § 1026.9(c)(2)(iv) when a variable rate is being changed to a non-variable rate on a credit card account. The sample explains when the new rate will apply to new transactions and to which balances the current rate will continue to apply. Sample G–21 contains an example of how to comply with the requirements in § 1026.9(c)(2)(iv) when the late payment fee on a credit card account is being increased, and the returned payment fee is also being increased. The sample discloses the consumer's right to reject the changes in accordance with § 1026.9(h).

9. *Clear and conspicuous standard. See* comment 5(a)(1)–1 for the clear and conspicuous standard applicable to disclosures required under § 1026.9(c)(2)(iv)(A)(*1*).

10. *Terminology. See* § 1026.5(a)(2) for terminology requirements applicable to disclosures required under § 1026.9(c)(2)(iv)(A)(*1*).

11. *Reasons for increase.* i. *In general.* Section 1026.9(c)(2)(iv)(A)(*8*) requires card issuers to disclose the principal reason(s) for increasing an annual percentage rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan. The regulation does not mandate a minimum number of reasons that must be disclosed. However, the specific reasons disclosed under § 1026.9(c)(2)(iv)(A)(*8*) are required to relate to and accurately describe the principal factors actually considered by the card issuer in increasing the rate. A card issuer may describe the reasons for the increase in general terms. For example, the notice of a rate increase triggered by a decrease of 100 points in a consumer's credit score may state that the increase is due to ''a decline in your creditworthiness'' or ''a decline in your credit score.'' Similarly, a notice of a rate increase triggered by a 10% increase in the card issuer's cost of funds may be disclosed as ''a change in market conditions.'' In some circumstances, it may be appropriate for a card issuer to combine the disclosure of several reasons in one statement. However, § 1026.9(c)(2)(iv)(A)(*8*)

requires that the notice specifically disclose any violation of the terms of the account on which the rate is being increased, such as a late payment or a returned payment, if such violation of the account terms is one of the four principal reasons for the rate increase.

ii. *Example.* Assume that a consumer made a late payment on the credit card account on which the rate increase is being imposed, made a late payment on a credit card account with another card issuer, and the consumer's credit score decreased, in part due to such late payments. The card issuer may disclose the reasons for the rate increase as a decline in the consumer's credit score and the consumer's late payment on the account subject to the increase. Because the late payment on the credit card account with the other issuer also likely contributed to the decline in the consumer's credit score, it is not required to be separately disclosed. However, the late payment on the credit card account on which the rate increase is being imposed must be specifically disclosed even if that late payment also contributed to the decline in the consumer's credit score.

9(c)(2)(v) Notice not Required

1. *Changes not requiring notice.* The following are examples of changes that do not require a change-in-terms notice:

i. A change in the consumer's credit limit except as otherwise required by § 1026.9(c)(2)(vi).

ii. A change in the name of the credit card or credit card plan.

iii. The substitution of one insurer for another.

iv. A termination or suspension of credit privileges.

v. Changes arising merely by operation of law; for example, if the creditor's security interest in a consumer's car automatically extends to the proceeds when the consumer sells the car.

2. *Skip features.* i. *Skipped or reduced payments.* If a credit program allows consumers to skip or reduce one or more payments during the year, no notice of the change in terms is required either prior to the reduction in payments or upon resumption of the higher payments if these features are explained on the account-opening disclosure statement (including an explanation of the terms upon resumption). For example, a merchant may allow consumers to skip the December payment to encourage holiday shopping, or a teacher's credit union may not require payments during summer vacation. Otherwise, the creditor must give notice prior to resuming the original payment schedule, even though no notice is required prior to the reduction. The change-in-terms notice may be combined with the notice offering the reduction. For example, the periodic statement reflecting the skip feature may also be used to notify the consumer of the resumption of the original payment schedule, either by stating explicitly when the higher resumes or by indicating the duration of the skip option. Language such as ''You may skip your October payment'' may serve as the change-in-terms notice.

ii. *Temporary reductions in interest rates or fees.* If a credit program involves temporary reductions in an interest rate or fee, no notice of the change in terms is required either prior to the reduction or upon resumption of the original rate or fee if these features are disclosed in advance in accordance with the requirements of § 1026.9(c)(2)(v)(B). Otherwise, the creditor must give notice prior to resuming the original rate or fee, even though no notice is required prior to the reduction. The notice provided prior to resuming the original rate or fee must comply with the timing requirements of § 1026.9(c)(2)(i) and the content and format requirements of § 1026.9(c)(2)(iv)(A), (B) (if applicable), (C) (if applicable), and (D). *See* comment 55(b)–3 for guidance regarding the application of § 1026.55 in these circumstances.

3. *Changing from a variable rate to a non-variable rate. See* comment 9(c)(2)(iv)–3.

4. *Changing from a non-variable rate to a variable rate. See* comment 9(c)(2)(iv)–4.

5. *Temporary rate or fee reductions offered by telephone.* The timing requirements of § 1026.9(c)(2)(v)(B) are deemed to have been met, and written disclosures required by § 1026.9(c)(2)(v)(B) may be provided as soon as reasonably practicable after the first transaction subject to a rate that will be in effect for a specified period of time (a temporary rate) or the imposition of a fee that will be in effect for a specified period of time (a temporary fee) if:

i. The consumer accepts the offer of the temporary rate or temporary fee by telephone;

ii. The creditor permits the consumer to reject the temporary rate or temporary fee offer and have the rate or rates or fee that previously applied to the consumer's balances reinstated for 45 days after the creditor mails or delivers the written disclosures required by § 1026.9(c)(2)(v)(B), except that the creditor need not permit the consumer to reject a temporary rate or temporary fee offer if the rate or rates or fee that will apply following expiration of the temporary rate do not exceed the rate or rates or fee that applied immediately prior to commencement of the temporary rate or temporary fee; and

iii. The disclosures required by § 1026.9(c)(2)(v)(B) and the consumer's right to reject the temporary rate or temporary fee offer and have the rate or rates or fee that previously applied to the consumer's account reinstated, if applicable, are disclosed to the consumer as part of the temporary rate or temporary fee offer.

6. *First listing.* The disclosures required by § 1026.9(c)(2)(v)(B)(*1*) are only required to be provided in close proximity and in equal prominence to the first listing of the temporary rate or fee in the disclosure provided to the consumer. For purposes of § 1026.9(c)(2)(v)(B), the first statement of the temporary rate or fee is the most prominent listing on the front side of the first page of the disclosure. If the temporary rate or fee does not appear on the front side of the first page of the disclosure, then the first listing of the temporary rate or fee is the most prominent listing of the temporary rate on the subsequent pages of the disclosure. For advertising requirements for promotional rates, see § 1026.16(g).

7. *Close proximity—point of sale.* Creditors providing the disclosures required by § 1026.9(c)(2)(v)(B) of this section in person in connection with financing the purchase of goods or services may, at the creditor's option, disclose the annual percentage rate or fee that would apply after expiration of the period on a separate page or document from the temporary rate or fee and the length of the period, provided that the disclosure of the annual percentage rate or fee that would apply after the expiration of the period is equally prominent to, and is provided at the same time as, the disclosure of the temporary rate or fee and length of the period.

8. *Disclosure of annual percentage rates.* If a rate disclosed pursuant to § 1026.9(c)(2)(v)(B) or (c)(2)(v)(D) is a variable rate, the creditor must disclose the fact that the rate may vary and how the rate is determined. For example, a creditor could state ''After October 1, 2009, your APR will be 14.99%. This APR will vary with the market based on the Prime Rate.''

9. *Deferred interest or similar programs.* If the applicable conditions are met, the exception in § 1026.9(c)(2)(v)(B) applies to deferred interest or similar promotional programs under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. For purposes of this comment and § 1026.9(c)(2)(v)(B), ''deferred interest'' has the same meaning as in § 1026.16(h)(2) and associated commentary. For such programs, a creditor must disclose pursuant to § 1026.9(c)(2)(v)(B)(*1*) the length of the deferred interest period and the rate that will apply to the balance subject to the deferred interest program if that balance is not paid in full prior to expiration of the deferred interest period. Examples of language that a creditor may use to make the required disclosures under § 1026.9(c)(2)(v)(B)(*1*) include:

i. ''No interest if paid in full in 6 months. If the balance is not paid in full in 6 months, interest will be imposed from the date of purchase at a rate of 15.99%.''

ii. ''No interest if paid in full by December 31, 2010. If the balance is not paid in full by that date, interest will be imposed from the transaction date at a rate of 15%.''

10. *Relationship between §§ 1026.9(c)(2)(v)(B) and 1026.6(b).* A disclosure of the information described in § 1026.9(c)(2)(v)(B)(*1*) provided in the account-opening table in accordance with § 1026.6(b) complies with the requirements of § 1026.9(c)(2)(v)(B)(*2*), if the listing of the introductory rate in such tabular disclosure also is the first listing as described in comment 9(c)(2)(v)–6.

11. *Disclosure of the terms of a workout or temporary hardship arrangement.* In order for the exception in § 1026.9(c)(2)(v)(D) to apply, the disclosure provided to the consumer pursuant to § 1026.9(c)(2)(v)(D)(*2*) must set forth:

i. The annual percentage rate that will apply to balances subject to the workout or temporary hardship arrangement;

ii. The annual percentage rate that will apply to such balances if the consumer completes or fails to comply with the terms of, the workout or temporary hardship arrangement;

iii. Any reduced fee or charge of a type required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), (b)(2)(viii), (b)(2)(ix), (b)(2)(xi), or (b)(2)(xii) that will apply to balances subject to the workout or temporary hardship arrangement, as well as the fee or charge that will apply if the consumer completes or fails to comply with the terms of the workout or temporary hardship arrangement;

iv. Any reduced minimum periodic payment that will apply to balances subject to the workout or temporary hardship arrangement, as well as the minimum periodic payment that will apply if the consumer completes or fails to comply with the terms of the workout or temporary hardship arrangement; and

v. If applicable, that the consumer must make timely minimum payments in order to remain eligible for the workout or temporary hardship arrangement.

12. *Index not under creditor's control. See* comment 55(b)(2)–2 for guidance on when an index is deemed to be under a creditor's control.

13. *Temporary rates—relationship to § 1026.59.* i. *General.* Section 1026.59 requires a card issuer to review rate increases imposed due to the revocation of a temporary rate. In some circumstances, § 1026.59 may require an issuer to reinstate a reduced temporary rate based on that review. If, based on a review required by § 1026.59, a creditor reinstates a temporary rate that had been revoked, the card issuer is not required to provide an additional notice to the consumer when the reinstated temporary rate expires, if the card issuer provided the disclosures required by § 1026.9(c)(2)(v)(B) prior to the original commencement of the temporary rate. *See* § 1026.55 and the associated commentary for guidance on the permissibility and applicability of rate increases.

ii. *Example.* A consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan on January 1, 2011. The annual percentage rate applicable to purchases is 18%. The card issuer offers the consumer a 15% rate on purchases made between January 1, 2012 and January 1, 2014. Prior to January 1, 2012, the card issuer discloses, in accordance with § 1026.9(c)(2)(v)(B), that the rate on purchases made during that period will increase to the standard 18% rate on January 1, 2014. In March 2012, the consumer makes a payment that is ten days late. The card issuer, upon providing 45 days' advance notice of the change under § 1026.9(g), increases the rate on new purchases to 18% effective as of June 1, 2012. On December 1, 2012, the issuer performs a review of the consumer's account in accordance with § 1026.59. Based on that review, the card issuer is required to reduce the rate to the original 15% temporary rate as of January 15, 2013. On January 1, 2014, the card issuer may increase the rate on purchases to 18%, as previously disclosed prior to January 1, 2012, without providing an additional notice to the consumer.

9(d) Finance Charge Imposed at Time of Transaction

1. *Disclosure prior to imposition.* A person imposing a finance charge at the time of honoring a consumer's credit card must disclose the amount of the charge, or an explanation of how the charge will be determined, prior to its imposition. This must be disclosed before the consumer becomes obligated for property or services that may be paid for by use of a credit card. For example, disclosure must be given before the consumer has dinner at a restaurant, stays overnight at a hotel, or makes a deposit guaranteeing the purchase of property or services.

9(e) Disclosures Upon Renewal of Credit or Charge Card

1. *Coverage.* This paragraph applies to credit and charge card accounts of the type subject to § 1026.60. (*See* § 1026.60(a)(5) and the accompanying commentary for discussion of the types of accounts subject to § 1026.60.) The disclosure requirements are triggered when a card issuer imposes any annual or other periodic fee on such an account or if the card issuer has changed or amended any term of a cardholder's account required to be disclosed under § 1026.6(b)(1) and (b)(2) that has not previously been disclosed to the consumer, whether or not the card issuer originally was required to provide the application and solicitation disclosures described in § 1026.60.

2. *Form.* The disclosures under this paragraph must be clear and conspicuous, but need not appear in a tabular format or in a prominent location. The disclosures need not be in a form the cardholder can retain.

3. *Terms at renewal.* Renewal notices must reflect the terms actually in effect at the time of renewal. For example, a card issuer that offers a preferential annual percentage rate to employees during their employment must send a renewal notice to employees disclosing the lower rate actually charged to employees (although the card issuer also may show the rate charged to the general public).

4. *Variable rate.* If the card issuer cannot determine the rate that will be in effect if the cardholder chooses to renew a variable-rate account, the card issuer may disclose the rate in effect at the time of mailing or delivery of the renewal notice. Alternatively, the card issuer may use the rate as of a specified date within the last 30 days before the disclosure is provided.

5. *Renewals more frequent than annual.* If a renewal fee is billed more often than annually, the renewal notice should be provided each time the fee is billed. In this instance, the fee need not be disclosed as an annualized amount. Alternatively, the card issuer may provide the notice no less than once every 12 months if the notice explains the amount and frequency of the fee that will be billed during the time period covered by the disclosure, and also discloses the fee as an annualized amount. The notice under this alternative also must state the consequences of a cardholder's decision to terminate the account after the renewal-notice period has expired. For example, if a $2 fee is billed monthly but the notice is given annually, the notice must inform the cardholder that the monthly charge is $2, the annualized fee is $24, and $2 will be billed to the account each month for the coming year unless the cardholder notifies the card issuer. If the cardholder is obligated to pay an amount equal to the remaining unpaid monthly charges if the cardholder terminates the account during the coming year but after the first month, the notice must disclose the fact.

6. *Terminating credit availability.* Card issuers have some flexibility in determining the procedures for how and when an account may be terminated. However, the card issuer must clearly disclose the time by which the cardholder must act to terminate the account to avoid paying a renewal fee, if applicable. State and other applicable law govern whether the card issuer may impose requirements such as specifying that the cardholder's response be in writing or that the outstanding balance be repaid in full upon termination.

7. *Timing of termination by cardholder.* When a card issuer provides notice under § 1026.9(e)(1), a cardholder must be given at least 30 days or one billing cycle, whichever is less, from the date the notice is mailed or delivered to make a decision whether to terminate an account.

8. *Timing of notices.* A renewal notice is deemed to be provided when mailed or delivered. Similarly, notice of termination is deemed to be given when mailed or delivered.

9. *Prompt reversal of renewal fee upon termination.* In a situation where a cardholder has provided timely notice of termination and a renewal fee has been billed to a cardholder's account, the card issuer must reverse or otherwise withdraw the fee promptly. Once a cardholder has terminated an account, no additional action by the cardholder may be required.

10. *Disclosure of changes in terms required to be disclosed pursuant to § 1026.6(b)(1) and (b)(2).* Clear and conspicuous disclosure of a changed term on a periodic statement provided to a consumer prior to renewal of the consumer's account constitutes prior disclosure of that term for purposes of § 1026.9(e)(1). Card issuers should refer to § 1026.9(c)(2) for additional timing, content, and formatting requirements that apply to certain changes in terms under that paragraph.

9(e)(2) Notification on Periodic Statements

1. *Combined disclosures.* If a single disclosure is used to comply with both §§ 1026.9(e) and 1026.7, the periodic statement must comply with the rules in §§ 1026.60 and 1026.7. For example, a description substantially similar to the heading describing the grace period required by § 1026.60(b)(5) must be used and the name of the balance-calculation method must be identified (if listed in § 1026.60(g)) to comply with the requirements of § 1026.60. A card issuer may include some of the renewal disclosures on a periodic statement and others on a separate document so long as there is some reference indicating that the disclosures relate to one another. All renewal disclosures must be provided to a cardholder at the same time.

2. *Preprinted notices on periodic statements.* A card issuer may preprint the

required information on its periodic statements. A card issuer that does so, however, must make clear on the periodic statement when the preprinted renewal disclosures are applicable. For example, the card issuer could include a special notice (not preprinted) at the appropriate time that the renewal fee will be billed in the following billing cycle, or could show the renewal date as a regular (preprinted) entry on all periodic statements.

9(f) Change in Credit Card Account Insurance Provider

1. *Coverage.* This paragraph applies to credit card accounts of the type subject to § 1026.60 if credit insurance (typically life, disability, and unemployment insurance) is offered on the outstanding balance of such an account. (Credit card accounts subject to § 1026.9(f) are the same as those subject to § 1026.9(e); *see* comment 9(e)–1.) Charge card accounts are not covered by this paragraph. In addition, the disclosure requirements of this paragraph apply only where the card issuer initiates the change in insurance provider. For example, if the card issuer's current insurance provider is merged into or acquired by another company, these disclosures would not be required. Disclosures also need not be given in cases where card issuers pay for credit insurance themselves and do not separately charge the cardholder.

2. *No increase in rate or decrease in coverage.* The requirement to provide the disclosure arises when the card issuer changes the provider of insurance, even if there will be no increase in the premium rate charged to the consumer and no decrease in coverage under the insurance policy.

3. *Form of notice.* If a substantial decrease in coverage will result from the change in provider, the card issuer either must explain the decrease or refer to an accompanying copy of the policy or group certificate for details of the new terms of coverage. (*See* the commentary to AppendixG–13 to part 1026.)

4. *Discontinuation of insurance.* In addition to stating that the cardholder may cancel the insurance, the card issuer may explain the effect the cancellation would have on the consumer's credit card plan.

5. *Mailing by third party.* Although the card issuer is responsible for the disclosures, the insurance provider or another third party may furnish the disclosures on the card issuer's behalf.

9(f)(3) Substantial Decrease in Coverage

1. *Determination.* Whether a substantial decrease in coverage will result from the change in provider is determined by the two-part test in § 1026.9(f)(3): First, whether the decrease is in a significant term of coverage; and second, whether the decrease might reasonably be expected to affect a cardholder's decision to continue the insurance. If both conditions are met, the decrease must be disclosed in the notice.

9(g) Increase in Rates Due to Delinquency or Default or as a Penalty

1. *Relationship between § 1026.9(c) and (g) and § 1026.55—examples.* Card issuers subject to § 1026.55 are prohibited from increasing the annual percentage rate for a category of transactions on any consumer credit card account unless specifically permitted by one of the exceptions in § 1026.55(b). See comments 55(a)–1 and 55(b)–3 and the commentary to § 1026.55(b)(4) for examples that illustrate the relationship between the notice requirements of § 1026.9(c) and (g) and § 1026.55.

2. *Affected consumers.* If a single credit account involves multiple consumers that may be affected by the change, the creditor should refer to § 1026.5(d) to determine the number of notices that must be given.

3. *Combining a notice described in § 1026.9(g)(3) with a notice described in § 1026.9(c)(2)(iv).* If a creditor is required to provide notices pursuant to both § 1026.9(c)(2)(iv) and (g)(3) to a consumer, the creditor may combine the two notices. This would occur when penalty pricing has been triggered, and other terms are changing on the consumer's account at the same time.

4. *Content.* Sample G–22 contains an example of how to comply with the requirements in § 1026.9(g)(3)(i) when the rate on a consumer's credit card account is being increased to a penalty rate as described in § 1026.9(g)(1)(ii), based on a late payment that is not more than 60 days late. Sample G–23 contains an example of how to comply with the requirements in § 1026.9(g)(3)(i) when the rate increase is triggered by a delinquency of more than 60 days.

5. *Clear and conspicuous standard.* See comment 5(a)(1)–1 for the clear and conspicuous standard applicable to disclosures required under § 1026.9(g).

6. *Terminology.* See § 1026.5(a)(2) for terminology requirements applicable to disclosures required under § 1026.9(g).

7. *Reasons for increase.* See comment 9(c)(2)(iv)–11 for guidance on disclosure of the reasons for a rate increase for a credit card account under an open-end (not home-secured) consumer credit plan.

9(g)(4) Exception for Decrease in Credit Limit

1. The following illustrates the requirements of § 1026.9(g)(4). Assume that a creditor decreased the credit limit applicable to a consumer's account and sent a notice pursuant to § 1026.9(g)(4) on January 1, stating among other things that the penalty rate would apply if the consumer's balance exceeded the new credit limit as of February 16. If the consumer's balance exceeded the credit limit on February 16, the creditor could impose the penalty rate on that date. However, a creditor could not apply the penalty rate if the consumer's balance did not exceed the new credit limit on February 16, even if the consumer's balance had exceeded the new credit limit on several dates between January 1 and February 15. If the consumer's balance did not exceed the new credit limit on February 16 but the consumer conducted a transaction on February 17 that caused the balance to exceed the new credit limit, the general rule in § 1026.9(g)(1)(ii) would apply and the creditor would be required to give an additional 45 days' notice prior to imposition of the penalty rate (but under these circumstances the consumer would have no ability to cure the over-the-limit balance in order to avoid penalty pricing).

9(h) Consumer Rejection of Certain Significant Changes in Terms

1. *Circumstances in which § 1026.9(h) does not apply.* Section 1026.9(h) applies when § 1026.9(c)(2)(iv)(B) requires disclosure of the consumer's right to reject a significant change to an account term. Thus, for example, § 1026.9(h) does not apply to changes to the terms of home equity plans subject to the requirements of § 1026.40 that are accessible by a credit or charge card because § 1026.9(c)(2) does not apply to such plans. Similarly, § 1026.9(h) does not apply in the following circumstances because § 1026.9(c)(2)(iv)(B) does not require disclosure of the right to reject in those circumstances: (i) An increase in the required minimum periodic payment; (ii) a change in an annual percentage rate applicable to a consumer's account (such as changing the margin or index for calculating a variable rate, changing from a variable rate to a non-variable rate, or changing from a non-variable rate to a variable rate); (iii) a change in the balance computation method necessary to comply with § 1026.54; and (iv) when the change results from the creditor not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment.

9(h)(1) Right To Reject

1. *Reasonable requirements for submission of rejections.* A creditor may establish reasonable requirements for the submission of rejections pursuant to § 1026.9(h)(1). For example:

i. It would be reasonable for a creditor to require that rejections be made by the primary account holder and that the consumer identify the account number.

ii. It would be reasonable for a creditor to require that rejections be made only using the toll-free telephone number disclosed pursuant to § 1026.9(c). It would also be reasonable for a creditor to designate additional channels for the submission of rejections (such as an address for rejections submitted by mail) so long as the creditor does not require that rejections be submitted through such additional channels.

iii. It would be reasonable for a creditor to require that rejections be received before the effective date disclosed pursuant to § 1026.9(c) and to treat the account as not subject to § 1026.9(h) if a rejection is received on or after that date. It would not, however, be reasonable to require that rejections be submitted earlier than the day before the effective date. If a creditor is unable to process all rejections received before the effective date, the creditor may delay implementation of the change in terms until all rejections have been processed. In the alternative, the creditor could implement the change on the effective date and then, on any account for which a timely rejection was received, reverse the change and remove or credit any interest charges or fees imposed as a result of the change. For example, if the effective date for a change in terms is June 15 and the creditor cannot process all rejections received by telephone on June 14 until June 16, the creditor may delay imposition of the change until June 17. Alternatively, the creditor could implement

the change for all affected accounts on June 15 and then, once all rejections have been processed, return any account for which a timely rejection was received to the prior terms and ensure that the account is not assessed any additional interest or fees as a result of the change or that the account is credited for such interest or fees.

2. *Use of account following provision of notice.* A consumer does not waive or forfeit the right to reject a significant change in terms by using the account for transactions prior to the effective date of the change. Similarly, a consumer does not revoke a rejection by using the account for transactions after the rejection is received.

Paragraph 9(h)(2)(ii)

1. *Termination or suspension of credit availability.* Section 1026.9(h)(2)(ii) does not prohibit a creditor from terminating or suspending credit availability as a result of the consumer's rejection of a significant change in terms.

2. *Solely as a result of rejection.* A creditor is prohibited from imposing a fee or charge or treating an account as in default solely as a result of the consumer's rejection of a significant change in terms. For example, if credit availability is terminated or suspended as a result of the consumer's rejection of a significant change in terms, a creditor is prohibited from imposing a periodic fee that was not charged before the consumer rejected the change (such as a closed account fee). *See* also comment 55(d)–1. However, regardless of whether credit availability is terminated or suspended as a result of the consumer's rejection, a creditor is not prohibited from continuing to charge a periodic fee that was charged before the rejection. Similarly, a creditor that charged a fee for late payment before a change was rejected is not prohibited from charging that fee after rejection of the change.

Paragraph 9(h)(2)(iii)

1. *Relevant date for repayment methods.* Once a consumer has rejected a significant change in terms, § 1026.9(h)(2)(iii) prohibits the creditor from requiring repayment of the balance on the account using a method that is less beneficial to the consumer than one of the methods listed in § 1026.55(c)(2). When applying the methods listed in § 1026.55(c)(2) pursuant to § 1026.9(h)(2)(iii), a creditor may utilize the date on which the creditor was notified of the rejection or a later date (such as the date on which the change would have gone into effect but for the rejection). For example, assume that on April 16 a creditor provides a notice pursuant to § 1026.9(c) informing the consumer that the monthly maintenance fee for the account will increase effective June 1. The notice also states that the consumer may reject the increase by calling a specified toll-free telephone number before June 1 but that, if the consumer does so, credit availability for the account will be terminated. On May 5, the consumer calls the toll-free number and exercises the right to reject. If the creditor chooses to establish a five-year amortization period for the balance on the account consistent with § 1026.55(c)(2)(ii), that period may begin no earlier than the date on which the creditor was notified of the rejection (May 5). However, the creditor may also begin the amortization period on the date on which the change would have gone into effect but for the rejection (June 1).

2. *Balance on the account.* i. *In general.* When applying the methods listed in § 1026.55(c)(2) pursuant to § 1026.9(h)(2)(iii), the provisions in § 1026.55(c)(2) and the guidance in the commentary to § 1026.55(c)(2) regarding protected balances also apply to a balance on the account subject to § 1026.9(h)(2)(iii). If a creditor terminates or suspends credit availability based on a consumer's rejection of a significant change in terms, the balance on the account that is subject to § 1026.9(h)(2)(iii) is the balance at the end of the day on which credit availability is terminated or suspended. However, if a creditor does not terminate or suspend credit availability based on the consumer's rejection, the balance on the account subject to § 1026.9(h)(2)(iii) is the balance at the end of the day on which the creditor was notified of the rejection or, at the creditor's option, a later date.

ii. *Example.* Assume that on June 16 a creditor provides a notice pursuant to § 1026.9(c) informing the consumer that the annual fee for the account will increase effective August 1. The notice also states that the consumer may reject the increase by calling a specified toll-free telephone number before August 1 but that, if the consumer does so, credit availability for the account will be terminated. On July 20, the account has a purchase balance of $1,000 and the consumer calls the toll-free number and exercises the right to reject. On July 22, a $200 purchase is charged to the account. If the creditor terminates credit availability on July 25 as a result of the rejection, the balance subject to the repayment limitations in § 1026.9(h)(2)(iii) is the $1,200 purchase balance at the end of the day on July 25. However, if the creditor does not terminate credit availability as a result of the rejection, the balance subject to the repayment limitations in § 1026.9(h)(2)(iii) is the $1,000 purchase balance at the end of the day on the date the creditor was notified of the rejection (July 20), although the creditor may, at its option, treat the $200 purchase as part of the balance subject to § 1026.9(h)(2)(iii).

9(h)(3) Exception

1. *Examples.* Section 1026.9(h)(3) provides that § 1026.9(h) does not apply when the creditor has not received the consumer's required minimum periodic payment within 60 days after the due date for that payment. The following examples illustrate the application of this exception:

i. *Account becomes more than 60 days delinquent before notice provided.* Assume that a credit card account is opened on January 1 of year one and that the payment due date for the account is the fifteenth day of the month. On June 20 of year two, the creditor has not received the required minimum periodic payments due on April 15, May 15, and June 15. On June 20, the creditor provides a notice pursuant to § 1026.9(c) informing the consumer that a monthly maintenance fee of $10 will be charged beginning on August 4. However, § 1026.9(c)(2)(iv)(B) does not require the creditor to notify the consumer of the right to reject because the creditor has not received the April 15 minimum payment within 60 days after the due date. Furthermore, the exception in § 1026.9(h)(3) applies and the consumer may not reject the fee.

ii. *Account becomes more than 60 days delinquent after rejection.* Assume that a credit card account is opened on January 1 of year one and that the payment due date for the account is the fifteenth day of the month. On April 20 of year two, the creditor has not received the required minimum periodic payment due on April 15. On April 20, the creditor provides a notice pursuant to § 1026.9(c) informing the consumer that an annual fee of $100 will be charged beginning on June 4. The notice further states that the consumer may reject the fee by calling a specified toll-free telephone number before June 4 but that, if the consumer does so, credit availability for the account will be terminated. On May 5, the consumer calls the toll-free telephone number and rejects the fee. Section 1026.9(h)(2)(i) prohibits the creditor from charging the $100 fee to the account. If, however, the creditor does not receive the minimum payments due on April 15 and May 15 by June 15, § 1026.9(h)(3) permits the creditor to charge the $100 fee. The creditor must provide a second notice of the fee pursuant to § 1026.9(c), but § 1026.9(c)(2)(iv)(B) does not require the creditor to disclose the right to reject and § 1026.9(h)(3) does not allow the consumer to reject the fee. Similarly, the restrictions in § 1026.9(h)(2)(ii) and (iii) no longer apply.

Section 1026.10—Payments

10(a) General Rule.

1. *Crediting date.* Section 1026.10(a) does not require the creditor to post the payment to the consumer's account on a particular date; the creditor is only required to credit the payment *as of* the date of receipt.

2. *Date of receipt.* The ''date of receipt'' is the date that the payment instrument or other means of completing the payment reaches the creditor. For example:

i. Payment by check is received when the creditor gets it, not when the funds are collected.

ii. In a payroll deduction plan in which funds are deposited to an asset account held by the creditor, and from which payments are made periodically to an open-end credit account, payment is received on the date when it is debited to the asset account (rather than on the date of the deposit), provided the payroll deduction method is voluntary and the consumer retains use of the funds until the contractual payment date.

iii. If the consumer elects to have payment made by a third party payor such as a financial institution, through a preauthorized payment or telephone bill-payment arrangement, payment is received when the creditor gets the third party payor's check or other transfer medium, such as an electronic fund transfer, as long as the payment meets the creditor's requirements as specified under § 1026.10(b).

iv. Payment made via the creditor's Web site is received on the date on which the consumer authorizes the creditor to effect the payment, even if the consumer gives the instruction authorizing that payment in

advance of the date on which the creditor is authorized to effect the payment. If the consumer authorizes the creditor to effect the payment immediately, but the consumer's instruction is received after 5 p.m. or any later cut-off time specified by the creditor, the date on which the consumer authorizes the creditor to effect the payment is deemed to be the next business day.

10(b) Specific Requirements for Payments

1. *Payment by electronic fund transfer.* A creditor may be prohibited from specifying payment by preauthorized electronic fund transfer. (See Section 913 of the Electronic Fund Transfer Act.)

2. *Payment methods promoted by creditor.* If a creditor promotes a specific payment method, any payments made via that method (prior to any cut-off time specified by the creditor, to the extent permitted by § 1026.10(b)(2)) are generally conforming payments for purposes of § 1026.10(b). For example:

i. If a creditor promotes electronic payment via its Web site (such as by disclosing on the Web site itself that payments may be made via the Web site), any payments made via the creditor's Web site prior to the creditor's specified cut-off time, if any, would generally be conforming payments for purposes of § 1026.10(b).

ii. If a creditor promotes payment by telephone (for example, by including the option to pay by telephone in a menu of options provided to consumers at a toll-free number disclosed on its periodic statement), payments made by telephone would generally be conforming payments for purposes of § 1026.10(b).

iii. If a creditor promotes in-person payments, for example by stating in an advertisement that payments may be made in person at its branch locations, such in-person payments made at a branch or office of the creditor generally would be conforming payments for purposes of § 1026.10(b).

iv. If a creditor promotes that payments may be made through an unaffiliated third party, such as by disclosing the Web site address of that third party on the periodic statement, payments made via that third party's Web site generally would be conforming payments for purposes of § 1026.10(b). In contrast, if a customer service representative of the creditor confirms to a consumer that payments may be made via an unaffiliated third party, but the creditor does not otherwise promote that method of payment, § 1026.10(b) permits the creditor to treat payments made via such third party as nonconforming payments in accordance with § 1026.10(b)(4).

3. *Acceptance of nonconforming payments.* If the creditor accepts a nonconforming payment (for example, payment mailed to a branch office, when the creditor had specified that payment be sent to a different location), finance charges may accrue for the period between receipt and crediting of payments.

4. *Implied guidelines for payments.* In the absence of specified requirements for making payments (see § 1026.10(b)):

i. Payments may be made at any location where the creditor conducts business.

ii. Payments may be made any time during the creditor's normal business hours.

iii. Payment may be by cash, money order, draft, or other similar instrument in properly negotiable form, or by electronic fund transfer if the creditor and consumer have so agreed.

5. *Payments made at point of sale.* If a card issuer that is a financial institution issues a credit card under an open-end (not home-secured) consumer credit plan that can be used only for transactions with a particular merchant or merchants or a credit card that is cobranded with the name of a particular merchant or merchants, and a consumer is able to make a payment on that credit card account at a retail location maintained by such a merchant, that retail location is not considered to be a branch or office of the card issuer for purposes of § 1026.10(b)(3).

6. *In-person payments on credit card accounts.* For purposes of § 1026.10(b)(3), payments made in person at a branch or office of a financial institution include payments made with the direct assistance of, or to, a branch or office employee, for example a teller at a bank branch. A payment made at the bank branch without the direct assistance of a branch or office employee, for example a payment placed in a branch or office mail slot, is not a payment made in person for purposes of § 1026.10(b)(3).

7. *In-person payments at affiliate of card issuer.* If an affiliate of a card issuer that is a financial institution shares a name with the card issuer, such as ''ABC,'' and accepts in-person payments on the card issuer's credit card accounts, those payments are subject to the requirements of § 1026.10(b)(3).

10(d) Crediting of Payments When Creditor Does Not Receive or Accept Payments on Due Date

1. *Example.* A day on which the creditor does not receive or accept payments by mail may occur, for example, if the U.S. Postal Service does not deliver mail on that date.

2. *Treating a payment as late for any purpose.* See comment 5(b)(2)(ii)–2 for guidance on treating a payment as late for any purpose. When an account is not eligible for a grace period, imposing a finance charge due to a periodic interest rate does not constitute treating a payment as late.

10(e) Limitations on Fees Related to Method of Payment

1. *Separate fee to allow consumers to make a payment.* For purposes of § 1026.10(e), the term ''separate fee'' means a fee imposed on a consumer for making a payment to the consumer's account. A fee or other charge imposed if payment is made after the due date, such as a late fee or finance charge, is not a separate fee to allow consumers to make a payment for purposes of § 1026.10(e).

2. *Expedited.* For purposes of § 1026.10(e), the term ''expedited'' means crediting a payment the same day or, if the payment is received after any cut-off time established by the creditor, the next business day.

3. *Service by a customer service representative.* Service by a customer service representative of a creditor means any payment made to the consumer's account with the assistance of a live representative or agent of the creditor, including those made in person, on the telephone, or by electronic means. A customer service representative does not include automated means of making payment that do not involve a live representative or agent of the creditor, such as a voice response unit or interactive voice response system. Service by a customer service representative includes any payment transaction which involves the assistance of a live representative or agent of the creditor, even if an automated system is required for a portion of the transaction.

4. *Creditor.* For purposes of § 1026.10(e), the term ''creditor'' includes a third party that collects, receives, or processes payments on behalf of a creditor. For example:

i. Assume that a creditor uses a service provider to receive, collect, or process on the creditor's behalf payments made through the creditor's Web site or made through an automated telephone payment service. In these circumstances, the service provider would be considered a creditor for purposes of paragraph (e).

ii. Assume that a consumer pays a fee to a money transfer or payment service in order to transmit a payment to the creditor on the consumer's behalf. In these circumstances, the money transfer or payment service would not be considered a creditor for purposes of paragraph (e).

iii. Assume that a consumer has a checking account at a depository institution. The consumer makes a payment to the creditor from the checking account using a bill payment service provided by the depository institution. In these circumstances, the depository institution would not be considered a creditor for purposes of paragraph (e).

10(f) Changes by Card Issuer

1. *Address for receiving payment.* For purposes of § 1026.10(f), ''address for receiving payment'' means a mailing address for receiving payment, such as a post office box, or the address of a branch or office at which payments on credit card accounts are accepted.

2. *Materiality.* For purposes of § 1026.10(f), a ''material change'' means any change in the address for receiving payment or procedures for handling cardholder payments which causes a material delay in the crediting of a payment. ''Material delay'' means any delay in crediting payment to a consumer's account which would result in a late payment and the imposition of a late fee or finance charge. A delay in crediting a payment which does not result in a late fee or finance charge would be immaterial.

3. *Safe harbor.* i. *General.* A card issuer may elect not to impose a late fee or finance charge on a consumer's account for the 60-day period following a change in address for receiving payment or procedures for handling cardholder payments which could reasonably be expected to cause a material delay in crediting of a payment to the consumer's account. For purposes of § 1026.10(f), a late fee or finance charge is not imposed if the fee or charge is waived or removed, or an amount equal to the fee or charge is credited to the account.

ii. *Retail location.* For a material change in the address of a retail location or procedures for handling cardholder payments at a retail

location, a card issuer may impose a late fee or finance charge on a consumer's account for a late payment during the 60-day period following the date on which the change took effect. However, if a card issuer is notified by a consumer no later than 60 days after the card issuer transmitted the first periodic statement that reflects the late fee or finance charge for a late payment that the late payment was caused by such change, the card issuer must waive or remove any late fee or finance charge, or credit an amount equal to any late fee or finance charge, imposed on the account during the 60-day period following the date on which the change took effect.

4. *Examples.* i. A card issuer changes the mailing address for receiving payments by mail from a five-digit postal zip code to a nine-digit postal zip code. A consumer mails a payment using the five-digit postal zip code. The change in mailing address is immaterial and it does not cause a delay. Therefore, a card issuer may impose a late fee or finance charge for a late payment on the account.

ii. A card issuer changes the mailing address for receiving payments by mail from one post office box number to another post office box number. For a 60-day period following the change, the card issuer continues to use both post office box numbers for the collection of payments received by mail. The change in mailing address would not cause a material delay in crediting a payment because payments would be received and credited at both addresses. Therefore, a card issuer may impose a late fee or finance charge for a late payment on the account during the 60-day period following the date on which the change took effect.

iii. Same facts as paragraph ii above, except the prior post office box number is no longer valid and mail sent to that address during the 60-day period following the change would be returned to sender. The change in mailing address is material and the change could cause a material delay in the crediting of a payment because a payment sent to the old address could be delayed past the due date. If, as a result, a consumer makes a late payment on the account during the 60-day period following the date on which the change took effect, a card issuer may not impose any late fee or finance charge for the late payment.

iv. A card issuer permanently closes a local branch office at which payments are accepted on credit card accounts. The permanent closing of the local branch office is a material change in address for receiving payment. Relying on the safe harbor, the card issuer elects not to impose a late fee or finance charge for the 60-day period following the local branch closing for late payments on consumer accounts which the issuer reasonably determines are associated with the local branch and which could reasonably be expected to have been caused by the branch closing.

v. A consumer has elected to make payments automatically to a credit card account, such as through a payroll deduction plan or a third party payor's preauthorized payment arrangement. A card issuer changes the procedures for handling such payments and as a result, a payment is delayed and not credited to the consumer's account before the due date. In these circumstances, a card issuer may not impose any late fee or finance charge during the 60-day period following the date on which the change took effect for a late payment on the account.

vi. A card issuer no longer accepts payments in person at a retail location as a conforming method of payment, which is a material change in the procedures for handling cardholder payment. In the 60-day period following the date on which the change took effect, a consumer attempts to make a payment in person at a retail location of a card issuer. As a result, the consumer makes a late payment and the issuer charges a late fee on the consumer's account. The consumer notifies the card issuer of the late fee for the late payment which was caused by the material change. In order to comply with § 1026.10(f), the card issuer must waive or remove the late fee or finance charge, or credit the consumer's account in an amount equal to the late fee or finance charge.

5. *Finance charge due to periodic interest rate.* When an account is not eligible for a grace period, imposing a finance charge due to a periodic interest rate does not constitute imposition of a finance charge for a late payment for purposes of § 1026.10(f).

Section 1026.11—Treatment of Credit Balances; Account Termination

11(a) Credit Balances

1. *Timing of refund.* The creditor may also fulfill its obligations under § 1026.11 by:

i. Refunding any credit balance to the consumer immediately.

ii. Refunding any credit balance prior to receiving a written request (under § 1026.11(a)(2)) from the consumer.

iii. Refunding any credit balance upon the consumer's oral or electronic request.

iv. Making a good faith effort to refund any credit balance before 6 months have passed. If that attempt is unsuccessful, the creditor need not try again to refund the credit balance at the end of the 6-month period.

2. *Amount of refund.* The phrases *any part of the remaining credit balance* in § 1026.11(a)(2) and *any part of the credit balance remaining in the account* in § 1026.11(a)(3) mean the amount of the credit balance at the time the creditor is required to make the refund. The creditor may take into consideration intervening purchases or other debits to the consumer's account (including those that have not yet been reflected on a periodic statement) that decrease or eliminate the credit balance.

Paragraph 11(a)(2)

1. *Written requests—standing orders.* The creditor is not required to honor standing orders requesting refunds of any credit balance that may be created on the consumer's account.

Paragraph 11(a)(3)

1. *Good faith effort to refund.* The creditor must take positive steps to return any credit balance that has remained in the account for over 6 months. This includes, if necessary, attempts to trace the consumer through the consumer's last known address or telephone number, or both.

2. *Good faith effort unsuccessful.* Section 1026.11 imposes no further duties on the creditor if a good faith effort to return the balance is unsuccessful. The ultimate disposition of the credit balance (or any credit balance of $1 or less) is to be determined under other applicable law.

11(b) Account Termination

Paragraph 11(b)(1)

1. *Expiration date.* The credit agreement determines whether or not an open-end plan has a stated expiration (maturity) date. Creditors that offer accounts with no stated expiration date are prohibited from terminating those accounts solely because a consumer does not incur a finance charge, even if credit cards or other access devices associated with the account expire after a stated period. Creditors may still terminate such accounts for inactivity consistent with § 1026.11(b)(2).

11(c) Timely Settlement of Estate Debts

1. *Administrator of an estate.* For purposes of § 1026.11(c), the term ''administrator'' means an administrator, executor, or any personal representative of an estate who is authorized to act on behalf of the estate.

2. *Examples.* The following are examples of reasonable procedures that satisfy this rule:

i. A card issuer may decline future transactions and terminate the account upon receiving reasonable notice of the consumer's death.

ii. A card issuer may credit the account for fees and charges imposed after the date of receiving reasonable notice of the consumer's death.

iii. A card issuer may waive the estate's liability for all charges made to the account after receiving reasonable notice of the consumer's death.

iv. A card issuer may authorize an agent to handle matters in accordance with the requirements of this rule.

v. A card issuer may require administrators of an estate to provide documentation indicating authority to act on behalf of the estate.

vi. A card issuer may establish or designate a department, business unit, or communication channel for administrators, such as a specific mailing address or toll-free number, to handle matters in accordance with the requirements of this rule.

vii. A card issuer may direct administrators, who call a general customer service toll-free number or who send correspondence by mail to an address for general correspondence, to an appropriate customer service representative, department, business unit, or communication channel to handle matters in accordance with the requirements of this rule.

2. *Request by an administrator of an estate.* A card issuer may receive a request for the amount of the balance on a deceased consumer's account in writing or by telephone call from the administrator of an estate. If a request is made in writing, such as by mail, the request is received on the date the card issuer receives the correspondence.

3. *Timely statement of balance.* A card issuer must disclose the balance on a

deceased consumer's account, upon request by the administrator of the decedent's estate. A card issuer may provide the amount, if any, by a written statement or by telephone. This does not preclude a card issuer from providing the balance amount to appropriate persons, other than the administrator, such as the spouse or a relative of the decedent, who indicate that they may pay any balance. This provision does not relieve card issuers of the requirements to provide a periodic statement, under § 1026.5(b)(2). A periodic statement, under § 1026.5(b)(2), may satisfy the requirements of § 1026.11(c)(2), if provided within 30 days of receiving a request by an administrator of the estate.

4. *Imposition of fees and interest charges.* Section 1026.11(c)(3) does not prohibit a card issuer from imposing fees and finance charges due to a periodic interest rate based on balances for days that precede the date on which the card issuer receives a request pursuant to § 1026.11(c)(2). For example, if the last day of the billing cycle is June 30 and the card issuer receives a request pursuant to § 1026.11(c)(2) on June 25, the card issuer may charge interest that accrued prior to June 25.

5. *Example.* A card issuer receives a request from an administrator for the amount of the balance on a deceased consumer's account on March 1. The card issuer discloses to the administrator on March 25 that the balance is $1,000. If the card issuer receives payment in full of the $1,000 on April 24, the card issuer must waive or rebate any additional interest that accrued on the $1,000 balance between March 25 and April 24. If the card issuer receives a payment of $1,000 on April 25, the card issuer is not required to waive or rebate interest charges on the $1,000 balance in respect of the period between March 25 and April 25. If the card issuer receives a partial payment of $500 on April 24, the card issuer is not required to waive or rebate interest charges on the $1,000 balance in respect of the period between March 25 and April 25.

6. *Application to joint accounts.* A card issuer may impose fees and charges on an account of a deceased consumer if a joint accountholder remains on the account. If only an authorized user remains on the account of a deceased consumer, however, then a card issuer may not impose fees and charges.

Section 1026.12—Special Credit Card Provisions

1. *Scope.* Sections 1026.12(a) and (b) deal with the issuance and liability rules for credit cards, whether the card is intended for consumer, business, or any other purposes. Sections 1026.12(a) and (b) are exceptions to the general rule that the regulation applies only to consumer credit. (See §§ 1026.1 and 1026.3.)

2. *Definition of ''accepted credit card''.* For purposes of this section, ''accepted credit card'' means any credit card that a cardholder has requested or applied for and received, or has signed, used, or authorized another person to use to obtain credit. Any credit card issued as a renewal or substitute in accordance with § 1026.12(a) becomes an accepted credit card when received by the cardholder.

12(a) Issuance of Credit Cards

Paragraph 12(a)(1)

1. *Explicit request.* A request or application for a card must be explicit. For example, a request for an overdraft plan tied to a checking account does not constitute an application for a credit card with overdraft checking features.

2. *Addition of credit features.* If the consumer has a non-credit card, the addition of credit features to the card (for example, the granting of overdraft privileges on a checking account when the consumer already has a check guarantee card) constitutes issuance of a credit card.

3. *Variance of card from request.* The request or application need not correspond exactly to the card that is issued. For example:

i. The name of the card requested may be different when issued.

ii. The card may have features in addition to those reflected in the request or application.

4. *Permissible form of request.* The request or application may be oral (in response to a telephone solicitation by a card issuer, for example) or written.

5. *Time of issuance.* A credit card may be issued in response to a request made before any cards are ready for issuance (for example, if a new program is established), even if there is some delay in issuance.

6. *Persons to whom cards may be issued.* A card issuer may issue a credit card to the person who requests it, and to anyone else for whom that person requests a card and who will be an authorized user on the requester's account. In other words, cards may be sent to consumer A on A's request, and also (on A's request) to consumers B and C, who will be authorized users on A's account. In these circumstances, the following rules apply:

i. The additional cards may be imprinted in either A's name or in the names of B and C.

ii. No liability for unauthorized use (by persons other than B and C), not even the $50, may be imposed on B or C since they are merely users and not cardholders as that term is defined in § 1026.2 and used in § 1026.12(b); of course, liability of up to $50 for unauthorized use of B's and C's cards may be imposed on A.

iii. Whether B and C may be held liable for their own use, or on the account generally, is a matter of state or other applicable law.

7. *Issuance of non-credit cards.* i. *General.* Under § 1026.12(a)(1), a credit card cannot be issued except in response to a request or an application. (*See* comment 2(a)(15)–2 for examples of cards or devices that are and are not credit cards.) A non-credit card may be sent on an unsolicited basis by an issuer that does not propose to connect the card to any credit plan; a credit feature may be added to a previously issued non-credit card only upon the consumer's specific request.

ii. *Examples.* A purchase-price discount card may be sent on an unsolicited basis by an issuer that does not propose to connect the card to any credit plan. An issuer demonstrates that it proposes to connect the card to a credit plan by, for example, including promotional materials about credit features or account agreements and disclosures required by § 1026.6. The issuer will violate the rule against unsolicited issuance if, for example, at the time the card is sent a credit plan can be accessed by the card or the recipient of the unsolicited card has been preapproved for credit that the recipient can access by contacting the issuer and activating the card.

8. *Unsolicited issuance of PINs.* A card issuer may issue personal identification numbers (PINs) to existing credit cardholders without a specific request from the cardholders, provided the PINs cannot be used alone to obtain credit. For example, the PINs may be necessary if consumers wish to use their existing credit cards at automated teller machines or at merchant locations with point of sale terminals that require PINs.

Paragraph 12(a)(2)

1. *Renewal.* Renewal generally contemplates the regular replacement of existing cards because of, for example, security reasons or new technology or systems. It also includes the re-issuance of cards that have been suspended temporarily, but does not include the opening of a new account after a previous account was closed.

2. *Substitution—examples.* Substitution encompasses the replacement of one card with another because the underlying account relationship has changed in some way—such as when the card issuer has:

i. Changed its name.

ii. Changed the name of the card.

iii. Changed the credit or other features available on the account. For example, the original card could be used to make purchases and obtain cash advances at teller windows. The substitute card might be usable, in addition, for obtaining cash advances through automated teller machines. (If the substitute card constitutes an access device, as defined in Regulation E, then the Regulation E issuance rules would have to be followed.) The substitution of one card with another on an unsolicited basis is not permissible, however, where in conjunction with the substitution an additional credit card account is opened and the consumer is able to make new purchases or advances under both the original and the new account with the new card. For example, if a retail card issuer replaces its credit card with a combined retailer/bank card, each of the creditors maintains a separate account, and both accounts can be accessed for new transactions by use of the new credit card, the card cannot be provided to a consumer without solicitation.

iv. Substituted a card user's name on the substitute card for the cardholder's name appearing on the original card.

v. Changed the merchant base, provided that the new card is honored by at least one of the persons that honored the original card. However, unless the change in the merchant base is the addition of an affiliate of the existing merchant base, the substitution of a new card for another on an unsolicited basis is not permissible where the account is inactive. A credit card cannot be issued in these circumstances without a request or application. For purposes of § 1026.12(a), an account is inactive if no credit has been

extended and if the account has no outstanding balance for the prior 24 months. (See § 1026.11(b)(2).)

3. *Substitution—successor card issuer.* Substitution also occurs when a successor card issuer replaces the original card issuer (for example, when a new card issuer purchases the accounts of the original issuer and issues its own card to replace the original one). A permissible substitution exists even if the original issuer retains the existing receivables and the new card issuer acquires the right only to future receivables, provided use of the original card is cut off when use of the new card becomes possible.

4. *Substitution—non-credit-card plan.* A credit card that replaces a retailer's open-end credit plan not involving a credit card is not considered a substitute for the retailer's plan—even if the consumer used the retailer's plan. A credit card cannot be issued in these circumstances without a request or application.

5. *One-for-one rule.* An accepted card may be replaced by no more than one renewal or substitute card. For example, the card issuer may not replace a credit card permitting purchases and cash advances with two cards, one for the purchases and another for the cash advances.

6. *One-for-one rule—exceptions.* The regulation does not prohibit the card issuer from:

i. Replacing a debit/credit card with a credit card and another card with only debit functions (or debit functions plus an associated overdraft capability), since the latter card could be issued on an unsolicited basis under Regulation E.

ii. Replacing an accepted card with more than one renewal or substitute card, provided that:

A. No replacement card accesses any account not accessed by the accepted card;

B. For terms and conditions required to be disclosed under § 1026.6, all replacement cards are issued subject to the same terms and conditions, except that a creditor may vary terms for which no change in terms notice is required under § 1026.9(c); and

C. Under the account's terms the consumer's total liability for unauthorized use with respect to the account does not increase.

7. *Methods of terminating replaced card.* The card issuer need not physically retrieve the original card, provided the old card is voided in some way, for example:

i. The issuer includes with the new card a notification that the existing card is no longer valid and should be destroyed immediately.

ii. The original card contained an expiration date.

iii. The card issuer, in order to preclude use of the card, reprograms computers or issues instructions to authorization centers.

8. *Incomplete replacement.* If a consumer has duplicate credit cards on the same account (Card A—one type of bank credit card, for example), the card issuer may not replace the duplicate cards with one Card A and one Card B (Card B—another type of bank credit card) unless the consumer requests Card B.

9. *Multiple entities.* Where multiple entities share responsibilities with respect to a credit card issued by one of them, the entity that issued the card may replace it on an unsolicited basis, if that entity terminates the original card by voiding it in some way, as described in comment 12(a)(2)–7. The other entity or entities may not issue a card on an unsolicited basis in these circumstances.

12(b) Liability of Cardholder for Unauthorized Use

1. *Meaning of cardholder.* For purposes of this provision, cardholder includes any person (including organizations) to whom a credit card is issued for any purpose, including business. When a corporation is the cardholder, required disclosures should be provided to the corporation (as opposed to an employee user).

2. *Imposing liability.* A card issuer is not required to impose liability on a cardholder for the unauthorized use of a credit card; if the card issuer does not seek to impose liability, the issuer need not conduct any investigation of the cardholder's claim.

3. *Reasonable investigation.* If a card issuer seeks to impose liability when a claim of unauthorized use is made by a cardholder, the card issuer must conduct a reasonable investigation of the claim. In conducting its investigation, the card issuer may reasonably request the cardholder's cooperation. The card issuer may not automatically deny a claim based solely on the cardholder's failure or refusal to comply with a particular request, including providing an affidavit or filing a police report; however, if the card issuer otherwise has no knowledge of facts confirming the unauthorized use, the lack of information resulting from the cardholder's failure or refusal to comply with a particular request may lead the card issuer reasonably to terminate the investigation. The procedures involved in investigating claims may differ, but actions such as the following represent steps that a card issuer may take, as appropriate, in conducting a reasonable investigation:

i. Reviewing the types or amounts of purchases made in relation to the cardholder's previous purchasing pattern.

ii. Reviewing where the purchases were delivered in relation to the cardholder's residence or place of business.

iii. Reviewing where the purchases were made in relation to where the cardholder resides or has normally shopped.

iv. Comparing any signature on credit slips for the purchases to the signature of the cardholder or an authorized user in the card issuer's records, including other credit slips.

v. Requesting documentation to assist in the verification of the claim.

vi. Requiring a written, signed statement from the cardholder or authorized user. For example, the creditor may include a signature line on a billing rights form that the cardholder may send in to provide notice of the claim. However, a creditor may not require the cardholder to provide an affidavit or signed statement under penalty of perjury as part of a reasonable investigation.

vii. Requesting a copy of a police report, if one was filed.

viii. Requesting information regarding the cardholder's knowledge of the person who allegedly used the card or of that person's authority to do so.

4. *Checks that access a credit card account.* The liability provisions for unauthorized use under § 1026.12(b)(1) only apply to transactions involving the use of a credit card, and not if an unauthorized transaction is made using a check accessing the credit card account. However, the billing error provisions in § 1026.13 apply to both of these types of transactions.

12(b)(1)(ii) Limitation on Amount

1. *Meaning of authority.* Section 1026.12(b)(1)(i) defines unauthorized use in terms of whether the user has actual, implied, or apparent authority. Whether such authority exists must be determined under state or other applicable law.

2. *Liability limits—dollar amounts.* As a general rule, the cardholder's liability for a series of unauthorized uses cannot exceed either $50 or the value obtained through the unauthorized use before the card issuer is notified, whichever is less.

3. *Implied or apparent authority.* If a cardholder furnishes a credit card and grants authority to make credit transactions to a person (such as a family member or coworker) who exceeds the authority given, the cardholder is liable for the transaction(s) unless the cardholder has notified the creditor that use of the credit card by that person is no longer authorized.

4. *Credit card obtained through robbery or fraud.* An unauthorized use includes, but is not limited to, a transaction initiated by a person who has obtained the credit card from the consumer, or otherwise initiated the transaction, through fraud or robbery.

12(b)(2) Conditions of Liability

1. *Issuer's option not to comply.* A card issuer that chooses not to impose any liability on cardholders for unauthorized use need not comply with the disclosure and identification requirements discussed in § 1026.12(b)(2).

Paragraph 12(b)(2)(ii)

1. *Disclosure of liability and means of notifying issuer.* The disclosures referred to in § 1026.12(b)(2)(ii) may be given, for example, with the initial disclosures under § 1026.6, on the credit card itself, or on periodic statements. They may be given at any time preceding the unauthorized use of the card.

2. *Meaning of ''adequate notice.''* For purposes of this provision, ''adequate notice'' means a printed notice to a cardholder that sets forth clearly the pertinent facts so that the cardholder may reasonably be expected to have noticed it and understood its meaning. The notice may be given by any means reasonably assuring receipt by the cardholder.

Paragraph 12(b)(2)(iii)

1. *Means of identifying cardholder or user.* To fulfill the condition set forth in § 1026.12(b)(2)(iii), the issuer must provide some method whereby the cardholder or the authorized user can be identified. This could include, for example, a signature, photograph, or fingerprint on the card or other biometric means, or electronic or mechanical confirmation.

2. *Identification by magnetic strip.* Unless a magnetic strip (or similar device not

readable without physical aids) must be used in conjunction with a secret code or the like, it would not constitute sufficient means of identification. Sufficient identification also does not exist if a ''pool'' or group card, issued to a corporation and signed by a corporate agent who will not be a user of the card, is intended to be used by another employee for whom no means of identification is provided.

3. *Transactions not involving card.* The cardholder may not be held liable under § 1026.12(b) when the card itself (or some other sufficient means of identification of the cardholder) is not presented. Since the issuer has not provided a means to identify the user under these circumstances, the issuer has not fulfilled one of the conditions for imposing liability. For example, when merchandise is ordered by telephone or the Internet by a person without authority to do so, using a credit card account number by itself or with other information that appears on the card (for example, the card expiration date and a 3- or 4-digit cardholder identification number), no liability may be imposed on the cardholder.

12(b)(3) Notification to Card Issuer

1. *How notice must be provided.* Notice given in a normal business manner—for example, by mail, telephone, or personal visit—is effective even though it is not given to, or does not reach, some particular person within the issuer's organization. Notice also may be effective even though it is not given at the address or phone number disclosed by the card issuer under § 1026.12(b)(2)(ii).

2. *Who must provide notice.* Notice of loss, theft, or possible unauthorized use need not be initiated by the cardholder. Notice is sufficient so long as it gives the ''pertinent information'' which would include the name or card number of the cardholder and an indication that unauthorized use has or may have occurred.

3. *Relationship to § 1026.13.* The liability protections afforded to cardholders in § 1026.12 do not depend upon the cardholder's following the error resolution procedures in § 1026.13. For example, the written notification and time limit requirements of § 1026.13 do not affect the § 1026.12 protections. (See also comment 12(b)–4.)

12(b)(5) Business Use of Credit Cards

1. *Agreement for higher liability for business use cards.* The card issuer may not rely on § 1026.12(b)(5) if the business is clearly not in a position to provide 10 or more cards to employees (for example, if the business has only 3 employees). On the other hand, the issuer need not monitor the personnel practices of the business to make sure that it has at least 10 employees at all times.

2. *Unauthorized use by employee.* The protection afforded to an employee against liability for unauthorized use in excess of the limits set in § 1026.12(b) applies only to unauthorized use by someone other than the employee. If the employee uses the card in an unauthorized manner, the regulation sets no restriction on the employee's potential liability for such use.

12(c) Right of Cardholder To Assert Claims or Defenses Against Card Issuer

1. *Relationship to § 1026.13.* The § 1026.12(c) credit card ''holder in due course'' provision deals with the consumer's right to assert against the card issuer a claim or defense concerning property or services purchased with a credit card, if the merchant has been unwilling to resolve the dispute. Even though certain merchandise disputes, such as non-delivery of goods, may also constitute ''billing errors'' under § 1026.13, that section operates independently of § 1026.12(c). The cardholder whose asserted billing error involves undelivered goods may institute the error resolution procedures of § 1026.13; but whether or not the cardholder has done so, the cardholder may assert claims or defenses under § 1026.12(c). Conversely, the consumer may pay a disputed balance and thus have no further right to assert claims and defenses, but still may assert a billing error if notice of that billing error is given in the proper time and manner. An assertion that a particular transaction resulted from unauthorized use of the card could also be both a ''defense'' and a billing error.

2. *Claims and defenses assertible.* Section 1026.12(c) merely preserves the consumer's right to assert against the card issuer any claims or defenses that can be asserted against the merchant. It does not determine what claims or defenses are valid as to the merchant; this determination must be made under state or other applicable law.

3. *Transactions excluded.* Section 1026.12(c) does not apply to the use of a check guarantee card or a debit card in connection with an overdraft credit plan, or to a check guarantee card used in connection with cash-advance checks.

4. *Method of calculating the amount of credit outstanding.* The amount of the claim or defense that the cardholder may assert shall not exceed the amount of credit outstanding for the disputed transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of the existence of the claim or defense. However, when a consumer has asserted a claim or defense against a creditor pursuant to § 1026.12(c), the creditor must apply any payment or other credit in a manner that avoids or minimizes any reduction in the amount subject to that claim or defense. Accordingly, to determine the amount of credit outstanding for purposes of this section, payments and other credits must be applied first to amounts other than the disputed transaction.

i. For examples of how to comply with §§ 1026.12 and 1026.53 for credit card accounts under an open-end (not home-secured) consumer credit plan, see comment 53–3.

ii. For other types of credit card accounts, creditors may, at their option, apply payments consistent with § 1026.53 and comment 53–3. In the alternative, payments and other credits may be applied to: Late charges in the order of entry to the account; then to finance charges in the order of entry to the account; and then to any debits other than the transaction subject to the claim or defense in the order of entry to the account. In these circumstances, if more than one item is included in a single extension of credit, credits are to be distributed pro rata according to prices and applicable taxes.

12(c)(1) General Rule

1. *Situations excluded and included.* The consumer may assert claims or defenses only when the goods or services are ''purchased with the credit card.'' This could include mail, the Internet or telephone orders, if the purchase is charged to the credit card account. But it would exclude:

i. Use of a credit card to obtain a cash advance, even if the consumer then uses the money to purchase goods or services. Such a transaction would not involve ''property or services purchased with the credit card.''

ii. The purchase of goods or services by use of a check accessing an overdraft account and a credit card used solely for identification of the consumer. (On the other hand, if the credit card is used to make partial payment for the purchase and not merely for identification, the right to assert claims or defenses would apply to credit extended via the credit card, although not to the credit extended on the overdraft line.)

iii. Purchases made by use of a check guarantee card in conjunction with a cash advance check (or by cash advance checks alone). (*See* comment 12(c)–3.) A cash advance check is a check that, when written, does not draw on an asset account; instead, it is charged entirely to an open-end credit account.

iv. Purchases effected by use of either a check guarantee card or a debit card when used to draw on overdraft credit plans. (*See* comment 12(c)–3.) The debit card exemption applies whether the card accesses an asset account via point of sale terminals, automated teller machines, or in any other way, and whether the card qualifies as an ''access device'' under Regulation E or is only a paper based debit card. If a card serves both as an ordinary credit card and also as check guarantee or debit card, a transaction will be subject to this rule on asserting claims and defenses when used as an ordinary credit card, but not when used as a check guarantee or debit card.

12(c)(2) Adverse Credit Reports Prohibited

1. *Scope of prohibition.* Although an amount in dispute may not be reported as delinquent until the matter is resolved:

i. That amount may be reported as disputed.

ii. Nothing in this provision prohibits the card issuer from undertaking its normal collection activities for the delinquent and undisputed portion of the account.

2. *Settlement of dispute.* A card issuer may not consider a dispute settled and report an amount disputed as delinquent or begin collection of the disputed amount until it has completed a reasonable investigation of the cardholder's claim. A reasonable investigation requires an independent assessment of the cardholder's claim based on information obtained from both the cardholder and the merchant, if possible. In conducting an investigation, the card issuer may request the cardholder's reasonable cooperation. The card issuer may not automatically consider a dispute settled if the

cardholder fails or refuses to comply with a particular request. However, if the card issuer otherwise has no means of obtaining information necessary to resolve the dispute, the lack of information resulting from the cardholder's failure or refusal to comply with a particular request may lead the card issuer reasonably to terminate the investigation.

12(c)(3) Limitations

Paragraph 12(c)(3)(i)(A)

1. *Resolution with merchant.* The consumer must have tried to resolve the dispute with the merchant. This does not require any special procedures or correspondence between them, and is a matter for factual determination in each case. The consumer is not required to seek satisfaction from the manufacturer of the goods involved. When the merchant is in bankruptcy proceedings, the consumer is not required to file a claim in those proceedings, and may instead file a claim for the property or service purchased with the credit card with the card issuer directly.

Paragraph 12(c)(3)(i)(B)

1. *Geographic limitation.* The question of where a transaction occurs (as in the case of mail, Internet, or telephone orders, for example) is to be determined under state or other applicable law.

12(c)(3)(ii) Exclusion

1. *Merchant honoring card.* The exceptions (stated in § 1026.12(c)(3)(ii)) to the amount and geographic limitations in § 1026.12(c)(3)(i)(B) do not apply if the merchant merely honors, or indicates through signs or advertising that it honors, a particular credit card.

12(d) Offsets by Card Issuer Prohibited

Paragraph 12(d)(1)

1. *Holds on accounts.* ''Freezing'' or placing a hold on funds in the cardholder's deposit account is the functional equivalent of an offset and would contravene the prohibition in § 1026.12(d)(1), unless done in the context of one of the exceptions specified in § 1026.12(d)(2). For example, if the terms of a security agreement permitted the card issuer to place a hold on the funds, the hold would not violate the offset prohibition. Similarly, if an order of a bankruptcy court required the card issuer to turn over deposit account funds to the trustee in bankruptcy, the issuer would not violate the regulation by placing a hold on the funds in order to comply with the court order.

2. *Funds intended as deposits.* If the consumer tenders funds as a deposit (to a checking account, for example), the card issuer may not apply the funds to repay indebtedness on the consumer's credit card account.

3. *Types of indebtedness; overdraft accounts.* The offset prohibition applies to any indebtedness arising from transactions under a credit card plan, including accrued finance charges and other charges on the account. The prohibition also applies to balances arising from transactions not using the credit card itself but taking place under plans that involve credit cards. For example, if the consumer writes a check that accesses an overdraft line of credit, the resulting indebtedness is subject to the offset prohibition since it is incurred through a credit card plan, even though the consumer did not use an associated check guarantee or debit card.

4. *When prohibition applies in case of termination of account.* The offset prohibition applies even after the card issuer terminates the cardholder's credit card privileges, if the indebtedness was incurred prior to termination. If the indebtedness was incurred after termination, the prohibition does not apply.

Paragraph 12(d)(2)

1. *Security interest—limitations.* In order to qualify for the exception stated in § 1026.12(d)(2), a security interest must be affirmatively agreed to by the consumer and must be disclosed in the issuer's account-opening disclosures under § 1026.6. The security interest must not be the functional equivalent of a right of offset; as a result, routinely including in agreements contract language indicating that consumers are giving a security interest in any deposit accounts maintained with the issuer does not result in a security interest that falls within the exception in § 1026.12(d)(2). For a security interest to qualify for the exception under § 1026.12(d)(2) the following conditions must be met:

i. The consumer must be aware that granting a security interest is a condition for the credit card account (or for more favorable account terms) and must specifically intend to grant a security interest in a deposit account. Indicia of the consumer's awareness and intent include at least one of the following (or a substantially similar procedure that evidences the consumer's awareness and intent):

A. Separate signature or initials on the agreement indicating that a security interest is being given.

B. Placement of the security agreement on a separate page, or otherwise separating the security interest provisions from other contract and disclosure provisions.

C. Reference to a specific amount of deposited funds or to a specific deposit account number.

ii. The security interest must be obtainable and enforceable by creditors generally. If other creditors could not obtain a security interest in the consumer's deposit accounts to the same extent as the card issuer, the security interest is prohibited by § 1026.12(d)(2).

2. *Security interest—after-acquired property.* As used in § 1026.12(d)(2), the term ''security interest'' does not exclude (as it does for other Regulation Z purposes) interests in after-acquired property. Thus, a consensual security interest in deposit-account funds, including funds deposited after the granting of the security interest would constitute a permissible exception to the prohibition on offsets.

3. *Court order.* If the card issuer obtains a judgment against the cardholder, and if state and other applicable law and the terms of the judgment do not so prohibit, the card issuer may offset the indebtedness against the cardholder's deposit account.

Paragraph 12(d)(3)

1. *Automatic payment plans—scope of exception.* With regard to automatic debit plans under § 1026.12(d)(3), the following rules apply:

i. The cardholder's authorization must be in writing and signed or initialed by the cardholder.

ii. The authorizing language need not appear directly above or next to the cardholder's signature or initials, provided it appears on the same document and that it clearly spells out the terms of the automatic debit plan.

iii. If the cardholder has the option to accept or reject the automatic debit feature (such option may be required under section 913 of the Electronic Fund Transfer Act), the fact that the option exists should be clearly indicated.

2. *Automatic payment plans—additional exceptions.* The following practices are not prohibited by § 1026.12(d)(1):

i. Automatically deducting charges for participation in a program of banking services (one aspect of which may be a credit card plan).

ii. Debiting the cardholder's deposit account on the cardholder's specific request rather than on an automatic periodic basis (for example, a cardholder might check a box on the credit card bill stub, requesting the issuer to debit the cardholder's account to pay that bill).

12(e) Prompt Notification of Returns and Crediting of Refunds

Paragraph 12(e)(1)

1. *Normal channels.* The term normal channels refers to any network or interchange system used for the processing of the original charge slips (or equivalent information concerning the transaction).

Paragraph 12(e)(2)

1. *Crediting account.* The card issuer need not actually post the refund to the consumer's account within three business days after receiving the credit statement, provided that it credits the account as of a date within that time period.

Section 1026.13—Billing Error Resolution

1. *Creditor's failure to comply with billing error provisions.* Failure to comply with the error resolution procedures may result in the forfeiture of disputed amounts as prescribed in section 161(e) of the Act. (Any failure to comply may also be a violation subject to the liability provisions of section 130 of the Act.)

2. *Charges for error resolution.* If a billing error occurred, whether as alleged or in a different amount or manner, the creditor may not impose a charge related to any aspect of the error resolution process (including charges for documentation or investigation) and must credit the consumer's account if such a charge was assessed pending resolution. Since the Act grants the consumer error resolution rights, the creditor should avoid any chilling effect on the good faith assertion of errors that might result if charges are assessed when no billing error has occurred.

13(a) Definition of Billing Error

Paragraph 13(a)(1)

1. *Actual, implied, or apparent authority.* Whether use of a credit card or open-end credit plan is authorized is determined by state or other applicable law. (*See* comment 12(b)(1)(ii)–1.)

Paragraph 13(a)(3)

1. *Coverage.* i. Section 1026.13(a)(3) covers disputes about goods or services that are ''not accepted'' or ''not delivered * * * as agreed''; for example:

A. The appearance on a periodic statement of a purchase, when the consumer refused to take delivery of goods because they did not comply with the contract.

B. Delivery of property or services different from that agreed upon.

C. Delivery of the wrong quantity.

D. Late delivery.

E. Delivery to the wrong location.

ii. Section 1026.13(a)(3) does not apply to a dispute relating to the quality of property or services that the consumer accepts. Whether acceptance occurred is determined by state or other applicable law.

2. *Application to purchases made using a third-party payment intermediary.* Section 1026.13(a)(3) generally applies to disputes about goods and services that are purchased using a third-party payment intermediary, such as a person-to-person Internet payment service, funded through use of a consumer's open-end credit plan when the goods or services are not accepted by the consumer or not delivered to the consumer as agreed. However, the extension of credit must be made at the time the consumer purchases the good or service and match the amount of the transaction to purchase the good or service (including ancillary taxes and fees). Under these circumstances, the property or service for which the extension of credit is made is not the payment service, but rather the good or service that the consumer has purchased using the payment service. Thus, for example, § 1026.13(a)(3) would not apply to purchases using a third party payment intermediary that is funded through use of an open-end credit plan if:

i. The extension of credit is made to fund the third-party payment intermediary ''account,'' but the consumer does not contemporaneously use those funds to purchase a good or service at that time.

ii. The extension of credit is made to fund only a portion of the purchase amount, and the consumer uses other sources to fund the remaining amount.

3. *Notice to merchant not required.* A consumer is not required to first notify the merchant or other payee from whom he or she has purchased goods or services and attempt to resolve a dispute regarding the good or service before providing a billing-error notice to the creditor under § 1026.13(a)(3) asserting that the goods or services were not accepted or delivered as agreed.

Paragraph 13(a)(5)

1. *Computational errors.* In periodic statements that are combined with other information, the error resolution procedures are triggered only if the consumer asserts a computational billing error in the credit-related portion of the periodic statement. For example, if a bank combines a periodic statement reflecting the consumer's credit card transactions with the consumer's monthly checking statement, a computational error in the checking account portion of the combined statement is not a billing error.

Paragraph 13(a)(6)

1. *Documentation requests.* A request for documentation such as receipts or sales slips, unaccompanied by an allegation of an error under § 1026.13(a) or a request for additional clarification under § 1026.13(a)(6), does not trigger the error resolution procedures. For example, a request for documentation merely for purposes such as tax preparation or recordkeeping does not trigger the error resolution procedures.

13(b) Billing Error Notice

1. *Withdrawal of billing error notice by consumer.* The creditor need not comply with the requirements of § 1026.13(c) through (g) of this section if the consumer concludes that no billing error occurred and voluntarily withdraws the billing error notice. The consumer's withdrawal of a billing error notice may be oral, electronic or written.

2. *Form of written notice.* The creditor may require that the written notice not be made on the payment medium or other material accompanying the periodic statement if the creditor so stipulates in the billing rights statement required by §§ 1026.6(a)(5) or (b)(5)(iii), and 1026.9(a). In addition, if the creditor stipulates in the billing rights statement that it accepts billing error notices submitted electronically, and states the means by which a consumer may electronically submit a billing error notice, a notice sent in such manner will be deemed to satisfy the written notice requirement for purposes of § 1026.13(b).

Paragraph 13(b)(1)

1. *Failure to send periodic statement—timing.* If the creditor has failed to send a periodic statement, the 60-day period runs from the time the statement should have been sent. Once the statement is provided, the consumer has another 60 days to assert any billing errors reflected on it.

2. *Failure to reflect credit—timing.* If the periodic statement fails to reflect a credit to the account, the 60-day period runs from transmittal of the statement on which the credit should have appeared.

3. *Transmittal.* If a consumer has arranged for periodic statements to be held at the financial institution until called for, the statement is ''transmitted'' when it is first made available to the consumer.

Paragraph 13(b)(2)

1. *Identity of the consumer.* The billing error notice need not specify both the name and the account number if the information supplied enables the creditor to identify the consumer's name and account.

13(c) Time for Resolution; General Procedures

1. *Temporary or provisional corrections.* A creditor may temporarily correct the consumer's account in response to a billing error notice, but is not excused from complying with the remaining error resolution procedures within the time limits for resolution.

2. *Correction without investigation.* A creditor may correct a billing error in the manner and amount asserted by the consumer without the investigation or the determination normally required. The creditor must comply, however, with all other applicable provisions. If a creditor follows this procedure, no presumption is created that a billing error occurred.

3. *Relationship with § 1026.12.* The consumer's rights under the billing error provisions in § 1026.13 are independent of the provisions set forth in § 1026.12(b) and (c). (*See* comments 12(b)–4, 12(b)(3)–3, and 12(c)–1.)

Paragraph 13(c)(2)

1. *Time for resolution.* The phrase two complete billing cycles means two actual billing cycles occurring after receipt of the billing error notice, not a measure of time equal to two billing cycles. For example, if a creditor on a monthly billing cycle receives a billing error notice mid-cycle, it has the remainder of that cycle plus the next two full billing cycles to resolve the error.

2. *Finality of error resolution procedure.* A creditor must comply with the error resolution procedures and complete its investigation to determine whether an error occurred within two complete billing cycles as set forth in § 1026.13(c)(2). Thus, for example, § 1026.13(c)(2) prohibits a creditor from reversing amounts previously credited for an alleged billing error even if the creditor obtains evidence after the error resolution time period has passed indicating that the billing error did not occur as asserted by the consumer. Similarly, if a creditor fails to mail or deliver a written explanation setting forth the reason why the billing error did not occur as asserted, or otherwise fails to comply with the error resolution procedures set forth in § 1026.13(f), the creditor generally must credit the disputed amount and related finance or other charges, as applicable, to the consumer's account. However, if a consumer receives more than one credit to correct the same billing error, § 1026.13 does not prevent a creditor from reversing amounts it has previously credited to correct that error, provided that the total amount of the remaining credits is equal to or more than the amount of the error and that the consumer does not incur any fees or other charges as a result of the timing of the creditor's reversal. For example, assume that a consumer asserts a billing error with respect to a $100 transaction and that the creditor posts a $100 credit to the consumer's account to correct that error during the time period set forth in § 1026.13(c)(2). However, following that time period, a merchant or other person honoring the credit card issues a $100 credit to the consumer to correct the same error. In these circumstances, § 1026.13(c)(2) does not prohibit the creditor from reversing its $100 credit once the $100 credit from the merchant or other person has posted to the consumer's account.

13(d) Rules Pending Resolution

1. *Disputed amount.* Disputed amount is the dollar amount alleged by the consumer to

be in error. When the allegation concerns the description or identification of the transaction (such as the date or the seller's name) rather than a dollar amount, the disputed amount is the amount of the transaction or charge that corresponds to the disputed transaction identification. If the consumer alleges a failure to send a periodic statement under § 1026.13(a)(7), the disputed amount is the entire balance owing.

13(d)(1) Consumer's Right To Withhold Disputed Amount; Collection Action Prohibited

1. *Prohibited collection actions.* During the error resolution period, the creditor is prohibited from trying to collect the disputed amount from the consumer. Prohibited collection actions include, for example, instituting court action, taking a lien, or instituting attachment proceedings.

2. *Right to withhold payment.* If the creditor reflects any disputed amount or related finance or other charges on the periodic statement, and is therefore required to make the disclosure under § 1026.13(d)(4), the creditor may comply with that disclosure requirement by indicating that payment of any disputed amount is not required pending resolution. Making a disclosure that only refers to the disputed amount would, of course, in no way affect the consumer's right under § 1026.13(d)(1) to withhold related finance and other charges. The disclosure under § 1026.13(d)(4) need not appear in any specific place on the periodic statement, need not state the specific amount that the consumer may withhold, and may be preprinted on the periodic statement.

3. *Imposition of additional charges on undisputed amounts.* The consumer's withholding of a disputed amount from the total bill cannot subject undisputed balances (including new purchases or cash advances made during the present or subsequent cycles) to the imposition of finance or other charges. For example, if on an account with a grace period (that is, an account in which paying the new balance in full allows the consumer to avoid the imposition of additional finance charges), a consumer disputes a $2 item out of a total bill of $300 and pays $298 within the grace period, the consumer would not lose the grace period as to any undisputed amounts, even if the creditor determines later that no billing error occurred. Furthermore, finance or other charges may not be imposed on any new purchases or advances that, absent the unpaid disputed balance, would not have finance or other charges imposed on them. Finance or other charges that would have been incurred even if the consumer had paid the disputed amount would not be affected.

4. *Automatic payment plans—coverage.* The coverage of this provision is limited to the card issuer's automatic payment plans, whether or not the consumer's asset account is held by the card issuer or by another financial institution. It does not apply to automatic or bill-payment plans offered by financial institutions other than the credit card issuer.

5. *Automatic payment plans—time of notice.* While the card issuer does not have to restore or prevent the debiting of a disputed amount if the billing error notice arrives after the three-business-day cut-off, the card issuer must, however, prevent the automatic debit of any part of the disputed amount that is still outstanding and unresolved at the time of the next scheduled debit date.

13(d)(2) Adverse Credit Reports Prohibited

1. *Report of dispute.* Although the creditor must not issue an adverse credit report because the consumer fails to pay the disputed amount or any related charges, the creditor may report that the amount or the account is in dispute. Also, the creditor may report the account as delinquent if undisputed amounts remain unpaid.

2. *Person.* During the error resolution period, the creditor is prohibited from making an adverse credit report about the disputed amount to any person—including employers, insurance companies, other creditors, and credit bureaus.

3. *Creditor's agent.* Whether an agency relationship exists between a creditor and an issuer of an adverse credit report is determined by state or other applicable law.

13(e) Procedures If Billing Error Occurred as Asserted

1. *Correction of error.* The phrase as applicable means that the necessary corrections vary with the type of billing error that occurred. For example, a misidentified transaction (or a transaction that is identified by one of the alternative methods in § 1026.8) is cured by properly identifying the transaction and crediting related finance and any other charges imposed. The creditor is not required to cancel the amount of the underlying obligation incurred by the consumer.

2. *Form of correction notice.* The written correction notice may take a variety of forms. It may be sent separately, or it may be included on or with a periodic statement that is mailed within the time for resolution. If the periodic statement is used, the amount of the billing error must be specifically identified. If a separate billing error correction notice is provided, the accompanying or subsequent periodic statement reflecting the corrected amount may simply identify it as credit.

3. *Discovery of information after investigation period. See* comment 13(c)(2)–2.

13(f) Procedures If Different Billing Error or No Billing Error Occurred

1. *Different billing error.* Examples of a different billing error include:

i. Differences in the amount of an error (for example, the customer asserts a $55.00 error but the error was only $53.00).

ii. Differences in other particulars asserted by the consumer (such as when a consumer asserts that a particular transaction never occurred, but the creditor determines that only the seller's name was disclosed incorrectly).

2. *Form of creditor's explanation.* The written explanation (which also may notify the consumer of corrections to the account) may take a variety of forms. It may be sent separately, or it may be included on or with a periodic statement that is mailed within the time for resolution. If the creditor uses the periodic statement for the explanation and correction(s), the corrections must be specifically identified. If a separate explanation, including the correction notice, is provided, the enclosed or subsequent periodic statement reflecting the corrected amount may simply identify it as a credit. The explanation may be combined with the creditor's notice to the consumer of amounts still owing, which is required under § 1026.13(g)(1), provided it is sent within the time limit for resolution. (See commentary to § 1026.13(e).)

3. *Reasonable investigation.* A creditor must conduct a reasonable investigation before it determines that no billing error occurred or that a different billing error occurred from that asserted. In conducting its investigation of an allegation of a billing error, the creditor may reasonably request the consumer's cooperation. The creditor may not automatically deny a claim based solely on the consumer's failure or refusal to comply with a particular request, including providing an affidavit or filing a police report. However, if the creditor otherwise has no knowledge of facts confirming the billing error, the lack of information resulting from the consumer's failure or refusal to comply with a particular request may lead the creditor reasonably to terminate the investigation. The procedures involved in investigating alleged billing errors may differ depending on the billing error type.

i. *Unauthorized transaction.* In conducting an investigation of a notice of billing error alleging an unauthorized transaction under § 1026.13(a)(1), actions such as the following represent steps that a creditor may take, as appropriate, in conducting a reasonable investigation:

A. Reviewing the types or amounts of purchases made in relation to the consumer's previous purchasing pattern.

B. Reviewing where the purchases were delivered in relation to the consumer's residence or place of business.

C. Reviewing where the purchases were made in relation to where the consumer resides or has normally shopped.

D. Comparing any signature on credit slips for the purchases to the signature of the consumer (or an authorized user in the case of a credit card account) in the creditor's records, including other credit slips.

E. Requesting documentation to assist in the verification of the claim.

F. Requiring a written, signed statement from the consumer (or authorized user, in the case of a credit card account). For example, the creditor may include a signature line on a billing rights form that the consumer may send in to provide notice of the claim. However, a creditor may not require the consumer to provide an affidavit or signed statement under penalty of perjury as a part of a reasonable investigation.

G. Requesting a copy of a police report, if one was filed.

H. Requesting information regarding the consumer's knowledge of the person who allegedly obtained an extension of credit on the account or of that person's authority to do so.

ii. *Nondelivery of property or services.* In conducting an investigation of a billing error

notice alleging the nondelivery of property or services under § 1026.13(a)(3), the creditor shall not deny the assertion unless it conducts a reasonable investigation and determines that the property or services were actually delivered, mailed, or sent as agreed.

iii. *Incorrect information.* In conducting an investigation of a billing error notice alleging that information appearing on a periodic statement is incorrect because a person honoring the consumer's credit card or otherwise accepting an access device for an open-end plan has made an incorrect report to the creditor, the creditor shall not deny the assertion unless it conducts a reasonable investigation and determines that the information was correct.

13(g) Creditor's Rights and Duties After Resolution

Paragraph 13(g)(1)

1. *Amounts owed by consumer.* Amounts the consumer still owes may include both minimum periodic payments and related finance and other charges that accrued during the resolution period. As explained in the commentary to § 1026.13(d)(1), even if the creditor later determines that no billing error occurred, the creditor may not include finance or other charges that are imposed on undisputed balances solely as a result of a consumer's withholding payment of a disputed amount.

2. *Time of notice.* The creditor need not send the notice of amount owed within the time period for resolution, although it is under a duty to send the notice promptly after resolution of the alleged error. If the creditor combines the notice of the amount owed with the explanation required under § 1026.13(f)(1), the combined notice must be provided within the time limit for resolution.

Paragraph 13(g)(2)

1. *Grace period if no error occurred.* If the creditor determines, after a reasonable investigation, that a billing error did not occur as asserted, and the consumer was entitled to a grace period at the time the consumer provided the billing error notice, the consumer must be given a period of time equal to the grace period disclosed under § 1026.6(a)(1) or (b)(2) and § 1026.7(a)(8) or (b)(8) to pay any disputed amounts due without incurring additional finance or other charges. However, the creditor need not allow a grace period disclosed under the above-mentioned sections to pay the amount due under § 1026.13(g)(1) if no error occurred and the consumer was not entitled to a grace period at the time the consumer asserted the error. For example, assume that a creditor provides a consumer a grace period of 20 days to pay a new balance to avoid finance charges, and that the consumer did not carry an outstanding balance from the prior month. If the consumer subsequently asserts a billing error for the current statement period within the 20-day grace period, and the creditor determines that no billing error in fact occurred, the consumer must be given at least 20 days (*i.e.,* the full disclosed grace period) to pay the amount due without incurring additional finance charges. Conversely, if the consumer was not entitled to a grace period at the time the consumer asserted the billing error, for example, if the consumer did not pay the previous monthly balance of undisputed charges in full, the creditor may assess finance charges on the disputed balance for the entire period the item was in dispute.

Paragraph 13(g)(3)

1. *Time for payment.* The consumer has a minimum of 10 days to pay (measured from the time the consumer could reasonably be expected to have received notice of the amount owed) before the creditor may issue an adverse credit report; if an initially disclosed grace period allows the consumer a longer time in which to pay, the consumer has the benefit of that longer period.

Paragraph 13(g)(4)

1. *Credit reporting.* Under § 1026.13(g)(4)(i) and (iii) the creditor's additional credit reporting responsibilities must be accomplished promptly. The creditor need not establish costly procedures to fulfill this requirement. For example, a creditor that reports to a credit bureau on scheduled updates need not transmit corrective information by an unscheduled computer or magnetic tape; it may provide the credit bureau with the correct information by letter or other commercially reasonable means when using the scheduled update would not be ''prompt.'' The creditor is not responsible for ensuring that the credit bureau corrects its information immediately.

2. *Adverse report to credit bureau.* If a creditor made an adverse report to a credit bureau that disseminated the information to other creditors, the creditor fulfills its § 1026.13(g)(4)(ii) obligations by providing the consumer with the name and address of the credit bureau.

13(i) Relation to Electronic Fund Transfer Act and Regulation E

1. *Coverage.* Credit extended directly from a non-overdraft credit line is governed solely by Regulation Z, even though a combined credit card/access device is used to obtain the extension.

2. *Incidental credit under agreement.* Credit extended incident to an electronic fund transfer under an agreement between the consumer and the financial institution is governed by § 1026.13(i), which provides that certain error resolution procedures in both this part and Regulation E apply. Incidental credit that is not extended under an agreement between the consumer and the financial institution is governed solely by the error resolution procedures in Regulation E. For example, credit inadvertently extended incident to an electronic fund-transfer, such as under an overdraft service not subject to Regulation Z, is governed solely by the Regulation E error resolution procedures, if the bank and the consumer do not have an agreement to extend credit when the consumer's account is overdrawn.

3. *Application to debit/credit transactions-examples.* If a consumer withdraws money at an automated teller machine and activates an overdraft credit feature on the checking account:

i. An error asserted with respect to the transaction is subject, for error resolution purposes, to the applicable Regulation E (12 CFR Part 1005) provisions (such as timing and notice) for the entire transaction.

ii. The creditor need not provisionally credit the consumer's account, under 12 CFR 1005.11(c)(2)(i), for any portion of the unpaid extension of credit.

iii. The creditor must credit the consumer's account under § 1005.11(c) with any finance or other charges incurred as a result of the alleged error.

iv. The provisions of §§ 1026.13(d) and (g) apply only to the credit portion of the transaction.

Section 1026.14—Determination of Annual Percentage Rate

14(a) General Rule

1. *Tolerance.* The tolerance of 1/8th of 1 percentage point above or below the annual percentage rate applies to any required disclosure of the annual percentage rate. The disclosure of the annual percentage rate is required in §§ 1026.60, 1026.40, 1026.6, 1026.7, 1026.9, 1026.15, 1026.16, 1026.26, 1026.55, and 1026.56.

2. *Rounding.* The regulation does not require that the annual percentage rate be calculated to any particular number of decimal places; rounding is permissible within the 1/8th of 1 percent tolerance. For example, an exact annual percentage rate of 14.33333% may be stated as 14.33% or as 14.3%, or even as 14¼%; but it could not be stated as 14.2% or 14%, since each varies by more than the permitted tolerance.

3. *Periodic rates.* No explicit tolerance exists for any periodic rate as such; a disclosed periodic rate may vary from precise accuracy (for example, due to rounding) only to the extent that its annualized equivalent is within the tolerance permitted by § 1026.14(a). Further, a periodic rate need not be calculated to any particular number of decimal places.

4. *Finance charges.* The regulation does not prohibit creditors from assessing finance charges on balances that include prior, unpaid finance charges; state or other applicable law may do so, however.

5. *Good faith reliance on faulty calculation tools.* The regulation relieves a creditor of liability for an error in the annual percentage rate or finance charge that resulted from a corresponding error in a calculation tool used in good faith by the creditor. Whether or not the creditor's use of the tool was in good faith must be determined on a case-by-case basis, but the creditor must in any case have taken reasonable steps to verify the accuracy of the tool, including any instructions, before using it. Generally, the safe harbor from liability is available only for errors directly attributable to the calculation tool itself, including software programs; it is not intended to absolve a creditor of liability for its own errors, or for errors arising from improper use of the tool, from incorrect data entry, or from misapplication of the law.

6. *Effect of leap year.* Any variance in the annual percentage rate that occurs solely by reason of the addition of February 29 in a leap year may be disregarded, and such a rate may be disclosed without regard to such variance.

14(b) Annual Percentage Rate—In General

1. *Corresponding annual percentage rate computation.* For purposes of §§ 1026.60, 1026.40, 1026.6, 1026.7(a)(4) or (b)(4), 1026.9, 1026.15, 1026.16, 1026.26, 1026.55, and 1026.56, the annual percentage rate is determined by multiplying the periodic rate by the number of periods in the year. This computation reflects the fact that, in such disclosures, the rate (known as the corresponding annual percentage rate) is prospective and does not involve any particular finance charge or periodic balance.

14(c) Optional Effective Annual Percentage Rate for Periodic Statements for Creditors Offering Open-End Credit Plans Secured by a Consumer's Dwelling

1. *General rule.* The periodic statement may reflect (under § 1026.7(a)(7)) the annualized equivalent of the rate actually applied during a particular cycle; this rate may differ from the corresponding annual percentage rate because of the inclusion of, for example, fixed, minimum, or transaction charges. Sections 1026.14(c)(1) through (c)(4) state the computation rules for the effective rate.

2. *Charges related to opening, renewing, or continuing an account.* Sections 1026.14(c)(2) and (c)(3) exclude from the calculation of the effective annual percentage rate finance charges that are imposed during the billing cycle such as a loan fee, points, or similar charge that relates to opening, renewing, or continuing an account. The charges involved here do not relate to a specific transaction or to specific activity on the account, but relate solely to the opening, renewing, or continuing of the account. For example, an annual fee to renew an open-end credit account that is a percentage of the credit limit on the account, or that is charged only to consumers that have not used their credit card for a certain dollar amount in transactions during the preceding year, would not be included in the calculation of the annual percentage rate, even though the fee may not be excluded from the finance charge under § 1026.4(c)(4). (See comment 4(c)(4)–2.) This rule applies even if the loan fee, points, or similar charges are billed on a subsequent periodic statement or withheld from the proceeds of the first advance on the account.

3. *Classification of charges.* If the finance charge includes a charge not due to the application of a periodic rate, the creditor must use the annual percentage rate computation method that corresponds to the type of charge imposed. If the charge is tied to a specific transaction (for example, 3 percent of the amount of each transaction), then the method in § 1026.14(c)(3) must be used. If a fixed or minimum charge is applied, that is, one not tied to any specific transaction, then the formula in § 1026.14(c)(2) is appropriate.

4. *Small finance charges.* Section 1026.14(c)(4) gives the creditor an alternative to § 1026.14(c)(2) and (c)(3) if small finance charges (50 cents or less) are involved; that is, if the finance charge includes minimum or fixed fees not due to the application of a periodic rate and the total finance charge for the cycle does not exceed 50 cents. For example, while a monthly activity fee of 50 cents on a balance of $20 would produce an annual percentage rate of 30 percent under the rule in § 1026.14(c)(2), the creditor may disclose an annual percentage rate of 18 percent if the periodic rate generally applicable to all balances is 1 and ½ percent per month.

5. *Prior-cycle adjustments.* i. The annual percentage rate reflects the finance charges imposed during the billing cycle. However, finance charges imposed during the billing cycle may relate to activity in a prior cycle. Examples of circumstances when this may occur are:

A. A cash advance occurs on the last day of a billing cycle on an account that uses the transaction date to figure finance charges, and it is impracticable to post the transaction until the following cycle.

B. An adjustment to the finance charge is made following the resolution of a billing error dispute.

C. A consumer fails to pay the purchase balance under a deferred payment feature by the payment due date, and finance charges are imposed from the date of purchase.

ii. Finance charges relating to activity in prior cycles should be reflected on the periodic statement as follows:

A. If a finance charge imposed in the current billing cycle is attributable to periodic rates applicable to prior billing cycles (such as when a deferred payment balance was not paid in full by the payment due date and finance charges from the date of purchase are now being debited to the account, or when a cash advance occurs on the last day of a billing cycle on an account that uses the transaction date to figure finance charges and it is impracticable to post the transaction until the following cycle), and the creditor uses the quotient method to calculate the annual percentage rate, the numerator would include the amount of any transaction charges plus any other finance charges posted during the billing cycle. At the creditor's option, balances relating to the finance charge adjustment may be included in the denominator if permitted by the legal obligation, if it was impracticable to post the transaction in the previous cycle because of timing, or if the adjustment is covered by comment 14(c)–5.ii.B.

B. If a finance charge that is posted to the account relates to activity for which a finance charge was debited or credited to the account in a previous billing cycle (for example, if the finance charge relates to an adjustment such as the resolution of a billing error dispute, or an unintentional posting error, or a payment by check that was later returned unpaid for insufficient funds or other reasons), the creditor shall at its option:

1. Calculate the annual percentage rate in accordance with ii.A of this paragraph, or

2. Disclose the finance charge adjustment on the periodic statement and calculate the annual percentage rate for the current billing cycle without including the finance charge adjustment in the numerator and balances associated with the finance charge adjustment in the denominator.

14(c)(1) Solely Periodic Rates Imposed

1. *Periodic rates.* Section 1026.14(c)(1) applies if the only finance charge imposed is due to the application of a periodic rate to a balance. The creditor may compute the annual percentage rate either:

i. By multiplying each periodic rate by the number of periods in the year; or

ii. By the ''quotient'' method. This method refers to a composite annual percentage rate when different periodic rates apply to different balances. For example, a particular plan may involve a periodic rate of ½ percent on balances up to $500, and 1 percent on balances over $500. If, in a given cycle, the consumer has a balance of $800, the finance charge would consist of $7.50 ($500 × .015) plus $3.00 ($300 × .01), for a total finance charge of $10.50. The annual percentage rate for this period may be disclosed either as 18% on $500 and 12 percent on $300, or as 15.75 percent on a balance of $800 (the quotient of $10.50 divided by $800, multiplied by 12).

14(c)(2) Minimum or Fixed Charge, But Not Transaction Charge, Imposed

1. *Certain charges not based on periodic rates.* Section 1026.14(c)(2) specifies use of the quotient method to determine the annual percentage rate if the finance charge imposed includes a certain charge not due to the application of a periodic rate (other than a charge relating to a specific transaction). For example, if the creditor imposes a minimum $1 finance charge on all balances below $50, and the consumer's balance was $40 in a particular cycle, the creditor would disclose an annual percentage rate of 30 percent (1/40 × 12).

2. *No balance.* If there is no balance to which the finance charge is applicable, an annual percentage rate cannot be determined under § 1026.14(c)(2). This could occur not only when minimum charges are imposed on an account with no balance, but also when a periodic rate is applied to advances from the date of the transaction. For example, if on May 19 the consumer pays the new balance in full from a statement dated May 1, and has no further transactions reflected on the June 1 statement, that statement would reflect a finance charge with no account balance.

14(c)(3) Transaction Charge Imposed

1. *Transaction charges.* i. Section 1026.14(c)(3) transaction charges include, for example:

A. A loan fee of $10 imposed on a particular advance.

B. A charge of 3 percent of the amount of each transaction.

ii. The reference to avoiding duplication in the computation requires that the amounts of transactions on which transaction charges were imposed not be included both in the amount of total balances and in the ''other amounts on which a finance charge was imposed'' figure. In a multifeatured plan, creditors may consider each bona fide feature separately in the calculation of the denominator. A creditor has considerable flexibility in defining features for open-end plans, as long as the creditor has a reasonable basis for the distinctions. For further explanation and examples of how to

determine the components of this formula, see Appendix F to part 1026.

2. *Daily rate with specific transaction charge.* Section 1026.14(c)(3) sets forth an acceptable method for calculating the annual percentage rate if the finance charge results from a charge relating to a specific transaction and the application of a daily periodic rate. This section includes the requirement that the creditor follow the rules in Appendix F to part 1026 in calculating the annual percentage rate, especially the provision in the introductory section of Appendix F which addresses the daily rate/transaction charge situation by providing that the ''average of daily balances'' shall be used instead of the ''sum of the balances.''

14(d) Calculations Where Daily Periodic Rate Applied

1. *Quotient method.* Section 1026.14(d) addresses use of a daily periodic rate(s) to determine some or all of the finance charge and use of the quotient method to determine the annual percentage rate. Since the quotient formula in § 1026.14(c)(1)(ii) and (c)(2) cannot be used when a daily rate is being applied to a series of daily balances, § 1026.14(d) provides two alternative ways to calculate the annual percentage rate—either of which satisfies the provisions of § 1026.7(a)(7).

2. *Daily rate with specific transaction charge.* If the finance charge results from a charge relating to a specific transaction and the application of a daily periodic rate, see comment 14(c)(3)–2 for guidance on an appropriate calculation method.

Section 1026.15—Right of Rescission

1. *Transactions not covered.* Credit extensions that are not subject to the regulation are not covered by § 1026.15 even if the customer's principal dwelling is the collateral securing the credit. For this purpose, *credit extensions* also would include the occurrences listed in comment 15(a)(1)–1. For example, the right of rescission does not apply to the opening of a business-purpose credit line, even though the loan is secured by the customer's principal dwelling.

15(a) Consumer's Right To Rescind

Paragraph 15(a)(1)

1. *Occurrences subject to right.* Under an open-end credit plan secured by the consumer's principal dwelling, the right of rescission generally arises with each of the following occurrences:

i. Opening the account.

ii. Each credit extension.

iii. Increasing the credit limit.

iv. Adding to an existing account a security interest in the consumer's principal dwelling.

v. Increasing the dollar amount of the security interest taken in the dwelling to secure the plan. For example, a consumer may open an account with a $10,000 credit limit, $5,000 of which is initially secured by the consumer's principal dwelling. The consumer has the right to rescind at that time and (except as noted in § 1026.15(a)(1)(ii)) with each extension on the account. Later, if the creditor decides that it wants the credit line fully secured, and increases the amount of its interest in the consumer's dwelling, the consumer has the right to rescind the increase.

2. *Exceptions.* Although the consumer generally has the right to rescind with each transaction on the account, Section 125(e) of the Act provides an exception: the creditor need not provide the right to rescind at the time of each credit extension made under an open-end credit plan secured by the consumer's principal dwelling to the extent that the credit extended is in accordance with a previously established credit limit for the plan. This limited rescission option is available whether or not the plan existed prior to the effective date of the Act.

3. *Security interest arising from transaction.* i. In order for the right of rescission to apply, the security interest must be retained as part of the credit transaction. For example:

A. A security interest that is acquired by a contractor who is also extending the credit in the transaction.

B. A mechanic's or materialman's lien that is retained by a subcontractor or supplier of a contractor-creditor, even when the latter has waived its own security interest in the consumer's home.

ii. The security interest is not part of the credit transaction, and therefore the transaction is not subject to the right of rescission when, for example:

A. A mechanic's or materialman's lien is obtained by a contractor who is not a party to the credit transaction but merely is paid with the proceeds of the consumer's cash advance.

B. All security interests that may arise in connection with the credit transaction are validly waived.

C. The creditor obtains a lien and completion bond that in effect satisfies all liens against the consumer's principal dwelling as a result of the credit transaction.

iii. Although liens arising by operation of law are not considered security interests for purposes of disclosure under § 1026.2, that section specifically includes them in the definition for purposes of the right of rescission. Thus, even though an interest in the consumer's principal dwelling is not a required disclosure under § 1026.6(c), it may still give rise to the right of rescission.

4. *Consumer.* To be a consumer within the meaning of § 1026.2, that person must at least have an ownership interest in the dwelling that is encumbered by the creditor's security interest, although that person need not be a signatory to the credit agreement. For example, if only one spouse enters into a secured plan, the other spouse is a consumer if the ownership interest of that spouse is subject to the security interest.

5. *Principal dwelling.* A consumer can only have one principal dwelling at a time. (But see comment 15(a)(1)–6.) A vacation or other second home would not be a principal dwelling. A transaction secured by a second home (such as a vacation home) that is not currently being used as the consumer's principal dwelling is not rescindable, even if the consumer intends to reside there in the future. When a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within one year or upon completion of construction, the new dwelling is considered the principal dwelling if it secures the open-end credit line. In that case, the transaction secured by the new dwelling is a residential mortgage transaction and is not rescindable. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, an advance on an open-end line to finance B and secured by B is a residential mortgage transaction. Dwelling, as defined in § 1026.2, includes structures that are classified as personalty under state law. For example, a transaction secured by a mobile home, trailer, or houseboat used as the consumer's principal dwelling may be rescindable.

6. *Special rule for principal dwelling.* Notwithstanding the general rule that consumers may have only one principal dwelling, when the consumer is acquiring or constructing a new principal dwelling, a credit plan or extension that is subject to Regulation Z and is secured by the equity in the consumer's current principal dwelling is subject to the right of rescission regardless of the purpose of that loan (for example, an advance to be used as a bridge loan). For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a loan to finance B and secured by A is subject to the right of rescission. Moreover, a loan secured by both A and B is, likewise, rescindable.

Paragraph 15(a)(2)

1. *Consumer's exercise of right.* The consumer must exercise the right of rescission in writing but not necessarily on the notice supplied under § 1026.15(b). Whatever the means of sending the notification of rescission—mail, telegram or other written means—the time period for the creditor's performance under § 1026.15(d)(2) does not begin to run until the notification has been received. The creditor may designate an agent to receive the notification so long as the agent's name and address appear on the notice provided to the consumer under § 1026.15(b). Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivery of the notification to the person or address to which the consumer has been directed to send payments constitutes delivery to the creditor or assignee. State law determines whether delivery of the notification to a third party other than the person to whom payments are made is delivery to the creditor or assignee, in the case where the creditor fails to designate an address for sending the notification of rescission.

Paragraph 15(a)(3)

1. *Rescission period.* i. The period within which the consumer may exercise the right to rescind runs for 3 business days from the last of 3 events:

A. The occurrence that gives rise to the right of rescission.

B. Delivery of *all* material disclosures that are relevant to the plan.

C. Delivery to the consumer of the required rescission notice.

ii. For example, an account is opened on Friday, June 1, and the disclosures and notice of the right to rescind were given on Thursday, May 31; the rescission period will expire at midnight of the third business day after June 1—that is, Tuesday June 5. In another example, if the disclosures are given and the account is opened on Friday, June 1, and the rescission notice is given on Monday, June 4, the rescission period expires at midnight of the third business day after June 4—that is Thursday, June 7. The consumer must place the rescission notice in the mail, file it for telegraphic transmission, or deliver it to the creditor's place of business within that period in order to exercise the right.

2. *Material disclosures.* Section 1026.15(a)(3) sets forth the material disclosures that must be provided before the rescission period can begin to run. The creditor must provide sufficient information to satisfy the requirements of § 1026.6 for these disclosures. A creditor may satisfy this requirement by giving an initial disclosure statement that complies with the regulation. Failure to give the other required initial disclosures (such as the billing rights statement) or the information required under § 1026.40 does not prevent the running of the rescission period, although that failure may result in civil liability or administrative sanctions. The payment terms set forth in § 1026.15(a)(3) apply to any repayment phase set forth in the agreement. Thus, the payment terms described in § 1026.6(e)(2) for any repayment phase as well as for the draw period are ''material disclosures.''

3. *Material disclosures—variable rate program.* For a variable rate program, the material disclosures also include the disclosures listed in § 1026.6(a)(1)(ii): the circumstances under which the rate may increase; the limitations on the increase; and the effect of an increase. The disclosures listed in § 1026.6(a)(1)(ii) for any repayment phase also are material disclosures for variable-rate programs.

4. *Unexpired right of rescission.* i. When the creditor has failed to take the action necessary to start the three-day rescission period running the right to rescind automatically lapses on the occurrence of the earliest of the following three events:

A. The expiration of three years after the occurrence giving rise to the right of rescission.

B. Transfer of all the consumer's interest in the property.

C. Sale of the consumer's interest in the property, including a transaction in which the consumer sells the dwelling and takes back a purchase money note and mortgage or retains legal title through a device such as an installment sale contract.

ii. Transfer of all the consumer's interest includes such transfers as bequests and gifts. A sale or transfer of the property need not be voluntary to terminate the right to rescind. For example, a foreclosure sale would terminate an unexpired right to rescind. As provided in section 125 of the Act, the three-year limit may be extended by an administrative proceeding to enforce the provisions of § 1026.15. A partial transfer of the consumer's interest, such as a transfer bestowing co-ownership on a spouse, does not terminate the right of rescission.

Paragraph 15(a)(4)

1. *Joint owners.* When more than one consumer has the right to rescind a transaction, any one of them may exercise that right and cancel the transaction on behalf of all. For example, if both a husband and wife have the right to rescind a transaction, either spouse acting alone may exercise the right and both are bound by the rescission.

15(b) Notice of Right To Rescind

1. *Who receives notice.* Each consumer entitled to rescind must be given two copies of the rescission notice and the material disclosures.In a transaction involving joint owners, both of whom are entitled to rescind, both must receive the notice of the right to rescind and disclosures. For example, if both spouses are entitled to rescind a transaction, each must receive two copies of the rescission notice (one copy to each if the notice is provided in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act) and one copy of the disclosures.

2. *Format.* The rescission notice may be physically separated from the material disclosures or combined with the material disclosures, so long as the information required to be included on the notice is set forth in a clear and conspicuous manner. See the model notices in Appendix G.

3. *Content.* The notice must include all of the information outlined in § 1026.15(b)(1) through (5). The requirement in § 1026.15(b) that the transaction or occurrence be identified may be met by providing the date of the transaction or occurrence. The notice may include additional information related to the required information, such as:

i. A description of the property subject to the security interest.

ii. A statement that joint owners may have the right to rescind and that a rescission by one is effective for all.

iii. The name and address of an agent of the creditor to receive notice of rescission.

4. *Time of providing notice.* The notice required by § 1026.15(b) need not be given before the occurrence giving rise to the right of rescission. The creditor may deliver the notice after the occurrence, but the rescission period will not begin to run until the notice is given. For example, if the creditor provides the notice on May 15, but disclosures were given and the credit limit was raised on May 10, the 3-business-day rescission period will run from May 15.

15(c) Delay of Creditor's Performance

1. *General rule.* i. Until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded, the creditor must not, either directly or through a third party:

A. Disburse advances to the consumer.

B. Begin performing services for the consumer.

C. Deliver materials to the consumer.

ii. A creditor may, however, continue to allow transactions under an existing open-end credit plan during a rescission period that results solely from the addition of a security interest in the consumer's principal dwelling. (See comment 15(c)–3 for other actions that may be taken during the delay period.)

2. *Escrow.* The creditor may disburse advances during the rescission period in a valid escrow arrangement. The creditor may not, however, appoint the consumer as ''trustee'' or ''escrow agent'' and distribute funds to the consumer in that capacity during the delay period.

3. *Actions during the delay period.* Section 1026.15(c) does not prevent the creditor from taking other steps during the delay, short of beginning actual performance. Unless otherwise prohibited, such as by state law, the creditor may, for example:

i. Prepare the cash advance check.

ii. Perfect the security interest.

iii. Accrue finance charges during the delay period.

4. *Performance by third party.* The creditor is relieved from liability for failure to delay performance if a third party with no knowledge that the rescission right has been activated provides materials or services, as long as any debt incurred for materials or services obtained by the consumer during the rescission period is not secured by the security interest in the consumer's dwelling. For example, if a consumer uses a bank credit card to purchase materials from a merchant in an amount below the floor limit, the merchant might not contact the card issuer for authorization and therefore would not know that materials should not be provided.

5. *Delay beyond rescission period.* i. The creditor must wait until it is reasonably satisfied that the consumer has not rescinded. For example, the creditor may satisfy itself by doing one of the following:

A. Waiting a reasonable time after expiration of the rescission period to allow for delivery of a mailed notice.

B. Obtaining a written statement from the consumer that the right has not been exercised.

ii. When more than one consumer has the right to rescind, the creditor cannot reasonably rely on the assurance of only one consumer, because other consumers may exercise the right.

15(d) Effects of Rescission

Paragraph 15(d)(1)

1. *Termination of security interest.* Any security interest giving rise to the right of rescission becomes void when the consumer exercises the right of rescission. The security interest is automatically negated, regardless of its status and whether or not it was recorded or perfected. Under § 1026.15(d)(2), however, the creditor must take any action necessary to reflect the fact that the security interest no longer exists.

2. *Extent of termination.* The creditor's security interest is void to the extent that it is related to the occurrence giving rise to the right of rescission. For example, upon rescission:

i. If the consumer's right to rescind is activated by the opening of a plan, any security interest in the principal dwelling is void.

ii. If the right arises due to an increase in the credit limit, the security interest is void as to the amount of credit extensions over the prior limit, but the security interest in

amounts up to the original credit limit is unaffected.

iii. If the right arises with each individual credit extension, then the interest is void as to that extension, and other extensions are unaffected.

Paragraph 15(d)(2)

1. *Refunds to consumer.* The consumer cannot be required to pay any amount in the form of money or property either to the creditor or to a third party as part of the occurrence subject to the right of rescission. Any amounts of this nature already paid by the consumer must be refunded. ''Any amount'' includes finance charges already accrued, as well as other charges such as broker fees, application and commitment fees, or fees for a title search or appraisal, whether paid to the creditor, paid by the consumer directly to a third party, or passed on from the creditor to the third party. It is irrelevant that these amounts may not represent profit to the creditor. For example:

i. If the occurrence is the opening of the plan, the creditor must return any membership or application fee paid.

ii. If the occurrence is the increase in a credit limit or the addition of a security interest, the creditor must return any fee imposed for a new credit report or filing fees.

iii. If the occurrence is a credit extension, the creditors must return fees such as application, title, and appraisal or survey fees, as well as any finance charges related to the credit extension.

2. *Amounts not refundable to consumer.* Creditors need not return any money given by the consumer to a third party outside of the occurrence, such as costs incurred for a building permit or for a zoning variance. Similarly, the term *any amount* does not apply to money or property given by the creditor to the consumer; those amounts must be tendered by the consumer to the creditor under § 1026.15(d)(3).

3. *Reflection of security interest termination.* The creditor must take whatever steps are necessary to indicate that the security interest is terminated. Those steps include the cancellation of documents creating the security interest, and the filing of release or termination statements in the public record. In a transaction involving subcontractors or suppliers that also hold security interests related to the occurrence rescinded by the consumer, the creditor must insure that the termination of their security interests is also reflected. The 20-day period for the creditor's action refers to the time within which the creditor must begin the process. It does not require all necessary steps to have been completed within that time, but the creditor is responsible for seeing the process through to completion.

Paragraph 15(d)(3)

1. *Property exchange.* Once the creditor has fulfilled its obligation under § 1026.15(d)(2), the consumer must tender to the creditor any property or money the creditor has already delivered to the consumer. At the consumer's option, property may be tendered at the location of the property. For example, if fixtures or furniture have been delivered to the consumer's home, the consumer may tender them to the creditor by making them available for pick-up at the home, rather than physically returning them to the creditor's premises. Money already given to the consumer *must* be tendered at the creditor's place of business. For purpose of property exchange, the following additional rules apply:

i. A cash advance is considered money for purposes of this section even if the creditor knows what the consumer intends to purchase with the money.

ii. In a 3-party open-end credit plan (that is, if the creditor and seller are not the same or related persons), extensions by the creditor that are used by the consumer for purchases from third-party sellers are considered to be the same as cash advances for purposes of tendering value to the creditor, even though the transaction is a purchase for other purposes under the regulation. For example, if a consumer exercises the unexpired right to rescind after using a 3-party credit card for one year, the consumer would tender the amount of the purchase price for the items charged to the account, rather than tendering the items themselves to the creditor.

2. *Reasonable value.* If returning the property would be extremely burdensome to the consumer, the consumer may offer the creditor its reasonable value rather than returning the property itself. For example, if building materials have already been incorporated into the consumer's dwelling, the consumer may pay their reasonable value.

Paragraph 15(d)(4)

1. *Modifications.* The procedures outlined in § 1026.15(d)(2) and (3) may be modified by a court. For example, when a consumer is in bankruptcy proceedings and prohibited from returning anything to the creditor, or when the equities dictate, a modification might be made. The sequence of procedures under § 1026.15(d)(2) and (3), or a court's modification of those procedures under § 1026.15(d)(4), does not affect a consumer's substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind and determine the amounts owed before establishing the procedures for the parties to tender any money or property.

15(e) Consumer's Waiver of Right To Rescind

1. *Need for waiver.* To waive the right to rescind, the consumer must have a bona fide personal financial emergency that must be met before the end of the rescission period. The existence of the consumer's waiver will not, of itself, automatically insulate the creditor from liability for failing to provide the right of rescission.

2. *Procedure.* To waive or modify the right to rescind, the consumer must give a written statement that specifically waives or modifies the right, and also includes a brief description of the emergency. Each consumer entitled to rescind must sign the waiver statement. In a transaction involving multiple consumers, such as a husband and wife using their home as collateral, the waiver must bear the signatures of both spouses.

15(f) Exempt Transactions

1. *Residential mortgage transaction.* Although residential mortgage transactions would seldom be made on bona fide open-end credit plans (under which repeated transactions must be reasonably contemplated), an advance on an open-end plan could be for a downpayment for the purchase of a dwelling that would then secure the remainder of the line. In such a case, only the particular advance for the downpayment would be exempt from the rescission right.

2. *State creditors.* Cities and other political subdivisions of states acting as creditors are not exempt from § 1026.15.

3. *Spreader clause.* When the creditor holds a mortgage or deed of trust on the consumer's principal dwelling and that mortgage or deed of trust contains a ''spreader clause'' (also known as a ''dragnet'' or cross-collateralization clause), subsequent occurrences such as the opening of a plan or individual credit extensions are subject to the right of rescission to the same degree as if the security interest were taken directly to secure the open-end plan, unless the creditor effectively waives its security interest under the spreader clause with respect to the subsequent open-end credit extensions.

Section 1026.16—Advertising

1. *Clear and conspicuous standard—general.* Section 1026.16 is subject to the general ''clear and conspicuous'' standard for subpart B (*see* § 1026.5(a)(1)) but prescribes no specific rules for the format of the necessary disclosures, other than the format requirements related to the disclosure of a promotional rate or payment under § 1026.16(d)(6), a promotional rate or promotional fee under § 1026.16(g), or a deferred interest or similar offer under § 1026.16(h). Other than the disclosure of certain terms described in §§ 1026.16(d)(6), (g), or (h), the credit terms need not be printed in a certain type size nor need they appear in any particular place in the advertisement.

2. *Clear and conspicuous standard—promotional rates or payments; deferred interest or similar offers.* i. For purposes of § 1026.16(d)(6), a clear and conspicuous disclosure means that the required information in § 1026.16(d)(6)(ii)(A)-(C) is disclosed with equal prominence and in close proximity to the promotional rate or payment to which it applies. If the information in § 1026.16(d)(6)(ii)(A)–(C) is the same type size and is located immediately next to or directly above or below the promotional rate or payment to which it applies, without any intervening text or graphical displays, the disclosures would be deemed to be equally prominent and in close proximity. Notwithstanding the above, for electronic advertisements that disclose promotional rates or payments, compliance with the requirements of § 1026.16(c) is deemed to satisfy the clear and conspicuous standard.

ii. For purposes of § 1026.16(g)(4) as it applies to written or electronic advertisements only, a clear and conspicuous disclosure means the required information in § 1026.16(g)(4)(i) and, as applicable, (g)(4)(ii)

and (g)(4)(iii) must be equally prominent to the promotional rate or promotional fee to which it applies. If the information in § 1026.16(g)(4)(i) and, as applicable, (g)(4)(ii) and (g)(4)(iii) is the same type size as the promotional rate or promotional fee to which it applies, the disclosures would be deemed to be equally prominent. For purposes of § 1026.16(h)(3) as it applies to written or electronic advertisements only, a clear and conspicuous disclosure means the required information in § 1026.16(h)(3) must be equally prominent to each statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred interest period. If the information required to be disclosed under § 1026.16(h)(3) is the same type size as the statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred interest period, the disclosure would be deemed to be equally prominent.

3. *Clear and conspicuous standard—Internet advertisements for home-equity plans.* For purposes of this section, a clear and conspicuous disclosure for visual text advertisements on the Internet for home-equity plans subject to the requirements of § 1026.40 means that the required disclosures are not obscured by techniques such as graphical displays, shading, coloration, or other devices and comply with all other requirements for clear and conspicuous disclosures under § 1026.16(d). (See also comment 16(c)(1)–2.)

4. *Clear and conspicuous standard—televised advertisements for home-equity plans.* For purposes of this section, including alternative disclosures as provided for by § 1026.16(e), a clear and conspicuous disclosure in the context of visual text advertisements on television for home-equity plans subject to the requirements of § 1026.40 means that the required disclosures are not obscured by techniques such as graphical displays, shading, coloration, or other devices, are displayed in a manner that allows for a consumer to read the information required to be disclosed, and comply with all other requirements for clear and conspicuous disclosures under § 1026.16(d). For example, very fine print in a television advertisement would not meet the clear and conspicuous standard if consumers cannot see and read the information required to be disclosed.

5. *Clear and conspicuous standard—oral advertisements for home-equity plans.* For purposes of this section, including alternative disclosures as provided for by § 1026.16(e), a clear and conspicuous disclosure in the context of an oral advertisement for home-equity plans subject to the requirements of § 1026.40, whether by radio, television, the Internet, or other medium, means that the required disclosures are given at a speed and volume sufficient for a consumer to hear and comprehend them. For example, information stated very rapidly at a low volume in a radio or television advertisement would not meet the clear and conspicuous standard if consumers cannot hear and comprehend the information required to be disclosed.

6. *Expressing the annual percentage rate in abbreviated form.* Whenever the annual percentage rate is used in an advertisement for open-end credit, it may be expressed using a readily understandable abbreviation such as APR.

16(a) Actually Available Terms

1. *General rule.* To the extent that an advertisement mentions specific credit terms, it may state only those terms that the creditor is actually prepared to offer. For example, a creditor may not advertise a very low annual percentage rate that will not in fact be available at any time. Section 1026.16(a) is not intended to inhibit the promotion of new credit programs, but to bar the advertising of terms that are not and will not be available. For example, a creditor may advertise terms that will be offered for only a limited period, or terms that will become available at a future date.

2. *Specific credit terms. Specific credit terms* is not limited to the disclosures required by the regulation but would include any specific components of a credit plan, such as the minimum periodic payment amount or seller's points in a plan secured by real estate.

16(b) Advertisement of Terms That Require Additional Disclosures

Paragraph 16(b)(1)

1. *Triggering terms.* Negative as well as affirmative references trigger the requirement for additional information. For example, if a creditor states *no interest* or *no annual membership fee* in an advertisement, additional information must be provided. Other examples of terms that trigger additional disclosures are:

i. *Small monthly service charge on the remaining balance,* which describes how the amount of a finance charge will be determined.

ii. *12 percent Annual Percentage Rate* or *A $15 annual membership fee buys you $2,000 in credit,* which describe required disclosures under § 1026.6.

2. *Implicit terms.* Section 1026.16(b) applies even if the triggering term is not stated explicitly, but may be readily determined from the advertisement.

3. *Membership fees.* A membership fee is not a triggering term nor need it be disclosed under § 1026.16(b)(1)(iii) if it is required for participation in the plan whether or not an open-end credit feature is attached. (See comment 6(a)(2)–1 and § 1026.6(b)(3)(iii)(B).)

4. *Deferred billing and deferred payment programs.* Statements such as ''Charge it—you won't be billed until May'' or ''You may skip your January payment'' are not in themselves triggering terms, since the timing for initial billing or for monthly payments are not terms required to be disclosed under § 1026.6. However, a statement such as ''No interest charges until May'' or any other statement regarding when interest or finance charges begin to accrue is a triggering term, whether appearing alone or in conjunction with a description of a deferred billing or deferred payment program such as the examples above.

5. *Variable-rate plans.* In disclosing the annual percentage rate in an advertisement for a variable-rate plan, as required by § 1026.16(b)(1)(ii), the creditor may use an insert showing the current rate; or may give the rate as of a specified recent date. The additional requirement in § 1026.16(b)(1)(ii) to disclose the variable-rate feature may be satisfied by disclosing that the annual percentage rate may vary or a similar statement, but the advertisement need not include the information required by § 1026.6(a)(1)(ii) or (b)(4)(ii).

6. *Membership fees for open-end (not home-secured) plans.* For purposes of § 1026.16(b)(1)(iii), membership fees that may be imposed on open-end (not home-secured) plans shall have the same meaning as in § 1026.60(b)(2).

Paragraph 16(b)(2)

1. *Assumptions.* In stating the total of payments and the time period to repay the obligation, assuming that the consumer pays only the periodic payment amounts advertised, as required under § 1026.16(b)(2), the following additional assumptions may be made:

i. Payments are made timely so as not to be considered late by the creditor;

ii. Payments are made each period, and no debt cancellation or suspension agreement, or skip payment feature applies to the account;

iii. No interest rate changes will affect the account;

iv. No other balances are currently carried or will be carried on the account;

v. No taxes or ancillary charges are or will be added to the obligation;

vi. Goods or services are delivered on a single date; and

vii. The consumer is not currently and will not become delinquent on the account.

2. *Positive periodic payment amounts.* Only positive periodic payment amounts trigger the additional disclosures under § 1026.16(b)(2). Therefore, if the periodic payment amount advertised is not a positive amount (*e.g.,* ''No payments''), the advertisement need not state the total of payments and the time period to repay the obligation.

16(c) Catalogs or Other Multiple-Page Advertisements; Electronic Advertisements

1. *Definition.* The multiple-page advertisements to which § 1026.16(c) refers are advertisements consisting of a series of sequentially numbered pages—for example, a supplement to a newspaper. A mailing consisting of several separate flyers or pieces of promotional material in a single envelope does not constitute a single multiple-page advertisement for purposes of § 1026.16(c).

Paragraph 16(c)(1)

1. *General.* Section 1026.16(c)(1) permits creditors to put credit information together in one place in a catalog or other multiple-page advertisement or an electronic advertisement (such as an advertisement appearing on an Internet Web site). The rule applies only if the advertisement contains one or more of the triggering terms from § 1026.16(b).

2. *Electronic advertisement.* If an electronic advertisement (such as an advertisement appearing on an Internet Web site) contains the table or schedule permitted under

§ 1026.16(c)(1), any statement of terms set forth in § 1026.6 appearing anywhere else in the advertisement must clearly direct the consumer to the location where the table or schedule begins. For example, a term triggering additional disclosures may be accompanied by a link that directly takes the consumer to the additional information.

Paragraph 16(c)(2)

1. *Table or schedule if credit terms depend on outstanding balance.* If the credit terms of a plan vary depending on the amount of the balance outstanding, rather than the amount of any property purchased, a table or schedule complies with § 1026.16(c)(2) if it includes the required disclosures for representative balances. For example, a creditor would disclose that a periodic rate of 1.5% is applied to balances of $500 or less, and a 1% rate is applied to balances greater than $500.

16(d) Additional Requirements for Home-Equity Plans

1. *Trigger terms.* Negative as well as affirmative references trigger the requirement for additional information. For example, if a creditor states *no annual fee, no points,* or *we waive closing costs* in an advertisement, additional information must be provided. (*See* comment 16(d)–4 regarding the use of a phrase such as *no closing costs.*) Inclusion of a statement such as *low fees,* however, would not trigger the need to state additional information. References to payment terms include references to the draw period or any repayment period, to the length of the plan, to how the minimum payments are determined and to the timing of such payments.

2. *Fees to open the plan.* Section 1026.16(d)(1)(i) requires a disclosure of any fees imposed by the creditor or a third party to open the plan. In providing the fee information required under this paragraph, the corresponding rules for disclosure of this information apply. For example, fees to open the plan may be stated as a range. Similarly, if property insurance is required to open the plan, a creditor either may estimate the cost of the insurance or provide a statement that such insurance is required. (*See* the commentary to § 1026.40(d)(7) and (d)(8).)

3. *Statements of tax deductibility.* An advertisement that refers to deductibility for tax purposes is not misleading if it includes a statement such as ''consult a tax advisor regarding the deductibility of interest.'' An advertisement distributed in paper form or through the Internet (rather than by radio or television) that states that the advertised extension of credit may exceed the fair market value of the consumer's dwelling is not misleading if it clearly and conspicuously states the required information in §§ 1026.16(d)(4)(i) and (d)(4)(ii).

4. *Misleading terms prohibited.* Under § 1026.16(d)(5), advertisements may not refer to home-equity plans as *free money* or use other misleading terms. For example, an advertisement could not state ''no closing costs'' or ''we waive closing costs'' if consumers may be required to pay any closing costs, such as recordation fees. In the case of property insurance, however, a creditor may state, for example, ''no closing costs'' even if property insurance may be required, as long as the creditor also provides a statement that such insurance may be required. (*See* the commentary to this section regarding fees to open a plan.)

5. *Promotional rates and payments in advertisements for home-equity plans.* Section 1026.16(d)(6) requires additional disclosures for promotional rates or payments.

i. *Variable-rate plans.* In advertisements for variable-rate plans, if the advertised annual percentage rate is based on (or the advertised payment is derived from) the index and margin that will be used to make rate (or payment) adjustments over the term of the loan, then there is no promotional rate or promotional payment. If, however, the advertised annual percentage rate is not based on (or the advertised payment is not derived from) the index and margin that will be used to make rate (or payment) adjustments, and a reasonably current application of the index and margin would result in a higher annual percentage rate (or, given an assumed balance, a higher payment) then there is a promotional rate or promotional payment.

ii. *Equal prominence, close proximity.* Information required to be disclosed in § 1026.16(d)(6)(ii) that is immediately next to or directly above or below the promotional rate or payment (but not in a footnote) is deemed to be closely proximate to the listing. Information required to be disclosed in § 1026.16(d)(6)(ii) that is in the same type size as the promotional rate or payment is deemed to be equally prominent.

iii. *Amounts and time periods of payments.* Section 1026.16(d)(6)(ii)(C) requires disclosure of the amount and time periods of any payments that will apply under the plan. This section may require disclosure of several payment amounts, including any balloon payment. For example, if an advertisement for a home-equity plan offers a $100,000 five-year line of credit and assumes that the entire line is drawn resulting in a minimum payment of $800 per month for the first six months, increasing to $1,000 per month after month six, followed by a $50,000 balloon payment after five years, the advertisement must disclose the amount and time period of each of the two monthly payment streams, as well as the amount and timing of the balloon payment, with equal prominence and in close proximity to the promotional payment. However, if the final payment could not be more than twice the amount of other minimum payments, the final payment need not be disclosed.

iv. *Plans other than variable-rate plans.* For a plan other than a variable-rate plan, if an advertised payment is calculated in the same way as other payments based on an assumed balance, the fact that the minimum payment could increase solely if the consumer made an additional draw does not make the payment a promotional payment. For example, if a payment of $500 results from an assumed $10,000 draw, and the payment would increase to $1,000 if the consumer made an additional $10,000 draw, the payment is not a promotional payment.

v. *Conversion option.* Some home-equity plans permit the consumer to repay all or part of the balance during the draw period at a fixed rate (rather than a variable rate) and over a specified time period. The fixed-rate conversion option does not, by itself, make the rate or payment that would apply if the consumer exercised the fixed-rate conversion option a promotional rate or payment.

vi. *Preferred-rate provisions.* Some home-equity plans contain a preferred-rate provision, where the rate will increase upon the occurrence of some event, such as the consumer-employee leaving the creditor's employ, the consumer closing an existing deposit account with the creditor, or the consumer revoking an election to make automated payments. A preferred-rate provision does not, by itself, make the rate or payment under the preferred-rate provision a promotional rate or payment.

6. *Reasonably current index and margin.* For the purposes of this section, an index and margin is considered reasonably current if:

i. For direct mail advertisements, it was in effect within 60 days before mailing;

ii. For advertisements in electronic form it was in effect within 30 days before the advertisement is sent to a consumer's email address, or in the case of an advertisement made on an Internet Web site, when viewed by the public; or

iii. For printed advertisements made available to the general public, including ones contained in a catalog, magazine, or other generally available publication, it was in effect within 30 days before printing.

7. *Relation to other sections.* Advertisements for home-equity plans must comply with all provisions in § 1026.16, not solely the rules in § 1026.16(d). If an advertisement contains information (such as the payment terms) that triggers the duty under § 1026.16(d) to state the annual percentage rate, the additional disclosures in § 1026.16(b) must be provided in the advertisement. While § 1026.16(d) does not require a statement of fees to use or maintain the plan (such as membership fees and transaction charges), such fees must be disclosed under § 1026.16(b)(1)(i) and (b)(1)(iii).

8. *Inapplicability of closed-end rules.* Advertisements for home-equity plans are governed solely by the requirements in § 1026.16, except § 1026.16(g), and not by the closed-end advertising rules in § 1026.24. Thus, if a creditor states payment information about the repayment phase, this will trigger the duty to provide additional information under § 1026.16, but not under § 1026.24.

9. *Balloon payment. See* comment 40(d)(5)(ii)–3 for information not required to be stated in advertisements, and on situations in which the balloon payment requirement does not apply.

16(e) Alternative Disclosures—Television or Radio Advertisements

1. *Multi-purpose telephone number.* When an advertised telephone number provides a recording, disclosures must be provided early in the sequence to ensure that the consumer receives the required disclosures. For example, in providing several options—such as providing directions to the advertiser's

place of business—the option allowing the consumer to request disclosures should be provided early in the telephone message to ensure that the option to request disclosures is not obscured by other information.

2. *Statement accompanying toll free number.* Language must accompany a telephone number indicating that disclosures are available by calling the telephone number, such as ''call 1-(800) 000–0000 for details about credit costs and terms.''

16(g) Promotional Rates and Fees

1. *Rate in effect at the end of the promotional period.* If the annual percentage rate that will be in effect at the end of the promotional period (*i.e.,* the post-promotional rate) is a variable rate, the post-promotional rate for purposes of § 1026.16(g)(2)(i) is the rate that would have applied at the time the promotional rate was advertised if the promotional rate was not offered, consistent with the accuracy requirements in § 1026.60(c)(2) and (e)(4), as applicable.

2. *Immediate proximity.* For written or electronic advertisements, including the term ''introductory'' or ''intro'' in the same phrase as the listing of the introductory rate or introductory fee is deemed to be in immediate proximity of the listing.

3. *Prominent location closely proximate.* For written or electronic advertisements, information required to be disclosed in § 1026.16(g)(4)(i) and, as applicable, (g)(4)(ii) and (g)(4)(iii) that is in the same paragraph as the first listing of the promotional rate or promotional fee is deemed to be in a prominent location closely proximate to the listing. Information disclosed in a footnote will not be considered in a prominent location closely proximate to the listing.

4. *First listing.* For purposes of § 1026.16(g)(4) as it applies to written or electronic advertisements, the first listing of the promotional rate or promotional fee is the most prominent listing of the rate or fee on the front side of the first page of the principal promotional document. The principal promotional document is the document designed to be seen first by the consumer in a mailing, such as a cover letter or solicitation letter. If the promotional rate or promotional fee does not appear on the front side of the first page of the principal promotional document, then the first listing of the promotional rate or promotional fee is the most prominent listing of the rate or fee on the subsequent pages of the principal promotional document. If the promotional rate or promotional fee is not listed on the principal promotional document or there is no principal promotional document, the first listing is the most prominent listing of the rate or fee on the front side of the first page of each document listing the promotional rate or promotional fee. If the promotional rate or promotional fee does not appear on the front side of the first page of a document, then the first listing of the promotional rate or promotional fee is the most prominent listing of the rate or fee on the subsequent pages of the document. If the listing of the promotional rate or promotional fee with the largest type size on the front side of the first page (or subsequent pages if the promotional rate or promotional fee is not listed on the front side of the first page) of the principal promotional document (or each document listing the promotional rate or promotional fee if the promotional rate or promotional fee is not listed on the principal promotional document or there is no principal promotional document) is used as the most prominent listing, it will be deemed to be the first listing. Consistent with comment 16(c)–1, a catalog or multiple-page advertisement is considered one document for purposes of § 1026.16(g)(4).

5. *Post-promotional rate depends on consumer's creditworthiness.* For purposes of disclosing the rate that may apply after the end of the promotional rate period, at the advertiser's option, the advertisement may disclose the rates that may apply as either specific rates, or a range of rates. For example, if there are three rates that may apply (9.99%, 12.99% or 17.99%), an issuer may disclose these three rates as specific rates (9.99%, 12.99% or 17.99%) or as a range of rates (9.99%-17.99%).

16(h) Deferred Interest or Similar Offers

1. *Deferred interest or similar offers clarified.* Deferred interest or similar offers do not include offers that allow a consumer to skip payments during a specified period of time, and under which the consumer is not obligated under any circumstances for any interest or other finance charges that could be attributable to that period. Deferred interest or similar offers also do not include 0% annual percentage rate offers where a consumer is not obligated under any circumstances for interest attributable to the time period the 0% annual percentage rate was in effect, though such offers may be considered promotional rates under § 1026.16(g)(2)(i). Deferred interest or similar offers also do not include skip payment programs that have no required minimum payment for one or more billing cycles but where interest continues to accrue and is imposed during that period.

2. *Deferred interest period clarified.* Although the terms of an advertised deferred interest or similar offer may provide that a creditor may charge the accrued interest if the balance is not paid in full by a certain date, creditors sometimes have an informal policy or practice that delays charging the accrued interest for payment received a brief period of time after the date upon which a creditor has the contractual right to charge the accrued interest. The advertisement need not include the end of an informal ''courtesy period'' in disclosing the deferred interest period under § 1026.16(h)(3).

3. *Immediate proximity.* For written or electronic advertisements, including the deferred interest period in the same phrase as the statement of ''no interest,'' ''no payments,'' ''deferred interest,'' or ''same as cash'' or similar term regarding interest or payments during the deferred interest period is deemed to be in immediate proximity of the statement.

4. *Prominent location closely proximate.* For written or electronic advertisements, information required to be disclosed in § 1026.16(h)(4)(i) and (ii) that is in the same paragraph as the first statement of ''no interest,'' ''no payments,'' ''deferred interest,'' or ''same as cash'' or similar term regarding interest or payments during the deferred interest period is deemed to be in a prominent location closely proximate to the statement. Information disclosed in a footnote is not considered in a prominent location closely proximate to the statement.

5. *First listing.* For purposes of § 1026.16(h)(4) as it applies to written or electronic advertisements, the first statement of ''no interest,'' ''no payments,'' ''deferred interest,'' ''same as cash,'' or similar term regarding interest or payments during the deferred interest period is the most prominent listing of one of these statements on the front side of the first page of the principal promotional document. The principal promotional document is the document designed to be seen first by the consumer in a mailing, such as a cover letter or solicitation letter. If one of the statements does not appear on the front side of the first page of the principal promotional document, then the first listing of one of these statements is the most prominent listing of a statement on the subsequent pages of the principal promotional document. If one of the statements is not listed on the principal promotional document or there is no principal promotional document, the first listing of one of these statements is the most prominent listing of the statement on the front side of the first page of each document containing one of these statements. If one of the statements does not appear on the front side of the first page of a document, then the first listing of one of these statements is the most prominent listing of a statement on the subsequent pages of the document. If the listing of one of these statements with the largest type size on the front side of the first page (or subsequent pages if one of these statements is not listed on the front side of the first page) of the principal promotional document (or each document listing one of these statements if a statement is not listed on the principal promotional document or there is no principal promotional document) is used as the most prominent listing, it will be deemed to be the first listing. Consistent with comment 16(c)–1, a catalog or multiple-page advertisement is considered one document for purposes of § 1026.16(h)(4).

6. *Additional information.* Consistent with comment 5(a)–2, the information required under § 1026.16(h)(4) need not be segregated from other information regarding the deferred interest or similar offer. Advertisements may also be required to provide additional information pursuant to § 1026.16(b) though such information need not be integrated with the information required under § 1026.16(h)(4).

7. *Examples.* Examples of disclosures that could be used to comply with the requirements of § 1026.16(h)(3) include: ''no interest if paid in full within 6 months'' and ''no interest if paid in full by December 31, 2010.''

Subpart C—Closed-End Credit

Section 1026.17—General Disclosure Requirements

17(a) Form of Disclosures

Paragraph 17(a)(1)

1. *Clear and conspicuous.* This standard requires that disclosures be in a reasonably

understandable form. For example, while the regulation requires no mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other. In addition, although no minimum type size is mandated (except for the interest rate and payment summary for mortgage transactions required by § 1026.18(s)), the disclosures must be legible, whether typewritten, handwritten, or printed by computer.

2. *Segregation of disclosures.* i. The disclosures may be grouped together and segregated from other information in a variety of ways. For example, the disclosures may appear on a separate sheet of paper or may be set off from other information on the contract or other documents:

A. By outlining them in a box.

B. By bold print dividing lines.

C. By a different color background.

D. By a different type style.

ii. The general segregation requirement described in this subparagraph does not apply to the disclosures required under §§ 1026.19(b) and 1026.20(c) although the disclosures must be clear and conspicuous.

3. *Location.* The regulation imposes no specific location requirements on the segregated disclosures. For example:

i. They may appear on a disclosure statement separate from all other material.

ii. They may be placed on the same document with the credit contract or other information, so long as they are segregated from that information.

iii. They may be shown on the front or back of a document.

iv. They need not begin at the top of a page.

v. They may be continued from one page to another.

4. *Content of segregated disclosures.* Section 1026.17(a)(1) contains exceptions to the requirement that the disclosures under § 1026.18 be segregated from material that is not directly related to those disclosures. Section 1026.17(a)(1) lists the items that may be added to the segregated disclosures, even though not directly related to those disclosures. The section also lists the items required under § 1026.18 that may be deleted from the segregated disclosures and appear elsewhere. Any one or more of these additions or deletions may be combined and appear either together with or separate from the segregated disclosures. The itemization of the amount financed under § 1026.18(c), however, must be separate from the other segregated disclosures under § 1026.18, except for private education loan disclosures made in compliance with § 1026.47. If a creditor chooses to include the security interest charges required to be itemized under § 1026.4(e) and § 1026.18(o) in the amount financed itemization, it need not list these charges elsewhere.

5. *Directly related.* The segregated disclosures may, at the creditor's option, include any information that is directly related to those disclosures. The following is directly related information:

i. A description of a grace period after which a late payment charge will be imposed. For example, the disclosure given under § 1026.18(l) may state that a late charge will apply to ''any payment received more than 15 days after the due date.''

ii. A statement that the transaction is not secured. For example, the creditor may add a category labeled ''unsecured'' or ''not secured'' to the security interest disclosures given under § 1026.18(m).

iii. The basis for any estimates used in making disclosures. For example, if the maturity date of a loan depends solely on the occurrence of a future event, the creditor may indicate that the disclosures assume that event will occur at a certain time.

iv. The conditions under which a demand feature may be exercised. For example, in a loan subject to demand after five years, the disclosures may state that the loan will become payable on demand in five years.

v. An explanation of the use of pronouns or other references to the parties to the transaction. For example, the disclosures may state, '' 'You' refers to the customer and 'we' refers to the creditor.''

vi. Instructions to the creditor or its employees on the use of a multiple-purpose form. For example, the disclosures may state, ''Check box if applicable.''

vii. A statement that the borrower may pay a minimum finance charge upon prepayment in a simple-interest transaction. For example, when state law prohibits penalties, but would allow a minimum finance charge in the event of prepayment, the creditor may make the § 1026.18(k)(1) disclosure by stating, ''You may be charged a minimum finance charge.''

viii. A brief reference to negative amortization in variable-rate transactions. For example, in the variable-rate disclosure, the creditor may include a short statement such as ''Unpaid interest will be added to principal.'' (See the commentary to § 1026.18(f)(1)(iii).)

ix. A brief caption identifying the disclosures. For example, the disclosures may bear a general title such as ''Federal Truth in Lending Disclosures'' or a descriptive title such as ''Real Estate Loan Disclosures.''

x. A statement that a due-on-sale clause or other conditions on assumption are contained in the loan document. For example, the disclosure given under § 1026.18(q) may state, ''Someone buying your home may, subject to conditions in the due-on-sale clause contained in the loan document, assume the remainder of the mortgage on the original terms.''

xi. If a state or Federal law prohibits prepayment penalties and excludes the charging of interest after prepayment from coverage as a penalty, a statement that the borrower may have to pay interest for some period after prepayment in full. The disclosure given under § 1026.18(k) may state, for example, ''If you prepay your loan on other than the regular installment date, you may be assessed interest charges until the end of the month.''

xii. More than one hypothetical example under § 1026.18(f)(1)(iv) in transactions with more than one variable-rate feature. For example, in a variable-rate transaction with an option permitting consumers to convert to a fixed-rate transaction, the disclosures may include an example illustrating the effects on the payment terms of an increase resulting from conversion in addition to the example illustrating an increase resulting from changes in the index.

xiii. The disclosures set forth under § 1026.18(f)(1) for variable-rate transactions subject to § 1026.18(f)(2).

xiv. A statement whether or not a subsequent purchaser of the property securing an obligation may be permitted to assume the remaining obligation on its original terms.

xv. A late-payment fee disclosure under § 1026.18(l) on a single payment loan.

xvi. The notice set forth in § 1026.19(a)(4), in a closed-end transaction not subject to § 1026.19(a)(1)(i). In a mortgage transaction subject to § 1026.19(a)(1)(i), the creditor must disclose the notice contained in § 1026.19(a)(4) grouped together with the disclosures made under § 1026.18. *See* comment 19(a)(4)–1.

6. *Multiple-purpose forms.* The creditor may design a disclosure statement that can be used for more than one type of transaction, so long as the required disclosures for individual transactions are clear and conspicuous. (See the commentary to Appendices G and H for a discussion of the treatment of disclosures that do not apply to specific transactions.) Any disclosure listed in § 1026.18 (except the itemization of the amount financed under § 1026.18(c) for transactions other than private education loans) may be included on a standard disclosure statement even though not all of the creditor's transactions include those features. For example, the statement may include:

i. The variable rate disclosure under § 1026.18(f).

ii. The demand feature disclosure under § 1026.18(i).

iii. A reference to the possibility of a security interest arising from a spreader clause, under § 1026.18(m).

iv. The assumption policy disclosure under § 1026.18(q).

v. The required deposit disclosure under § 1026.18(r).

7. *Balloon payment financing with leasing characteristics.* In certain credit sale or loan transactions, a consumer may reduce the dollar amount of the payments to be made during the course of the transaction by agreeing to make, at the end of the loan term, a large final payment based on the expected residual value of the property. The consumer may have a number of options with respect to the final payment, including, among other things, retaining the property and making the final payment, refinancing the final payment, or transferring the property to the creditor in lieu of the final payment. Such transactions may have some of the characteristics of lease transactions subject to Regulation M (12 CFR Part 1013), but are considered credit transactions where the consumer assumes the indicia of ownership, including the risks, burdens and benefits of ownership upon consummation. These transactions are governed by the disclosure requirements of this part instead of Regulation M. Creditors should not include in the segregated Truth in Lending disclosures additional information. Thus, disclosures should show the large final

payment in the payment schedule and should not, for example, reflect the other options available to the consumer at maturity.

Paragraph 17(a)(2)

1. *When disclosures must be more conspicuous.* The following rules apply to the requirement that the terms ''annual percentage rate'' (except for private education loan disclosures made in compliance with § 1026.47) and ''finance charge'' be shown more conspicuously:

i. The terms must be more conspicuous only in relation to the other required disclosures under § 1026.18. For example, when the disclosures are included on the contract document, those two terms need not be more conspicuous as compared to the heading on the contract document or information required by state law.

ii. The terms need not be more conspicuous except as part of the finance charge and annual percentage rate disclosures under § 1026.18(d) and (e), although they may, at the creditor's option, be highlighted wherever used in the required disclosures. For example, the terms may, but need not, be highlighted when used in disclosing a prepayment penalty under § 1026.18(k) or a required deposit under § 1026.18(r).

iii. The creditor's identity under § 1026.18(a) may, but need not, be more prominently displayed than the finance charge and annual percentage rate.

iv. The terms need not be more conspicuous than figures (including, for example, numbers, percentages, and dollar signs).

2. *Making disclosures more conspicuous.* The terms ''finance charge'' and (except for private education loan disclosures made in compliance with § 1026.47) ''annual percentage rate'' may be made more conspicuous in any way that highlights them in relation to the other required disclosures. For example, they may be:

i. Capitalized when other disclosures are printed in capital and lower case.

ii. Printed in larger type, bold print or different type face.

iii. Printed in a contrasting color.

iv. Underlined.

v. Set off with asterisks.

17(b) Time of Disclosures

1. *Consummation.* As a general rule, disclosures must be made before ''consummation'' of the transaction. The disclosures need not be given by any particular time before consummation, except in certain mortgage transactions and variable-rate transactions secured by the consumer's principal dwelling with a term greater than one year under § 1026.19, and in private education loan transactions disclosed in compliance with §§ 1026.46 and 1026.47. (See the commentary to § 1026.2(a)(13) regarding the definition of consummation.)

2. *Converting open-end to closed-end credit.* Except for home equity plans subject to § 1026.40 in which the agreement provides for a repayment phase, if an open-end credit account is converted to a closed-end transaction under a written agreement with the consumer, the creditor must provide a set of closed-end credit disclosures before consummation of the closed-end transaction. (See the commentary to § 1026.19(b) for the timing rules for additional disclosures required upon the conversion to a variable-rate transaction secured by a consumer's principal dwelling with a term greater than one year.) If consummation of the closed-end transaction occurs at the same time as the consumer enters into the open-end agreement, the closed-end credit disclosures may be given at the time of conversion. If disclosures are delayed until conversion and the closed-end transaction has a variable-rate feature, disclosures should be based on the rate in effect at the time of conversion. (See the commentary to § 1026.5 regarding conversion of closed-end to open-end credit.)

3. *Disclosures provided on credit contracts.* Creditors must give the required disclosures to the consumer in writing, in a form that the consumer may keep, before consummation of the transaction. *See* § 1026.17(a)(1) and (b). Sometimes the disclosures are placed on the same document with the credit contract. Creditors are not required to give the consumer two separate copies of the document before consummation, one for the consumer to keep and a second copy for the consumer to execute. The disclosure requirement is satisfied if the creditor gives a copy of the document containing the unexecuted credit contract and disclosures to the consumer to read and sign; and the consumer receives a copy to keep at the time the consumer becomes obligated. It is not sufficient for the creditor merely to show the consumer the document containing the disclosures before the consumer signs and becomes obligated. The consumer must be free to take possession of and review the document in its entirety before signing.

i. *Example.* To illustrate, a creditor gives a consumer a multiple-copy form containing a credit agreement and TILA disclosures. The consumer reviews and signs the form and returns it to the creditor, who separates the copies and gives one copy to the consumer to keep. The creditor has satisfied the disclosure requirement.

17(c) Basis of Disclosures and Use of Estimates

Paragraph 17(c)(1)

1. *Legal obligation.* The disclosures shall reflect the credit terms to which the parties are legally bound as of the outset of the transaction. In the case of disclosures required under § 1026.20(c), the disclosures shall reflect the credit terms to which the parties are legally bound when the disclosures are provided. The legal obligation is determined by applicable state law or other law. (Certain transactions are specifically addressed in this commentary. See, for example, the discussion of buydown transactions elsewhere in the commentary to § 1026.17(c).) The fact that a term or contract may later be deemed unenforceable by a court on the basis of equity or other grounds does not, by itself, mean that disclosures based on that term or contract did not reflect the legal obligation.

2. *Modification of obligation.* The legal obligation normally is presumed to be contained in the note or contract that evidences the agreement. But this presumption is rebutted if another agreement between the parties legally modifies that note or contract. If the parties informally agree to a modification of the legal obligation, the modification should not be reflected in the disclosures unless it rises to the level of a change in the terms of the legal obligation. For example:

i. If the creditor offers a preferential rate, such as an employee preferred rate, the disclosures should reflect the terms of the legal obligation. (See the commentary to § 1026.19(b) for an example of a preferred-rate transaction that is a variable-rate transaction.)

ii. If the contract provides for a certain monthly payment schedule but payments are made on a voluntary payroll deduction plan or an informal principal-reduction agreement, the disclosures should reflect the schedule in the contract.

iii. If the contract provides for regular monthly payments but the creditor informally permits the consumer to defer payments from time to time, for instance, to take account of holiday seasons or seasonal employment, the disclosures should reflect the regular monthly payments.

3. *Third-party buydowns.* In certain transactions, a seller or other third party may pay an amount, either to the creditor or to the consumer, in order to reduce the consumer's payments or buy down the interest rate for all or a portion of the credit term. For example, a consumer and a bank agree to a mortgage with an interest rate of 15% and level payments over 25 years. By a separate agreement, the seller of the property agrees to subsidize the consumer's payments for the first 2 years of the mortgage, giving the consumer an effective rate of 12% for that period.

i. If the lower rate is reflected in the credit contract between the consumer and the bank, the disclosures must take the buydown into account. For example, the annual percentage rate must be a composite rate that takes account of both the lower initial rate and the higher subsequent rate, and the payment schedule disclosures must reflect the 2 payment levels. However, the amount paid by the seller would not be specifically reflected in the disclosures given by the bank, since that amount constitutes seller's points and thus is not part of the finance charge.

ii. If the lower rate is not reflected in the credit contract between the consumer and the bank and the consumer is legally bound to the 15% rate from the outset, the disclosures given by the bank must not reflect the seller buydown in any way. For example, the annual percentage rate and payment schedule would not take into account the reduction in the interest rate and payment level for the first 2 years resulting from the buydown.

4. *Consumer buydowns.* In certain transactions, the consumer may pay an amount to the creditor to reduce the payments or obtain a lower interest rate on the transaction. Consumer buydowns must be reflected in the disclosures given for that transaction. To illustrate, in a mortgage transaction, the creditor and consumer agree

to a note specifying a 14 percent interest rate. However, in a separate document, the consumer agrees to pay an amount to the creditor at consummation in return for a reduction in the interest rate to 12 percent for a portion of the mortgage term. The amount paid by the consumer may be deposited in an escrow account or may be retained by the creditor. Depending upon the buydown plan, the consumer's prepayment of the obligation may or may not result in a portion of the amount being credited or refunded to the consumer. In the disclosures given for the mortgage, the creditor must reflect the terms of the buydown agreement.

i. For example:

A. The amount paid by the consumer is a prepaid finance charge (even if deposited in an escrow account).

B. A composite annual percentage rate must be calculated, taking into account both interest rates, as well as the effect of the prepaid finance charge.

C. The payment schedule must reflect the multiple payment levels resulting from the buydown.

ii. The rules regarding consumer buydowns do not apply to transactions known as ''lender buydowns.'' In lender buydowns, a creditor pays an amount (either into an account or to the party to whom the obligation is sold) to reduce the consumer's payments or interest rate for all or a portion of the credit term. Typically, these transactions are structured as a buydown of the interest rate during an initial period of the transaction with a higher than usual rate for the remainder of the term. The disclosures for lender buydowns should be based on the terms of the legal obligation between the consumer and the creditor. (See comment 17(c)(1)–3 for the analogous rules concerning third-party buydowns.)

5. *Split buydowns.* In certain transactions, a third party (such as a seller) and a consumer both pay an amount to the creditor to reduce the interest rate. The creditor must include the portion paid by the consumer in the finance charge and disclose the corresponding multiple payment levels and composite annual percentage rate. The portion paid by the third party and the corresponding reduction in interest rate, however, should not be reflected in the disclosures unless the lower rate is reflected in the credit contract. (See the discussion on third-party and consumer buydown transactions elsewhere in the commentary to § 1026.17(c).)

6. *Wrap-around financing.* Wrap-around transactions, usually loans, involve the creditor's wrapping the outstanding balance on an existing loan and advancing additional funds to the consumer. The pre-existing loan, which is wrapped, may be to the same consumer or to a different consumer. In either case, the consumer makes a single payment to the new creditor, who makes the payments on the pre-existing loan to the original creditor. Wrap-around loans or sales are considered new single-advance transactions, with an amount financed equaling the sum of the new funds advanced by the wrap creditor and the remaining principal owed to the original creditor on the pre-existing loan. In disclosing the itemization of the amount financed, the creditor may use a label such as ''the amount that will be paid to creditor X'' to describe the remaining principal balance on the pre-existing loan. This approach to Truth in Lending calculations has no effect on calculations required by other statutes, such as state usury laws.

7. *Wrap-around financing with balloon payments.* For wrap-around transactions involving a large final payment of the new funds before the maturity of the pre-existing loan, the amount financed is the sum of the new funds and the remaining principal on the pre-existing loan. The disclosures should be based on the shorter term of the wrap loan, with a large final payment of both the new funds and the total remaining principal on the pre-existing loan (although only the wrap loan will actually be paid off at that time).

8. *Basis of disclosures in variable-rate transactions.* The disclosures for a variable-rate transaction must be given for the full term of the transaction and must be based on the terms in effect at the time of consummation. Creditors should base the disclosures only on the initial rate and should not assume that this rate will increase. For example, in a loan with an initial rate of 10 percent and a 5 percentage points rate cap, creditors should base the disclosures on the initial rate and should not assume that this rate will increase 5 percentage points. However, in a variable-rate transaction with a seller buydown that is reflected in the credit contract, a consumer buydown, or a discounted or premium rate, disclosures should not be based solely on the initial terms. In those transactions, the disclosed annual percentage rate should be a composite rate based on the rate in effect during the initial period and the rate that is the basis of the variable-rate feature for the remainder of the term. (See the commentary to § 1026.17(c) for a discussion of buydown, discounted, and premium transactions and the commentary to § 1026.19(a)(2) for a discussion of the redisclosure in certain mortgage transactions with a variable-rate feature.)

9. *Use of estimates in variable-rate transactions.* The variable-rate feature does not, by itself, make the disclosures estimates.

10. *Discounted and premium variable-rate transactions.* In some variable-rate transactions, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. Typically, this initial rate charged to consumers is lower than the rate would be if it were calculated using the index or formula. However, in some cases the initial rate may be higher. In a discounted transaction, for example, a creditor may calculate interest rates according to a formula using the six-month Treasury bill rate plus a 2 percent margin. If the Treasury bill rate at consummation is 10 percent, the creditor may forgo the 2 percent spread and charge only 10 percent for a limited time, instead of setting an initial rate of 12 percent.

i. When creditors use an initial interest rate that is not calculated using the index or formula for later rate adjustments, the disclosures should reflect a composite annual percentage rate based on the initial rate for as long as it is charged and, for the remainder of the term, the rate that would have been applied using the index or formula at the time of consummation. The rate at consummation need not be used if a contract provides for a delay in the implementation of changes in an index value. For example, if the contract specifies that rate changes are based on the index value in effect 45 days before the change date, creditors may use any index value in effect during the 45 day period before consummation in calculating a composite annual percentage rate.

ii. The effect of the multiple rates must also be reflected in the calculation and disclosure of the finance charge, total of payments, and payment schedule.

iii. If a loan contains a rate or payment cap that would prevent the initial rate or payment, at the time of the first adjustment, from changing to the rate determined by the index or formula at consummation, the effect of that rate or payment cap should be reflected in the disclosures.

iv. Because these transactions involve irregular payment amounts, an annual percentage rate tolerance of ¼ of 1 percent applies, in accordance with § 1026.22(a)(3).

v. Examples of discounted variable-rate transactions include:

A. A 30-year loan for $100,000 with no prepaid finance charges and rates determined by the Treasury bill rate plus 2 percent. Rate and payment adjustments are made annually. Although the Treasury bill rate at the time of consummation is 10 percent, the creditor sets the interest rate for one year at 9 percent, instead of 12 percent according to the formula. The disclosures should reflect a composite annual percentage rate of 11.63 percent based on 9 percent for one year and 12 percent for 29 years. Reflecting those two rate levels, the payment schedule should show 12 payments of $804.62 and 348 payments of $1,025.31. The finance charge should be $266,463.32 and the total of payments $366,463.32.

B. Same loan as above, except with a 2 percent rate cap on periodic adjustments. The disclosures should reflect a composite annual percentage rate of 11.53 percent based on 9 percent for the first year, 11 percent for the second year, and 12 percent for the remaining 28 years. Reflecting those three rate levels, the payment schedule should show 12 payments of $804.62, 12 payments of $950.09, and 336 payments of $1,024.34. The finance charge should be $265,234.76 and the total of payments $365,234.76.

C. Same loan as above, except with a 7 ½ percent cap on payment adjustments. The disclosures should reflect a composite annual percentage rate of 11.64 percent, based on 9 percent for one year and 12 percent for 29 years. Because of the payment cap, five levels of payments should be reflected. The payment schedule should show 12 payments of $804.62, 12 payments of $864.97, 12 payments of $929.84, 12 payments of $999.58, and 312 payments of $1,070.04. The finance charge should be $277,040.60, and the total of payments $377,040.60.

vi. A loan in which the initial interest rate is set according to the index or formula used for later adjustments but is not set at the

value of the index or formula at consummation is not a discounted variable-rate loan. For example, if a creditor commits to an initial rate based on the formula on a date prior to consummation, but the index has moved during the period between that time and consummation, a creditor should base its disclosures on the initial rate.

11. *Examples of variable-rate transactions.* Variable-rate transactions include:

i. Renewable balloon-payment instruments where the creditor is both unconditionally obligated to renew the balloon-payment loan at the consumer's option (or is obligated to renew subject to conditions within the consumer's control) and has the option of increasing the interest rate at the time of renewal. Disclosures must be based on the payment amortization (unless the specified term of the obligation with renewals is shorter) and on the rate in effect at the time of consummation of the transaction. (Examples of conditions within a consumer's control include requirements that a consumer be current in payments or continue to reside in the mortgaged property. In contrast, setting a limit on the rate at which the creditor would be obligated to renew or reserving the right to change the credit standards at the time of renewal are examples of conditions outside a consumer's control.) If, however, a creditor is not obligated to renew as described above, disclosures must be based on the term of the balloon-payment loan. Disclosures also must be based on the term of the balloon-payment loan in balloon-payment instruments in which the legal obligation provides that the loan will be renewed by a ''refinancing'' of the obligation, as that term is defined by § 1026.20(a). If it cannot be determined from the legal obligation that the loan will be renewed by a ''refinancing,'' disclosures must be based either on the term of the balloon-payment loan or on the payment amortization, depending on whether the creditor is unconditionally obligated to renew the loan as described above. (This discussion does not apply to construction loans subject to § 1026.17(c)(6).)

ii. ''Shared-equity'' or ''shared-appreciation'' mortgages that have a fixed rate of interest and an appreciation share based on the consumer's equity in the mortgaged property. The appreciation share is payable in a lump sum at a specified time. Disclosures must be based on the fixed interest rate. (As discussed in the commentary to § 1026.2, other types of shared-equity arrangements are not considered ''credit'' and are not subject to Regulation Z.)

iii. Preferred-rate loans where the terms of the legal obligation provide that the initial underlying rate is fixed but will increase upon the occurrence of some event, such as an employee leaving the employ of the creditor, and the note reflects the preferred rate. The disclosures are to be based on the preferred rate.

iv. Graduated-payment mortgages and step-rate transactions without a variable-rate feature are not considered variable-rate transactions.

v. ''Price level adjusted mortgages'' or other indexed mortgages that have a fixed rate of interest but provide for periodic adjustments to payments and the loan balance to reflect changes in an index measuring prices or inflation. Disclosures are to be based on the fixed interest rate.

12. *Graduated payment adjustable rate mortgages.* These mortgages involve both a variable interest rate and scheduled variations in payment amounts during the loan term. For example, under these plans, a series of graduated payments may be scheduled before rate adjustments affect payment amounts, or the initial scheduled payment may remain constant for a set period before rate adjustments affect the payment amount. In any case, the initial payment amount may be insufficient to cover the scheduled interest, causing negative amortization from the outset of the transaction. In these transactions, the disclosures should treat these features as follows:

i. The finance charge includes the amount of negative amortization based on the assumption that the rate in effect at consummation remains unchanged.

ii. The amount financed does not include the amount of negative amortization.

iii. As in any variable-rate transaction, the annual percentage rate is based on the terms in effect at consummation.

iv. The schedule of payments discloses the amount of any scheduled initial payments followed by an adjusted level of payments based on the initial interest rate. Since some mortgage plans contain limits on the amount of the payment adjustment, the payment schedule may require several different levels of payments, even with the assumption that the original interest rate does not increase.

13. *Growth-equity mortgages.* i. Also referred to as payment-escalated mortgages, these mortgage plans involve scheduled payment increases to prematurely amortize the loan. The initial payment amount is determined as for a long-term loan with a fixed interest rate. Payment increases are scheduled periodically, based on changes in an index. The larger payments result in accelerated amortization of the loan. In disclosing these mortgage plans, creditors may either:

A. Estimate the amount of payment increases, based on the best information reasonably available; or

B. Disclose by analogy to the variable-rate disclosures in 1026.18(f)(1).

ii. This discussion does not apply to growth-equity mortgages in which the amount of payment increases can be accurately determined at the time of disclosure. For these mortgages, as for graduated-payment mortgages, disclosures should reflect the scheduled increases in payments.

14. *Reverse mortgages.* Reverse mortgages, also known as reverse annuity or home equity conversion mortgages, typically involve the disbursement of monthly advances to the consumer for a fixed period or until the occurrence of an event such as the consumer's death. Repayment of the loan (generally a single payment of principal and accrued interest) may be required to be made at the end of the disbursements or, for example, upon the death of the consumer. In disclosing these transactions, creditors must apply the following rules, as applicable:

i. If the reverse mortgage has a specified period for disbursements but repayment is due only upon the occurrence of a future event such as the death of the consumer, the creditor must assume that disbursements will be made until they are scheduled to end. The creditor must assume repayment will occur when disbursements end (or within a period following the final disbursement which is not longer than the regular interval between disbursements). This assumption should be used even though repayment may occur before or after the disbursements are scheduled to end. In such cases, the creditor may include a statement such as ''The disclosures assume that you will repay the loan at the time our payments to you end. As provided in your agreement, your repayment may be required at a different time.''

ii. If the reverse mortgage has neither a specified period for disbursements nor a specified repayment date and these terms will be determined solely by reference to future events including the consumer's death, the creditor may assume that the disbursements will end upon the consumer's death (estimated by using actuarial tables, for example) and that repayment will be required at the same time (or within a period following the date of the final disbursement which is not longer than the regular interval for disbursements). Alternatively, the creditor may base the disclosures upon another future event it estimates will be most likely to occur first. (If terms will be determined by reference to future events which do not include the consumer's death, the creditor must base the disclosures upon the occurrence of the event estimated to be most likely to occur first.)

iii. In making the disclosures, the creditor must assume that all disbursements and accrued interest will be paid by the consumer. For example, if the note has a nonrecourse provision providing that the consumer is not obligated for an amount greater than the value of the house, the creditor must nonetheless assume that the full amount to be disbursed will be repaid. In this case, however, the creditor may include a statement such as ''The disclosures assume full repayment of the amount advanced plus accrued interest, although the amount you may be required to pay is limited by your agreement.''

iv. Some reverse mortgages provide that some or all of the appreciation in the value of the property will be shared between the consumer and the creditor. Such loans are considered variable-rate mortgages, as described in comment 17(c)(1)–11, and the appreciation feature must be disclosed in accordance with § 1026.18(f)(1). If the reverse mortgage has a variable interest rate, is written for a term greater than one year, and is secured by the consumer's principal dwelling, the shared appreciation feature must be described under § 1026.19(b)(2)(vii).

15. *Morris Plan transactions.* When a deposit account is created for the sole purpose of accumulating payments and then is applied to satisfy entirely the consumer's obligation in the transaction, each deposit made into the account is considered the same

as a payment on a loan for purposes of making disclosures.

16. *Number of transactions.* Creditors have flexibility in handling credit extensions that may be viewed as multiple transactions. For example:

i. When a creditor finances the credit sale of a radio and a television on the same day, the creditor may disclose the sales as either 1 or 2 credit sale transactions.

ii. When a creditor finances a loan along with a credit sale of health insurance, the creditor may disclose in one of several ways: a single credit sale transaction, a single loan transaction, or a loan and a credit sale transaction.

iii. The separate financing of a downpayment in a credit sale transaction may, but need not, be disclosed as 2 transactions (a credit sale and a separate transaction for the financing of the downpayment).

17. *Special rules for tax refund anticipation loans.* Tax refund loans, also known as refund anticipation loans (RALs), are transactions in which a creditor will lend up to the amount of a consumer's expected tax refund. RAL agreements typically require repayment upon demand, but also may provide that repayment is required when the refund is made. The agreements also typically provide that if the amount of the refund is less than the payment due, the consumer must pay the difference. Repayment often is made by a preauthorized offset to a consumer's account held with the creditor when the refund has been deposited by electronic transfer. Creditors may charge fees for RALs in addition to fees for filing the consumer's tax return electronically. In RAL transactions subject to the regulation the following special rules apply:

i. If, under the terms of the legal obligation, repayment of the loan is required when the refund is received by the consumer (such as by deposit into the consumer's account), the disclosures should be based on the creditor's estimate of the time the refund will be delivered even if the loan also contains a demand clause. The practice of a creditor to demand repayment upon delivery of refunds does not determine whether the legal obligation requires that repayment be made at that time; this determination must be made according to applicable state or other law. (See comment 17(c)(5)–1 for the rules regarding disclosures if the loan is payable solely on demand or is payable either on demand or on an alternate maturity date.)

ii. If the consumer is required to repay more than the amount borrowed, the difference is a finance charge unless excluded under § 1026.4. In addition, to the extent that any fees charged in connection with the loan (such as for filing the tax return electronically) exceed those fees for a comparable cash transaction (that is, filing the tax return electronically without a loan), the difference must be included in the finance charge.

18. *Pawn Transactions.* When, in connection with an extension of credit, a consumer pledges or sells an item to a pawnbroker creditor in return for a sum of money and retains the right to redeem the item for a greater sum (the redemption price) within a specified period of time, disclosures are required. In addition to other disclosure requirements that may be applicable under § 1026.18, for purposes of pawn transactions:

i. The amount financed is the initial sum paid to the consumer. The pawnbroker creditor need not provide a separate itemization of the amount financed if that entire amount is paid directly to the consumer and the disclosed description of the amount financed is ''the amount of cash given directly to you'' or a similar phrase.

ii. The finance charge is the difference between the initial sum paid to the consumer and the redemption price plus any other finance charges paid in connection with the transaction. (See § 1026.4.)

iii. The term of the transaction, for calculating the annual percentage rate, is the period of time agreed to by the pawnbroker creditor and the consumer. The term of the transaction does not include a grace period (including any statutory grace period) after the agreed redemption date.

Paragraph 17(c)(2)(i)

1. *Basis for estimates.* Disclosures may be estimated when the exact information is unknown at the time disclosures are made. Information is unknown if it is not reasonably available to the creditor at the time the disclosures are made. The ''reasonably available'' standard requires that the creditor, acting in good faith, exercise due diligence in obtaining information. For example, the creditor must at a minimum utilize generally accepted calculation tools, but need not invest in the most sophisticated computer program to make a particular type of calculation. The creditor normally may rely on the representations of other parties in obtaining information. For example, the creditor might look to the consumer for the time of consummation, to insurance companies for the cost of insurance, or to realtors for taxes and escrow fees. The creditor may utilize estimates in making disclosures even though the creditor knows that more precise information will be available by the point of consummation. However, new disclosures may be required under § 1026.17(f) or § 1026.19.

2. *Labeling estimates.* Estimates must be designated as such in the segregated disclosures. Even though other disclosures are based on the same assumption on which a specific estimated disclosure was based, the creditor has some flexibility in labeling the estimates. Generally, only the particular disclosure for which the exact information is unknown is labeled as an estimate. However, when several disclosures are affected because of the unknown information, the creditor has the option of labeling either every affected disclosure or only the disclosure primarily affected. For example, when the finance charge is unknown because the date of consummation is unknown, the creditor must label the finance charge as an estimate and may also label as estimates the total of payments and the payment schedule. When many disclosures are estimates, the creditor may use a general statement, such as ''all numerical disclosures except the late payment disclosure are estimates,'' as a method to label those disclosures as estimates.

3. *Simple-interest transactions.* If consumers do not make timely payments in a simple-interest transaction, some of the amounts calculated for Truth in Lending disclosures will differ from amounts that consumers will actually pay over the term of the transaction. Creditors may label disclosures as estimates in these transactions. For example, because the finance charge and total of payments may be larger than disclosed if consumers make late payments, creditors may label the finance charge and total of payments as estimates. On the other hand, creditors may choose not to label disclosures as estimates and may base all disclosures on the assumption that payments will be made on time, disregarding any possible inaccuracies resulting from consumers' payment patterns.

Paragraph 17(c)(2)(ii)

1. *Per-diem interest.* This paragraph applies to any numerical amount (such as the finance charge, annual percentage rate, or payment amount) that is affected by the amount of the per-diem interest charge that will be collected at consummation. If the amount of per-diem interest used in preparing the disclosures for consummation is based on the information known to the creditor at the time the disclosure document is prepared, the disclosures are considered accurate under this rule, and affected disclosures are also considered accurate, even if the disclosures are not labeled as estimates. For example, if the amount of per-diem interest used to prepare disclosures is less than the amount of per-diem interest charged at consummation, and as a result the finance charge is understated by $200, the disclosed finance charge is considered accurate even though the understatement is not within the $100 tolerance of § 1026.18(d)(1), and the finance charge was not labeled as an estimate. In this example, if in addition to the understatement related to the per-diem interest, a $90 fee is incorrectly omitted from the finance charge, causing it to be understated by a total of $290, the finance charge is considered accurate because the $90 fee is within the tolerance in § 1026.18(d)(1).

Paragraph 17(c)(3)

1. *Minor variations.* Section 1026.17(c)(3) allows creditors to disregard certain factors in calculating and making disclosures. For example:

i. Creditors may ignore the effects of collecting payments in whole cents. Because payments cannot be collected in fractional cents, it is often difficult to amortize exactly an obligation with equal payments; the amount of the last payment may require adjustment to account for the rounding of the other payments to whole cents.

ii. Creditors may base their disclosures on calculation tools that assume that all months have an equal number of days, even if their practice is to take account of the variations in months for purposes of collecting interest. For example, a creditor may use a calculation tool based on a 360-day year, when it in fact collects interest by applying a factor of 1/365 of the annual rate to 365 days. This rule does not, however, authorize creditors to ignore, for disclosure purposes, the effects of applying 1/360 of an annual rate to 365 days.

2. *Use of special rules.* A creditor may utilize the special rules in § 1026.17(c)(3) for purposes of calculating and making all disclosures for a transaction or may, at its option, use the special rules for some disclosures and not others.

Paragraph 17(c)(4)

1. *Payment schedule irregularities.* When one or more payments in a transaction differ from the others because of a long or short first period, the variations may be ignored in disclosing the payment schedule, finance charge, annual percentage rate, and other terms. For example:

i. A 36-month auto loan might be consummated on June 8 with payments due on July 1 and the first of each succeeding month. The creditor may base its calculations on a payment schedule that assumes 36 equal intervals and 36 equal installment payments, even though a precise computation would produce slightly different amounts because of the shorter first period.

ii. By contrast, in the same example, if the first payment were not scheduled until August 1, the irregular first period would exceed the limits in § 1026.17(c)(4); the creditor could not use the special rule and could not ignore the extra days in the first period in calculating its disclosures.

2. *Measuring odd periods.* i. In determining whether a transaction may take advantage of the rule in § 1026.17(c)(4), the creditor must measure the variation against a regular period. For purposes of that rule:

A. The first period is the period from the date on which the finance charge begins to be earned to the date of the first payment.

B. The term is the period from the date on which the finance charge begins to be earned to the date of the final payment.

C. The regular period is the most common interval between payments in the transaction.

ii. In transactions involving regular periods that are monthly, semimonthly or multiples of a month, the length of the irregular and regular periods may be calculated on the basis of either the actual number of days or an assumed 30-day month. In other transactions, the length of the periods is based on the actual number of days.

3. *Use of special rules.* A creditor may utilize the special rules in § 1026.17(c)(4) for purposes of calculating and making some disclosures but may elect not to do so for all of the disclosures. For example, the variations may be ignored in calculating and disclosing the annual percentage rate but taken into account in calculating and disclosing the finance charge and payment schedule.

4. *Relation to prepaid finance charges.* Prepaid finance charges, including ''odd-days'' or ''per-diem'' interest, paid prior to or at closing may not be treated as the first payment on a loan. Thus, creditors may not disregard an irregularity in disclosing such finance charges.

Paragraph 17(c)(5)

1. *Demand disclosures.* Disclosures for demand obligations are based on an assumed 1-year term, unless an alternate maturity date is stated in the legal obligation. Whether an alternate maturity date is stated in the legal obligation is determined by applicable law. An alternate maturity date is not inferred from an informal principal reduction agreement or a similar understanding between the parties. However, when the note itself specifies a principal reduction schedule (for example, ''payable on demand or $2,000 plus interest quarterly''), an alternate maturity is stated and the disclosures must reflect that date.

2. *Future event as maturity date.* An obligation whose maturity date is determined solely by a future event, as for example, a loan payable only on the sale of property, is not a demand obligation. Because no demand feature is contained in the obligation, demand disclosures under § 1026.18(i) are inapplicable. The disclosures should be based on the creditor's estimate of the time at which the specified event will occur, and may indicate the basis for the creditor's estimate, as noted in the commentary to § 1026.17(a).

3. *Demand after stated period.* Most demand transactions contain a demand feature that may be exercised at any point during the term, but certain transactions convert to demand status only after a fixed period. For example, in states prohibiting due-on-sale clauses, the Federal National Mortgage Association (FNMA) requires mortgages that it purchases to include a call option rider that may be exercised after 7 years. These mortgages are generally written as long-term obligations, but contain a demand feature that may be exercised only within a 30-day period at 7 years. The disclosures for these transactions should be based upon the legally agreed-upon maturity date. Thus, if a mortgage containing the 7-year FNMA call option is written as a 20-year obligation, the disclosures should be based on the 20-year term, with the demand feature disclosed under § 1026.18(i).

4. *Balloon mortgages.* Balloon payment mortgages, with payments based on a long-term amortization schedule and a large final payment due after a shorter term, are not demand obligations unless a demand feature is specifically contained in the contract. For example, a mortgage with a term of 5 years and a payment schedule based on 20 years would not be treated as a mortgage with a demand feature, in the absence of any contractual demand provisions. In this type of mortgage, disclosures should be based on the 5-year term.

Paragraph 17(c)(6)

1. *Series of advances.* Section 1026.17(c)(6)(i) deals with a series of advances under an agreement to extend credit up to a certain amount. A creditor may treat all of the advances as a single transaction or disclose each advance as a separate transaction. If these advances are treated as 1 transaction and the timing and amounts of advances are unknown, creditors must make disclosures based on estimates, as provided in § 1026.17(c)(2). If the advances are disclosed separately, disclosures must be provided before each advance occurs, with the disclosures for the first advance provided by consummation.

2. *Construction loans.* Section 1026.17(c)(6)(ii) provides a flexible rule for disclosure of construction loans that may be permanently financed. These transactions have 2 distinct phases, similar to 2 separate transactions. The construction loan may be for initial construction or subsequent construction, such as rehabilitation or remodeling. The construction period usually involves several disbursements of funds at times and in amounts that are unknown at the beginning of that period, with the consumer paying only accrued interest until construction is completed. Unless the obligation is paid at that time, the loan then converts to permanent financing in which the loan amount is amortized just as in a standard mortgage transaction. Section 1026.17(c)(6)(ii) permits the creditor to give either one combined disclosure for both the construction financing and the permanent financing, or a separate set of disclosures for the 2 phases. This rule is available whether the consumer is initially obligated to accept construction financing only or is obligated to accept both construction and permanent financing from the outset. If the consumer is obligated on both phases and the creditor chooses to give 2 sets of disclosures, both sets must be given to the consumer initially, because both transactions would be consummated at that time. (Appendix D provides a method of calculating the annual percentage rate and other disclosures for construction loans, which may be used, at the creditor's option, in disclosing construction financing.)

3. *Multiple-advance construction loans.* Section 1026.17(c)(6)(i) and (ii) are not mutually exclusive. For example, in a transaction that finances the construction of a dwelling that may be permanently financed by the same creditor, the construction phase may consist of a series of advances under an agreement to extend credit up to a certain amount. In these cases, the creditor may disclose the construction phase as either 1 or more than 1 transaction and also disclose the permanent financing as a separate transaction.

4. *Residential mortgage transaction.* See the commentary to § 1026.2(a)(24) for a discussion of the effect of § 1026.17(c)(6) on the definition of a residential mortgage transaction.

5. *Allocation of points.* When a creditor utilizes the special rule in § 1026.17(c)(6) to disclose credit extensions as multiple transactions, buyers points or similar amounts imposed on the consumer must be allocated for purposes of calculating disclosures. While such amounts should not be taken into account more than once in making calculations, they may be allocated between the transactions in any manner the creditor chooses. For example, if a construction-permanent loan is subject to 5 points imposed on the consumer and the creditor chooses to disclose the 2 phases separately, the 5 points may be allocated entirely to the construction loan, entirely to the permanent loan, or divided in any manner between the two. However, the entire 5 points may not be applied twice, that is, to both the construction and the permanent phases.

17(d) Multiple Creditors; Multiple Consumers

1. *Multiple creditors.* If a credit transaction involves more than one creditor:

i. The creditors must choose which of them will make the disclosures.

ii. A single, complete set of disclosures must be provided, rather than partial disclosures from several creditors.

iii. All disclosures for the transaction must be given, even if the disclosing creditor would not otherwise have been obligated to make a particular disclosure. For example, if one of the creditors is the seller, the total sale price disclosure under § 1026.18(j) must be made, even though the disclosing creditor is not the seller.

2. *Multiple consumers.* When two consumers are joint obligors with primary liability on an obligation, the disclosures may be given to either one of them. If one consumer is merely a surety or guarantor, the disclosures must be given to the principal debtor. In rescindable transactions, however, separate disclosures must be given to each consumer who has the right to rescind under § 1026.23, although the disclosures required under § 1026.19(b) need only be provided to the consumer who expresses an interest in a variable-rate loan program.

17(e) Effect of Subsequent Events

1. *Events causing inaccuracies.* Inaccuracies in disclosures are not violations if attributable to events occurring after the disclosures are made. For example, when the consumer fails to fulfill a prior commitment to keep the collateral insured and the creditor then provides the coverage and charges the consumer for it, such a change does not make the original disclosures inaccurate. The creditor may, however, be required to make new disclosures under § 1026.17(f) or § 1026.19 if the events occurred between disclosure and consummation or under § 1026.20 if the events occurred after consummation.

17(f) Early Disclosures

1. *Change in rate or other terms.* Redisclosure is required for changes that occur between the time disclosures are made and consummation if the annual percentage rate in the consummated transaction exceeds the limits prescribed in this section, even if the initial disclosures would be considered accurate under the tolerances in § 1026.18(d) or 1026.22(a). To illustrate:

i. *General.* A. If disclosures are made in a regular transaction on July 1, the transaction is consummated on July 15, and the actual annual percentage rate varies by more than ⅛ of 1 percentage point from the disclosed annual percentage rate, the creditor must either redisclose the changed terms or furnish a complete set of new disclosures before consummation. Redisclosure is required even if the disclosures made on July 1 are based on estimates and marked as such.

B. In a regular transaction, if early disclosures are marked as estimates and the disclosed annual percentage rate is within ⅛ of 1 percentage point of the rate at consummation, the creditor need not redisclose the changed terms (including the annual percentage rate).

ii. *Nonmortgage loan.* If disclosures are made on July 1, the transaction is consummated on July 15, and the finance charge increased by $35 but the disclosed annual percentage rate is within the permitted tolerance, the creditor must at least redisclose the changed terms that were not marked as estimates. (See § 1026.18(d)(2) of this part.)

iii. *Mortgage loan.* At the time TILA disclosures are prepared in July, the loan closing is scheduled for July 31 and the creditor does not plan to collect per-diem interest at consummation. Consummation actually occurs on August 5, and per-diem interest for the remainder of August is collected as a prepaid finance charge. Assuming there were no other changes requiring redisclosure, the creditor may rely on the disclosures prepared in July that were accurate when they were prepared. However, if the creditor prepares new disclosures in August that will be provided at consummation, the new disclosures must take into account the amount of the per-diem interest known to the creditor at that time.

2. *Variable rate.* The addition of a variable rate feature to the credit terms, after early disclosures are given, requires new disclosures.

3. *Content of new disclosures.* If redisclosure is required, the creditor has the option of either providing a complete set of new disclosures, or providing disclosures of only the terms that vary from those originally disclosed. (See the commentary to § 1026.19(a)(2).)

4. *Special rules.* In mortgage transactions subject to § 1026.19, the creditor must redisclose if, between the delivery of the required early disclosures and consummation, the annual percentage rate changes by more than a stated tolerance. When subsequent events occur after consummation, new disclosures are required only if there is a refinancing or an assumption within the meaning of § 1026.20.

Paragraph 17(f)(2)

1. *Irregular transactions.* For purposes of this paragraph, a transaction is deemed to be ''irregular'' according to the definition in § 1026.22(a)(3).

17(g) Mail or Telephone Orders—Delay in Disclosures

1. *Conditions for use.* When the creditor receives a mail or telephone request for credit, the creditor may delay making the disclosures until the first payment is due if the following conditions are met:

i. The credit request is initiated without face-to-face or direct telephone solicitation. (Creditors may, however, use the special rule when credit requests are solicited by mail.)

ii. The creditor has supplied the specified credit information about its credit terms either to the individual consumer or to the public generally. That information may be distributed through advertisements, catalogs, brochures, special mailers, or similar means.

2. *Insurance.* The location requirements for the insurance disclosures under § 1026.18(n) permit them to appear apart from the other disclosures. Therefore, a creditor may mail an insurance authorization to the consumer and then prepare the other disclosures to reflect whether or not the authorization is completed by the consumer. Creditors may also disclose the insurance cost on a unit-cost basis, if the transaction meets the requirements of § 1026.17(g).

17(h) Series of Sales—Delay in Disclosures

1. *Applicability.* The creditor may delay the disclosures for individual credit sales in a series of such sales until the first payment is due on the current sale, assuming the two conditions in this paragraph are met. If those conditions are not met, the general timing rules in § 1026.17(b) apply.

2. *Basis of disclosures.* Creditors structuring disclosures for a series of sales under § 1026.17(h) may compute the total sale price as either:

i. The cash price for the sale plus that portion of the finance charge and other charges applicable to that sale; or

ii. The cash price for the sale, other charges applicable to the sale, and the total finance charge and outstanding principal.

17(i) Interim Student Credit Extensions

1. *Definition.* Student credit plans involve extensions of credit for education purposes where the repayment amount and schedule are not known at the time credit is advanced. These plans include loans made under any student credit plan, whether government or private, where the repayment period does not begin immediately. (Certain student credit plans that meet this definition are exempt from Regulation Z. See § 1026.3(f).)

2. *Relation to other sections.* For disclosures made before the mandatory compliance date of the disclosures required under §§ 1026.46, 47, and 48, paragraph 17(i) permitted creditors to omit from the disclosures the terms set forth in that paragraph at the time the credit was actually extended. However, creditors were required to make complete disclosures at the time the creditor and consumer agreed upon the repayment schedule for the total obligation. At that time, a new set of disclosures of all applicable items under § 1026.18 was required. Most student credit plans are subject to the requirements in §§ 1026.46, 47, and 48. Consequently, for applications for student credit plans received on or after the mandatory compliance date of §§ 1026.46, 47, and 48, the creditor may not omit from the disclosures the terms set forth in paragraph 17(i). Instead, the creditor must comply with §§ 1026.46, 47, and 48, if applicable, or with §§ 1026.17 and 1026.18.

3. *Basis of disclosures.* The disclosures given at the time of execution of the interim note should reflect two annual percentage rates, one for the interim period and one for the repayment period. The use of § 1026.17(i) in making disclosures does not, by itself, make those disclosures estimates. Any portion of the finance charge, such as statutory interest, that is attributable to the interim period and is paid by the student (either as a prepaid finance charge, periodically during the interim period, in one payment at the end of the interim period, or capitalized at the beginning of the repayment period) must be reflected in the interim annual percentage rate. Interest subsidies, such as payments made by either a state or the Federal Government on an interim loan, must be excluded in computing the annual percentage rate on the interim obligation, when the consumer has no contingent liability for payment of those amounts. Any finance charges that are paid separately by

the student at the outset or withheld from the proceeds of the loan are prepaid finance charges. An example of this type of charge is the loan guarantee fee. The sum of the prepaid finance charges is deducted from the loan proceeds to determine the amount financed and included in the calculation of the finance charge.

4. *Consolidation.* Consolidation of the interim student credit extensions through a renewal note with a set repayment schedule is treated as a new transaction with disclosures made as they would be for a refinancing. Any unearned portion of the finance charge must be reflected in the new finance charge and annual percentage rate, and is not added to the new amount financed. In itemizing the amount financed under § 1026.18(c), the creditor may combine the principal balances remaining on the interim extensions at the time of consolidation and categorize them as the amount paid on the consumer's account.

5. *Approved student credit forms.* See the commentary to Appendix H regarding disclosure forms approved for use in certain student credit programs for which applications were received prior to the mandatory compliance date of §§ 1026.46, 1026.47, and 1026.48.

Section 1026.18—Content of Disclosures

1. *As applicable.* i. The disclosures required by this section need be made only as applicable. Any disclosure not relevant to a particular transaction may be eliminated entirely. For example:

A. In a loan transaction, the creditor may delete disclosure of the total sale price.

B. In a credit sale requiring disclosure of the total sale price under § 1026.18(j), the creditor may delete any reference to a downpayment where no downpayment is involved.

ii. Where the amounts of several numerical disclosures are the same, the ''as applicable'' language also permits creditors to combine the terms, so long as it is done in a clear and conspicuous manner. For example:

A. In a transaction in which the amount financed equals the total of payments, the creditor may disclose ''amount financed/total of payments,'' together with descriptive language, followed by a single amount.

B. However, if the terms are separated on the disclosure statement and separate space is provided for each amount, both disclosures must be completed, even though the same amount is entered in each space.

2. *Format.* See the commentary to § 1026.17 and Appendix H for a discussion of the format to be used in making these disclosures, as well as acceptable modifications.

18(a) Creditor

1. *Identification of creditor.* The creditor making the disclosures must be identified. This disclosure may, at the creditor's option, appear apart from the other disclosures. Use of the creditor's name is sufficient, but the creditor may also include an address and/or telephone number. In transactions with multiple creditors, any one of them may make the disclosures; the one doing so must be identified.

18(b) Amount Financed

1. *Disclosure required.* The net amount of credit extended must be disclosed using the term *amount financed* and a descriptive explanation similar to the phrase in the regulation.

2. *Rebates and loan premiums.* In a loan transaction, the creditor may offer a premium in the form of cash or merchandise to prospective borrowers. Similarly, in a credit sale transaction, a seller's or manufacturer's rebate may be offered to prospective purchasers of the creditor's goods or services. At the creditor's option, these amounts may be either reflected in the Truth in Lending disclosures or disregarded in the disclosures. If the creditor chooses to reflect them in the § 1026.18 disclosures, rather than disregard them, they may be taken into account in any manner as part of those disclosures.

Paragraph 18(b)(1)

1. *Downpayments.* A downpayment is defined in § 1026.2(a)(18) to include, at the creditor's option, certain deferred downpayments or pick-up payments. A deferred downpayment that meets the criteria set forth in the definition may be treated as part of the downpayment, at the creditor's option.

i. Deferred downpayments that are not treated as part of the downpayment (either because they do not meet the definition or because the creditor simply chooses not to treat them as downpayments) are included in the amount financed.

ii. Deferred downpayments that are treated as part of the downpayment are not part of the amount financed under § 1026.18(b)(1).

Paragraph 18(b)(2)

1. *Adding other amounts.* Fees or other charges that are not part of the finance charge and that are financed rather than paid separately at consummation of the transaction are included in the amount financed. Typical examples are real estate settlement charges and premiums for voluntary credit life and disability insurance excluded from the finance charge under § 1026.4. This paragraph does not include any amounts already accounted for under § 1026.18(b)(1), such as taxes, tag and title fees, or the costs of accessories or service policies that the creditor includes in the cash price.

Paragraph 18(b)(3)

1. *Prepaid finance charges.* i. Prepaid finance charges that are paid separately in cash or by check should be deducted under § 1026.18(b)(3) in calculating the amount financed. To illustrate:

A. A consumer applies for a loan of $2,500 with a $40 loan fee. The face amount of the note is $2,500 and the consumer pays the loan fee separately by cash or check at closing. The principal loan amount for purposes of § 1026.18(b)(1) is $2,500 and $40 should be deducted under § 1026.18(b(3), thereby yielding an amount financed of $2,460.

ii. In some instances, as when loan fees are financed by the creditor, finance charges are incorporated in the face amount of the note. Creditors have the option, when the charges are not add-on or discount charges, of determining a principal loan amount under § 1026.18(b)(1) that either includes or does not include the amount of the finance charges. (Thus the principal loan amount may, but need not, be determined to equal the face amount of the note.) When the finance charges are included in the principal loan amount, they should be deducted as prepaid finance charges under § 1026.18(b)(3). When the finance charges are not included in the principal loan amount, they should not be deducted under § 1026.18(b)(3). The following examples illustrate the application of § 1026.18(b) to this type of transaction. Each example assumes a loan request of $2,500 with a loan fee of $40; the creditor assesses the loan fee by increasing the face amount of the note to $2,540.

A. If the creditor determines the principal loan amount under § 1026.18(b)(1) to be $2,540, it has included the loan fee in the principal loan amount and should deduct $40 as a prepaid finance charge under § 1026.18(b)(3), thereby obtaining an amount financed of $2,500.

B. If the creditor determines the principal loan amount under § 1026.18(b)(1) to be $2,500, it has not included the loan fee in the principal loan amount and should not deduct any amount under § 1026.18(b)(3), thereby obtaining an amount financed of $2,500.

iii. The same rules apply when the creditor does not increase the face amount of the note by the amount of the charge but collects the charge by withholding it from the amount advanced to the consumer. To illustrate, the following examples assume a loan request of $2,500 with a loan fee of $40; the creditor prepares a note for $2,500 and advances $2,460 to the consumer.

A. If the creditor determines the principal loan amount under § 1026.18(b)(1) to be $2,500, it has included the loan fee in the principal loan amount and should deduct $40 as a prepaid finance charge under § 1026.18(b)(3), thereby obtaining an amount financed of $2,460.

B. If the creditor determines the principal loan amount under § 1026.18(b)(1) to be $2,460, it has not included the loan fee in the principal loan amount and should not deduct any amount under § 1026.18(b)(3), thereby obtaining an amount financed of $2,460.

iv. Thus in the examples where the creditor derives the net amount of credit by determining a principal loan amount that does not include the amount of the finance charge, no subtraction is appropriate. Creditors should note, however, that although the charges are not subtracted as *prepaid* finance charges in those examples, they are nonetheless finance charges and must be treated as such.

2. *Add-on or discount charges.* All finance charges must be deducted from the amount of credit in calculating the amount financed. If the principal loan amount reflects finance charges that meet the definition of a prepaid finance charge in § 1026.2, those charges are included in the § 1026.18(b)(1) amount and deducted under § 1026.18(b)(3). However, if the principal loan amount includes finance charges that do not meet the definition of a prepaid finance charge, the § 1026.18(b)(1) amount must exclude those finance charges.

The following examples illustrate the application of § 1026.18(b) to these types of transactions. Each example assumes a loan request of $1000 for 1 year, subject to a 6 percent precomputed interest rate, with a $10 loan fee paid separately at consummation.

i. The creditor assesses add-on interest of $60 which is added to the $1000 in loan proceeds for an obligation with a face amount of $1060. The principal for purposes of § 1026.18(b)(1) is $1000, no amounts are added under § 1026.18(b)(2), and the $10 loan fee is a prepaid finance charge to be deducted under § 1026.18(b)(3). The amount financed is $990.

ii. The creditor assesses discount interest of $60 and distributes $940 to the consumer, who is liable for an obligation with a face amount of $1000. The principal under § 1026.18(b)(1) is $940, which results in an amount financed of $930, after deduction of the $10 prepaid finance charge under § 1026.18(b)(3).

iii. The creditor assesses $60 in discount interest by increasing the face amount of the obligation to $1060, with the consumer receiving $1000. The principal under § 1026.18(b)(1) is thus $1000 and the amount financed $990, after deducting the $10 prepaid finance charge under § 1026.18(b)(3).

18(c) Itemization of Amount Financed

1. *Disclosure required.* i. The creditor has 2 alternatives in complying with § 1026.18(c):

A. The creditor may inform the consumer, on the segregated disclosures, that a written itemization of the amount financed will be provided on request, furnishing the itemization only if the customer in fact requests it.

B. The creditor may provide an itemization as a matter of course, without notifying the consumer of the right to receive it or waiting for a request.

ii. Whether given as a matter of course or only on request, the itemization must be provided at the same time as the other disclosures required by § 1026.18, although separate from those disclosures.

2. *Additional information.* Section 1026.18(c) establishes only a minimum standard for the material to be included in the itemization of the amount financed. Creditors have considerable flexibility in revising or supplementing the information listed in § 1026.18(c) and shown in model form H–3, although no changes are required. The creditor may, for example, do one or more of the following:

i. Include amounts that reflect payments not part of the amount financed. For example, escrow items and certain insurance premiums may be included, as discussed in the commentary to § 1026.18(g).

ii. Organize the categories in any order. For example, the creditor may rearrange the terms in a mathematical progression that depicts the arithmetic relationship of the terms.

iii. Add categories. For example, in a credit sale, the creditor may include the cash price and the downpayment. If the credit sale involves a trade-in of the consumer's car and an existing lien on that car exceeds the value of the trade-in amount, the creditor may disclose the consumer's trade-in value, the creditor's payoff of the existing lien, and the resulting additional amount financed.

iv. Further itemize each category. For example, the amount paid directly to the consumer may be subdivided into the amount given by check and the amount credited to the consumer's savings account.

v. Label categories with different language from that shown in § 1026.18(c). For example, an amount paid on the consumer's account may be revised to specifically identify the account as ''your auto loan with us.''

vi. Delete, leave blank, mark ''N/A,'' or otherwise note inapplicable categories in the itemization. For example, in a credit sale with no prepaid finance charges or amounts paid to others, the amount financed may consist of only the cash price less downpayment. In this case, the itemization may be composed of only a single category and all other categories may be eliminated.

3. *Amounts appropriate to more than one category.* When an amount may appropriately be placed in any of several categories and the creditor does not wish to revise the categories shown in § 1026.18(c), the creditor has considerable flexibility in determining where to show the amount. For example, in a credit sale, the portion of the purchase price being financed by the creditor may be viewed as either an amount paid to the consumer or an amount paid on the consumer's account.

4. *RESPA transactions.* The Real Estate Settlement Procedures Act (RESPA) requires creditors to provide a good faith estimate of closing costs and a settlement statement listing the amounts paid by the consumer. Transactions subject to RESPA are exempt from the requirements of § 1026.18(c) if the creditor complies with RESPA's requirements for a good faith estimate and settlement statement. The itemization of the amount financed need not be given, even though the content and timing of the good faith estimate and settlement statement under RESPA differ from the requirements of §§ 1026.18(c) and 1026.19(a)(2). If a creditor chooses to substitute RESPA's settlement statement for the itemization when redisclosure is required under § 1026.19(a)(2), the statement must be delivered to the consumer at or prior to consummation. The disclosures required by §§ 1026.18(c) and 1026.19(a)(2) may appear on the same page or on the same document as the good faith estimate or the settlement statement, so long as the requirements of § 1026.17(a) are met.

Paragraph 18(c)(1)(i)

1. *Amounts paid to consumer.* This encompasses funds given to the consumer in the form of cash or a check, including joint proceeds checks, as well as funds placed in an asset account. It may include money in an interest-bearing account even if that amount is considered a required deposit under § 1026.18(r). For example, in a transaction with total loan proceeds of $500, the consumer receives a check for $300 and $200 is required by the creditor to be put into an interest-bearing account. Whether or not the $200 is a required deposit, it is part of the amount financed. At the creditor's option, it may be broken out and labeled in the itemization of the amount financed.

Paragraph 18(c)(1)(ii)

1. *Amounts credited to consumer's account.* The term *consumer's account* refers to an account in the nature of a debt with that creditor. It may include, for example, an unpaid balance on a prior loan, a credit sale balance or other amounts owing to that creditor. It does not include asset accounts of the consumer such as savings or checking accounts.

Paragraph 18(c)(1)(iii)

1. *Amounts paid to others.* This includes, for example, tag and title fees; amounts paid to insurance companies for insurance premiums; security interest fees, and amounts paid to credit bureaus, appraisers or public officials. When several types of insurance premiums are financed, they may, at the creditor's option, be combined and listed in one sum, labeled ''insurance'' or similar term. This includes, but is not limited to, different types of insurance premiums paid to one company and different types of insurance premiums paid to different companies. Except for insurance companies and other categories noted in § 1026.18(c)(1)(iii), third parties must be identified by name.

2. *Charges added to amounts paid to others.* A sum is sometimes added to the amount of a fee charged to a consumer for a service provided by a third party (such as for an extended warranty or a service contract) that is payable in the same amount in comparable cash and credit transactions. In the credit transaction, the amount is retained by the creditor. Given the flexibility permitted in meeting the requirements of the amount financed itemization (see the commentary to § 1026.18(c)), the creditor in such cases may reflect that the creditor has retained a portion of the amount paid to others. For example, the creditor could add to the category ''amount paid to others'' language such as ''(we may be retaining a portion of this amount).''

Paragraph 18(c)(1)(iv)

1. *Prepaid finance charge.* Prepaid finance charges that are deducted under § 1026.18(b)(3) must be disclosed under this section. The prepaid finance charges must be shown as a total amount but may, at the creditor's option, also be further itemized and described. All amounts must be reflected in this total, even if portions of the prepaid finance charge are also reflected elsewhere. For example, if at consummation the creditor collects interim interest of $30 and a credit report fee of $10, a total prepaid finance charge of $40 must be shown. At the creditor's option, the credit report fee paid to a third party may also be shown elsewhere as an amount included in § 1026.18(c)(1)(iii). The creditor may also further describe the 2 components of the prepaid finance charge, although no itemization of this element is required by § 1026.18(c)(1)(iv).

2. *Prepaid mortgage insurance premiums.* RESPA requires creditors to give consumers a settlement statement disclosing the costs associated with mortgage loan transactions. Included on the settlement statement are mortgage insurance premiums collected at settlement, which are prepaid finance charges. In calculating the total amount of

prepaid finance charges, creditors should use the amount for mortgage insurance listed on the line for mortgage insurance on the settlement statement (line 1002 on HUD–1 or HUD 1–A), without adjustment, even if the actual amount collected at settlement may vary because of RESPA's escrow accounting rules. Figures for mortgage insurance disclosed in conformance with RESPA shall be deemed to be accurate for purposes of Regulation Z.

18(d) Finance Charge

1. *Disclosure required.* The creditor must disclose the finance charge as a dollar amount, using the term *finance charge,* and must include a brief description similar to that in § 1026.18(d). The creditor may, but need not, further modify the descriptor for variable rate transactions with a phrase such as *which is subject to change.* The finance charge must be shown on the disclosures only as a total amount; the elements of the finance charge must not be itemized in the segregated disclosures, although the regulation does not prohibit their itemization elsewhere.

18(d)(2) Other Credit

1. *Tolerance.* When a finance charge error results in a misstatement of the amount financed, or some other dollar amount for which the regulation provides no specific tolerance, the misstated disclosure does not violate the Act or the regulation if the finance charge error is within the permissible tolerance under this paragraph.

18(e) Annual Percentage Rate

1. *Disclosure required.* The creditor must disclose the cost of the credit as an annual rate, using the term *annual percentage rate,* plus a brief descriptive phrase comparable to that used in § 1026.18(e). For variable rate transactions, the descriptor may be further modified with a phrase such as *which is subject to change.* Under § 1026.17(a), the terms *annual percentage rate* and *finance charge* must be more conspicuous than the other required disclosures.

2. *Exception.* Section 1026.18(e) provides an exception for certain transactions in which no annual percentage rate disclosure is required.

18(f) Variable Rate

1. *Coverage.* The requirements of § 1026.18(f) apply to all transactions in which the terms of the legal obligation allow the creditor to increase the rate originally disclosed to the consumer. It includes not only increases in the interest rate but also increases in other components, such as the rate of required credit life insurance. The provisions, however, do not apply to increases resulting from delinquency (including late payment), default, assumption, acceleration or transfer of the collateral. Section 1026.18(f)(1) applies to variable-rate transactions that are not secured by the consumer's principal dwelling and to those that are secured by the principal dwelling but have a term of one year or less. Section 1026.18(f)(2) applies to variable-rate transactions that are secured by the consumer's principal dwelling and have a term greater than one year. Moreover, transactions subject to § 1026.18(f)(2) are subject to the special early disclosure requirements of § 1026.19(b). (However, ''shared-equity'' or ''shared-appreciation'' mortgages are subject to the disclosure requirements of § 1026.18(f)(1) and not to the requirements of §§ 1026.18(f)(2) and 1026.19(b) regardless of the general coverage of those sections.) Creditors are permitted under § 1026.18(f)(1) to substitute in any variable-rate transaction the disclosures required under § 1026.19(b) for those disclosures ordinarily required under § 1026.18(f)(1). Creditors who provide variable-rate disclosures under § 1026.19(b) must comply with all of the requirements of that section, including the timing of disclosures, and must also provide the disclosures required under § 1026.18(f)(2). Creditors substituting § 1026.19(b) disclosures for § 1026.18(f)(1) disclosures may, but need not, also provide disclosures pursuant to § 1026.20(c). (Substitution of disclosures under § 1026.18(f)(1) in transactions subject to § 1026.19(b) is not permitted.)

Paragraph 18(f)(1)

1. *Terms used in disclosure.* In describing the variable rate feature, the creditor need not use any prescribed terminology. For example, limitations and hypothetical examples may be described in terms of interest rates rather than annual percentage rates. The model forms in Appendix H provide examples of ways in which the variable rate disclosures may be made.

2. *Conversion feature.* In variable-rate transactions with an option permitting consumers to convert to a fixed-rate transaction, the conversion option is a variable-rate feature that must be disclosed. In making disclosures under § 1026.18(f)(1), creditors should disclose the fact that the rate may increase upon conversion; identify the index or formula used to set the fixed rate; and state any limitations on and effects of an increase resulting from conversion that differ from other variable-rate features. Because § 1026.18(f)(1)(iv) requires only one hypothetical example (such as an example of the effect on payments resulting from changes in the index), a second hypothetical example need not be given.

Paragraph 18(f)(1)(i)

1. *Circumstances.* The circumstances under which the rate may increase include identification of any index to which the rate is tied, as well as any conditions or events on which the increase is contingent.

i. When no specific index is used, any identifiable factors used to determine whether to increase the rate must be disclosed.

ii. When the increase in the rate is purely discretionary, the fact that any increase is within the creditor's discretion must be disclosed.

iii. When the index is internally defined (for example, by that creditor's prime rate), the creditor may comply with this requirement by either a brief description of that index or a statement that any increase is in the discretion of the creditor. An externally defined index, however, must be identified.

Paragraph 18(f)(1)(ii)

1. *Limitations.* This includes any maximum imposed on the amount of an increase in the rate at any time, as well as any maximum on the total increase over the life of the transaction. Except for private education loans disclosures, when there are no limitations, the creditor may, but need not, disclose that fact, and limitations do not include legal limits in the nature of usury or rate ceilings under state or Federal statutes or regulations. (See § 1026.30 for the rule requiring that a maximum interest rate be included in certain variable-rate transactions.) For disclosures with respect to private education loan disclosures, see comment 47(b)(1)–2.

Paragraph 18(f)(1)(iii)

1. *Effects.* Disclosure of the effect of an increase refers to an increase in the number or amount of payments or an increase in the final payment. In addition, the creditor may make a brief reference to negative amortization that may result from a rate increase. (See the commentary to § 1026.17(a)(1) regarding directly related information.) If the effect cannot be determined, the creditor must provide a statement of the possible effects. For example, if the exercise of the variable-rate feature may result in either more or larger payments, both possibilities must be noted.

Paragraph 18(f)(1)(iv)

1. *Hypothetical example.* The example may, at the creditor's option appear apart from the other disclosures. The creditor may provide either a standard example that illustrates the terms and conditions of that type of credit offered by that creditor or an example that directly reflects the terms and conditions of the particular transaction. In transactions with more than one variable-rate feature, only one hypothetical example need be provided. (See the commentary to § 1026.17(a)(1) regarding disclosure of more than one hypothetical example as directly related information.)

2. *Hypothetical example not required.* The creditor need not provide a hypothetical example in the following transactions with a variable-rate feature:

i. Demand obligations with no alternate maturity date.

ii. Private education loans as defined in § 1026.46(b)(5).

iii. Multiple-advance construction loans disclosed pursuant to Appendix D, Part I.

Paragraph 18(f)(2)

1. *Disclosure required.* In variable-rate transactions that have a term greater than one year and are secured by the consumer's principal dwelling, the creditor must give special early disclosures under § 1026.19(b) in addition to the later disclosures required under § 1026.18(f)(2). The disclosures under § 1026.18(f)(2) must state that the transaction has a variable-rate feature and that variable-rate disclosures have been provided earlier. (See the commentary to § 1026.17(a)(1) regarding the disclosure of certain directly related information in addition to the variable-rate disclosures required under § 1026.18(f)(2).)

18(g) Payment Schedule

1. *Amounts included in repayment schedule.* The repayment schedule should reflect all components of the finance charge, not merely the portion attributable to interest. A prepaid finance charge, however, should not be shown in the repayment schedule as a separate payment. The payments may include amounts beyond the amount financed and finance charge. For example, the disclosed payments may, at the creditor's option, reflect certain insurance premiums where the premiums are not part of either the amount financed or the finance charge, as well as real estate escrow amounts such as taxes added to the payment in mortgage transactions.

2. *Deferred downpayments.* As discussed in the commentary to § 1026.2(a)(18), deferred downpayments or pick-up payments that meet the conditions set forth in the definition of downpayment may be treated as part of the downpayment. Even if treated as a downpayment, that amount may nevertheless be disclosed as part of the payment schedule, at the creditor's option.

3. *Total number of payments.* In disclosing the number of payments for transactions with more than one payment level, creditors may but need not disclose as a single figure the total number of payments for all levels. For example, in a transaction calling for 108 payments of $350, 240 payments of $335, and 12 payments of $330, the creditor need not state that there will be a total of 360 payments.

4. *Timing of payments.* i. *General rule.* Section 1026.18(g) requires creditors to disclose the timing of payments. To meet this requirement, creditors may list all of the payment due dates. They also have the option of specifying the ''period of payments'' scheduled to repay the obligation. As a general rule, creditors that choose this option must disclose the payment intervals or frequency, such as ''monthly''or ''bi-weekly,'' and the calendar date that the beginning payment is due. For example, a creditor may disclose that payments are due ''monthly beginning on July 1, 1998.'' This information, when combined with the number of payments, is necessary to define the repayment period and enable a consumer to determine all of the payment due dates.

ii. *Exception.* In a limited number of circumstances, the beginning-payment date is unknown and difficult to determine at the time disclosures are made. For example, a consumer may become obligated on a credit contract that contemplates the delayed disbursement of funds based on a contingent event, such as the completion of home repairs. Disclosures may also accompany loan checks that are sent by mail, in which case the initial disbursement and repayment dates are solely within the consumer's control. In such cases, if the beginning-payment date is unknown the creditor may use an estimated date and label the disclosure as an estimate pursuant to § 1026.17(c). Alternatively, the disclosure may refer to the occurrence of a particular event, for example, by disclosing that the beginning payment is due ''30 days after the first loan disbursement.'' This information also may be included with an estimated date to explain the basis for the creditor's estimate. *See* comment 17(a)(1)–5.iii.

5. *Mortgage insurance.* The payment schedule should reflect the consumer's mortgage insurance payments until the date on which the creditor must automatically terminate coverage under applicable law, even though the consumer may have a right to request that the insurance be cancelled earlier. The payment schedule must reflect the legal obligation, as determined by applicable state or other law. For example, assume that under applicable law, mortgage insurance must terminate after the 130th scheduled monthly payment, and the creditor collects at closing and places in escrow two months of premiums. If, under the legal obligation, the creditor will include mortgage insurance premiums in 130 payments and refund the escrowed payments when the insurance is terminated, the payment schedule should reflect 130 premium payments. If, under the legal obligation, the creditor will apply the amount escrowed to the two final insurance payments, the payment schedule should reflect 128 monthly premium payments. (For assumptions in calculating a payment schedule that includes mortgage insurance that must be automatically terminated, see comments 17(c)(1)–8 and 17(c)(1)–10.)

6. *Mortgage transactions.* Section 1026.18(g) applies only to closed-end transactions other than transactions that are subject to § 1026.18(s). Section 1026.18(s) applies to closed-end transactions secured by real property or a dwelling. Thus, if a closed-end consumer credit transaction is secured by real property or a dwelling, the creditor discloses an interest rate and payment summary table in accordance with § 1026.18(s) and does not observe the requirements of § 1026.18(g). On the other hand, if a closed-end consumer credit transaction is not secured by real property or a dwelling, the creditor discloses a payment schedule in accordance with § 1026.18(g) and does not observe the requirements of § 1026.18(s).

Paragraph 18(g)(1)

1. *Demand obligations.* In demand obligations with no alternate maturity date, the creditor has the option of disclosing only the due dates or periods of scheduled interest payments in the first year (for example, ''interest payable quarterly'' or ''interest due the first of each month''). The amounts of the interest payments need not be shown.

Paragraph 18(g)(2)

1. *Abbreviated disclosure.* The creditor may disclose an abbreviated payment schedule when the amount of each regularly scheduled payment (other than the first or last payment) includes an equal amount to be applied on principal and a finance charge computed by application of a rate to the decreasing unpaid balance. This option is also available when mortgage-guarantee insurance premiums, paid either monthly or annually, cause variations in the amount of the scheduled payments, reflecting the continual decrease or increase in the premium due. In addition, in transactions where payments vary because interest and principal are paid at different intervals, the two series of payments may be disclosed separately and the abbreviated payment schedule may be used for the interest payments. For example, in transactions with fixed quarterly principal payments and monthly interest payments based on the outstanding principal balance, the amount of the interest payments will change quarterly as principal declines. In such cases the creditor may treat the interest and principal payments as two separate series of payments, separately disclosing the number, amount, and due dates of principal payments, and, using the abbreviated payment schedule, the number, amount, and due dates of interest payments. This option may be used when interest and principal are scheduled to be paid on the same date of the month as well as on different dates of the month. The creditor using this alternative must disclose the dollar amount of the highest and lowest payments and make reference to the variation in payments.

2. *Combined payment schedule disclosures.* Creditors may combine the option in this paragraph with the general payment schedule requirements in transactions where only a portion of the payment schedule meets the conditions of § 1026.18(g)(2). For example, in a graduated payment mortgage where payments rise sharply for 5 years and then decline over the next 25 years because of decreasing mortgage insurance premiums, the first 5 years would be disclosed under the general rule in § 1026.18(g) and the next 25 years according to the abbreviated schedule in § 1026.18(g)(2).

3. *Effect on other disclosures.* Section 1026.18(g)(2) applies only to the payment schedule disclosure. The actual amounts of payments must be taken into account in calculating and disclosing the finance charge and the annual percentage rate.

Paragraph 18(h) Total of Payments

1. *Disclosure required.* The total of payments must be disclosed using that term, along with a descriptive phrase similar to the one in the regulation. The descriptive explanation may be revised to reflect a variable rate feature with a brief phrase such as ''based on the current annual percentage rate which may change.''

2. *Calculation of total of payments.* The total of payments is the sum of the payments disclosed under § 1026.18(g). For example, if the creditor disclosed a deferred portion of the downpayment as part of the payment schedule, that payment must be reflected in the total disclosed under this paragraph. To calculate the total of payments amount for transactions subject to § 1026.18(s), creditors should use the rules in § 1026.18(g) and associated commentary and, for adjustable-rate transactions, comments 17(c)(1)–8 and –10.

3. *Exception.* Section 1026.18(h) permits creditors to omit disclosure of the total of payments in single-payment transactions. This exception does not apply to a transaction calling for a single payment of principal combined with periodic payments of interest.

4. *Demand obligations.* In demand obligations with no alternate maturity date, the creditor may omit disclosure of payment

amounts under § 1026.18(g)(1). In those transactions, the creditor need not disclose the total of payments.

Paragraph 18(i) Demand Feature

1. *Disclosure requirements.* The disclosure requirements of this provision apply not only to transactions payable on demand from the outset, but also to transactions that are not payable on demand at the time of consummation but convert to a demand status after a stated period. In demand obligations in which the disclosures are based on an assumed maturity of 1 year under § 1026.17(c)(5), that fact must also be stated. Appendix H contains model clauses that may be used in making this disclosure.

2. *Covered demand features.* The type of demand feature triggering the disclosures required by § 1026.18(i) includes only those demand features contemplated by the parties as part of the legal obligation. For example, this provision does not apply to transactions that covert to a demand status as a result of the consumer's default. A due-on-sale clause is not considered a demand feature. A creditor may, but need not, treat its contractual right to demand payment of a loan made to its executive officers as a demand feature to the extent that the contractual right is required by Regulation O of the Board of Governors of the Federal Reserve System (12 CFR 215.5) or other Federal law.

3. *Relationship to payment schedule disclosures.* As provided in § 1026.18(g)(1), in demand obligations with no alternate maturity date, the creditor need only disclose the due dates or payment periods of any scheduled interest payments for the first year. If the demand obligation states an alternate maturity, however, the disclosed payment schedule must reflect that stated term; the special rule in § 1026.18(g)(1) is not available.

Paragraph 18(j) Total Sale Price

1. *Disclosure required.* In a credit sale transaction, the *total sale price* must be disclosed using that term, along with a descriptive explanation similar to the one in the regulation. For variable rate transactions, the descriptive phrase may, at the creditor's option, be modified to reflect the variable rate feature. For example, the descriptor may read: ''The total cost of your purchase on credit, which is subject to change, including your downpayment of * * *.'' The reference to a downpayment may be eliminated in transactions calling for no downpayment.

2. *Calculation of total sale price.* The figure to be disclosed is the sum of the cash price, other charges added under § 1026.18(b)(2), and the finance charge disclosed under § 1026.18(d).

3. *Effect of existing liens.* When a credit sale transaction involves property that is being used as a trade-in (an automobile, for example) and that has a lien exceeding the value of the trade-in, the total sale price is affected by the amount of any cash provided. (See comment 2(a)(18)–3.) To illustrate, assume a consumer finances the purchase of an automobile with a cash price of $20,000. Another vehicle used as a trade-in has a value of $8,000 but has an existing lien of $10,000, leaving a $2,000 deficit that the consumer must finance.

i. If the consumer pays $1,500 in cash, the creditor may apply the cash first to the lien, leaving a $500 deficit, and reflect a downpayment of $0. The total sale price would include the $20,000 cash price, an additional $500 financed under § 1026.18(b)(2), and the amount of the finance charge. Alternatively, the creditor may reflect a downpayment of $1,500 and finance the $2,000 deficit. In that case, the total sale price would include the sum of the $20,000 cash price, the $2,000 lien payoff amount as an additional amount financed, and the amount of the finance charge.

ii. If the consumer pays $3,000 in cash, the creditor may apply the cash first to extinguish the lien and reflect the remainder as a downpayment of $1,000. The total sale price would reflect the $20,000 cash price and the amount of the finance charge. (The cash payment extinguishes the trade-in deficit and no charges are added under § 1026.18(b)(2).) Alternatively, the creditor may elect to reflect a downpayment of $3,000 and finance the $2,000 deficit. In that case, the total sale price would include the sum of the $20,000 cash price, the $2,000 lien payoff amount as an additional amount financed, and the amount of the finance charge.

18(k) Prepayment

1. *Disclosure required.* The creditor must give a definitive statement of whether or not a penalty will be imposed or a rebate will be given.

i. The fact that no penalty will be imposed may not simply be inferred from the absence of a penalty disclosure; the creditor must indicate that prepayment will not result in a penalty.

ii. If a penalty or refund is possible for one type of prepayment, even though not for all, a positive disclosure is required. This applies to any type of prepayment, whether voluntary or involuntary as in the case of prepayments resulting from acceleration.

iii. Any difference in rebate or penalty policy, depending on whether prepayment is voluntary or not, must not be disclosed with the segregated disclosures.

2. *Rebate-penalty disclosure.* A single transaction may involve both a precomputed finance charge and a finance charge computed by application of a rate to the unpaid balance (for example, mortgages with mortgage-guarantee insurance). In these cases, disclosures about both prepayment rebates and penalties are required. Sample form H–15 in Appendix H illustrates a mortgage transaction in which both rebate and penalty disclosures are necessary.

3. *Prepaid finance charge.* The existence of a prepaid finance charge in a transaction does not, by itself, require a disclosure under § 1026.18(k). A prepaid finance charge is not considered a penalty under § 1026.18(k)(1), nor does it require a disclosure under § 1026.18(k)(2). At its option, however, a creditor may consider a prepaid finance charge to be under § 1026.18(k)(2). If a disclosure is made under § 1026.18(k)(2) with respect to a prepaid finance charge or other finance charge, the creditor may further identify that finance charge. For example, the disclosure may state that the borrower ''will not be entitled to a refund of the prepaid finance charge'' or some other term that describes the finance charge.

Paragraph 18(k)(1)

1. *Penalty.* This applies only to those transactions in which the interest calculation takes account of all scheduled reductions in principal, as well as transactions in which interest calculations are made daily. The term penalty as used here encompasses only those charges that are assessed strictly because of the prepayment in full of a simple-interest obligation, as an addition to all other amounts. Items which are penalties include, for example:

i. Interest charges for any period after prepayment in full is made. (See the commentary to § 1026.17(a)(1) regarding disclosure of interest charges assessed for periods after prepayment in full as directly related information.)

ii. A minimum finance charge in a simple-interest transaction. (See the commentary to § 1026.17(a)(1) regarding the disclosure of a minimum finance charge as directly related information.) Items which are not penalties include, for example, loan guarantee fees.

Paragraph 18(k)(2)

1. *Rebate of finance charge.* i. This applies to any finance charges that do not take account of each reduction in the principal balance of an obligation. This category includes, for example:

A. Precomputed finance charges such as add-on charges.

B. Charges that take account of some but not all reductions in principal, such as mortgage guarantee insurance assessed on the basis of an annual declining balance, when the principal is reduced on a monthly basis.

ii. No description of the method of computing earned or unearned finance charges is required or permitted as part of the segregated disclosures under this section.

18(l) Late Payment

1. *Definition.* This paragraph requires a disclosure only if charges are added to individual delinquent installments by a creditor who otherwise considers the transaction ongoing on its original terms. Late payment charges do not include:

i. The right of acceleration.

ii. Fees imposed for actual collection costs, such as repossession charges or attorney's fees.

iii. Deferral and extension charges.

iv. The continued accrual of simple interest at the contract rate after the payment due date. However, an increase in the interest rate is a late payment charge to the extent of the increase.

2. *Content of disclosure.* Many state laws authorize the calculation of late charges on the basis of either a percentage or a specified dollar amount, and permit imposition of the lesser or greater of the 2 charges. The disclosure made under § 1026.18(l) may reflect this alternative. For example, stating that the charge in the event of a late payment is 5% of the late amount, not to exceed $5.00, is sufficient. Many creditors also permit a grace period during which no late charge will be assessed; this fact may be disclosed as directly related information. (See the commentary to § 1026.17(a).)

18(m) Security Interest

1. *Purchase money transactions.* When the collateral is the item purchased as part of, or with the proceeds of, the credit transaction, § 1026.18(m) requires only a general identification such as ''the property purchased in this transaction.'' However, the creditor may identify the property by item or type instead of identifying it more generally with a phrase such as ''the property purchased in this transaction.'' For example, a creditor may identify collateral as ''a motor vehicle,'' or as ''the property purchased in this transaction.'' Any transaction in which the credit is being used to purchase the collateral is considered a purchase money transaction and the abbreviated identification may be used, whether the obligation is treated as a loan or a credit sale.

2. *Nonpurchase money transactions.* In nonpurchase money transactions, the property subject to the security interest must be identified by item or type. This disclosure is satisfied by a general disclosure of the category of property subject to the security interest, such as ''motor vehicles,'' ''securities,'' ''certain household items,'' or ''household goods.'' (Creditors should be aware, however, that the Federal credit practices rules, as well as some state laws, prohibit certain security interests in household goods.) At the creditor's option, however, a more precise identification of the property or goods may be provided.

3. *Mixed collateral.* In some transactions in which the credit is used to purchase the collateral, the creditor may also take other property of the consumer as security. In those cases, a combined disclosure must be provided, consisting of an identification of the purchase money collateral consistent with comment 18(m)–1 and a specific identification of the other collateral consistent with comment 18(m)–2.

4. *After-acquired property.* An after-acquired property clause is not a security interest to be disclosed under § 1026.18(m).

5. *Spreader clause.* The fact that collateral for pre-existing credit with the institution is being used to secure the present obligation constitutes a security interest and must be disclosed. (Such security interests may be known as ''spreader'' or ''dragnet'' clauses, or as ''cross-collateralization'' clauses.) A specific identification of that collateral is unnecessary but a reminder of the interest arising from the prior indebtedness is required. The disclosure may be made by using language such as ''collateral securing other loans with us may also secure this loan.'' At the creditor's option, a more specific description of the property involved may be given.

6. *Terms used in disclosure.* No specified terminology is required in disclosing a security interest. Although the disclosure may, at the creditor's option, use the term *security interest,* the creditor may designate its interest by using, for example, *pledge, lien,* or *mortgage.*

7. *Collateral from third party.* In certain transactions, the consumer's obligation may be secured by collateral belonging to a third party. For example, a loan to a student may be secured by an interest in the property of the student's parents. In such cases, the security interest is taken in connection with the transaction and must be disclosed, even though the property encumbered is owned by someone other than the consumer.

18(n) Insurance and Debt Cancellation

1. *Location.* This disclosure may, at the creditor's option, appear apart from the other disclosures. It may appear with any other information, including the amount financed itemization, any information prescribed by state law, or other supplementary material. When this information is disclosed with the other segregated disclosures, however, no additional explanatory material may be included.

2. *Debt cancellation.* Creditors may use the model credit insurance disclosures only if the debt cancellation coverage constitutes insurance under state law. Otherwise, they may provide a parallel disclosure that refers to debt cancellation coverage.

18(o) Certain Security Interest Charges

1. *Format.* No special format is required for these disclosures; under § 1026.4(e), taxes and fees paid to government officials with respect to a security interest may be aggregated, or may be broken down by individual charge. For example, the disclosure could be labeled ''filing fees and taxes'' and all funds disbursed for such purposes may be aggregated in a single disclosure. This disclosure may appear, at the creditor's option, apart from the other required disclosures. The inclusion of this information on a statement required under the Real Estate Settlement Procedures Act is sufficient disclosure for purposes of Truth in Lending.

Paragraph 18(p) Contract Reference

1. *Content.* Creditors may substitute, for the phrase ''appropriate contract document,'' a reference to specific transaction documents in which the additional information is found, such as ''promissory note'' or ''retail installment sale contract.'' A creditor may, at its option, delete inapplicable items in the contract reference, as for example when the contract documents contain no information regarding the right of acceleration.

18(q) Assumption Policy

1. *Policy statement.* In many mortgages, the creditor cannot determine, at the time disclosure must be made, whether a loan may be assumable at a future date on its original terms. For example, the assumption clause commonly used in mortgages sold to the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation conditions an assumption on a variety of factors such as the creditworthiness of the subsequent borrower, the potential for impairment of the lender's security, and execution of an assumption agreement by the subsequent borrower. In cases where uncertainty exists as to the future assumability of a mortgage, the disclosure under § 1026.18(q) should reflect that fact. In making disclosures in such cases, the creditor may use phrases such as ''subject to conditions,'' ''under certain circumstances,'' or ''depending on future conditions.'' The creditor may provide a brief reference to more specific criteria such as a due-on-sale clause, although a complete explanation of all conditions is not appropriate. For example, the disclosure may state, ''Someone buying your home may be allowed to assume the mortgage on its original terms, subject to certain conditions, such as payment of an assumption fee.'' See comment 17(a)(1)–5 for an example for a reference to a due-on-sale clause.

2. *Original terms.* The phrase *original terms* for purposes of § 1026.18(q) does not preclude the imposition of an assumption fee, but a modification of the basic credit agreement, such as a change in the contract interest rate, represents different terms.

18(r) Required Deposit

1. *Disclosure required.* The creditor must inform the consumer of the existence of a required deposit. (Appendix H provides a model clause that may be used in making that disclosure.) Section 1026.18(r) describes 3 types of deposits that need not be considered required deposits. Use of the phrase ''need not'' permits creditors to include the disclosure even in cases where there is doubt as to whether the deposit constitutes a required deposit.

2. *Pledged account mortgages.* In these transactions, a consumer pledges as collateral funds that the consumer deposits in an account held by the creditor. The creditor withdraws sums from that account to supplement the consumer's periodic payments. Creditors may treat these pledged accounts as required deposits or they may treat them as consumer buydowns in accordance with the commentary to § 1026.17(c)(1).

3. *Escrow accounts.* The escrow exception in § 1026.18(r) applies, for example, to accounts for such items as maintenance fees, repairs, or improvements, whether in a realty or a nonrealty transaction. (See the commentary to § 1026.17(c)(1) regarding the use of escrow accounts in consumer buydown transactions.)

4. *Interest-bearing accounts.* When a deposit earns at least 5 percent interest per year, no disclosure is required under § 1026.18(r). This exception applies whether the deposit is held by the creditor or by a third party.

5. *Morris Plan transactions.* A deposit under a Morris Plan, in which a deposit account is created for the sole purpose of accumulating payments and this is applied to satisfy entirely the consumer's obligation in the transaction, is not a required deposit.

6. *Examples of amounts excluded.* The following are among the types of deposits that need not be treated as required deposits:

i. Requirement that a borrower be a customer or a member even if that involves a fee or a minimum balance.

ii. Required property insurance escrow on a mobile home transaction.

iii. Refund of interest when the obligation is paid in full.

iv. Deposits that are immediately available to the consumer.

v. Funds deposited with the creditor to be disbursed (for example, for construction) before the loan proceeds are advanced.

vi. Escrow of condominium fees.

vii. Escrow of loan proceeds to be released when the repairs are completed.

18(s) Interest Rate and Payment Summary for Mortgage Transactions

1. *In general.* Section 1026.18(s) prescribes format and content for disclosure of interest rates and monthly (or other periodic) payments for mortgage loans. The information in § 1026.18(s)(2)–(4) is required to be in the form of a table, except as otherwise provided, with headings and format substantially similar to Model Clause H–4(E), H–4(F), H–4(G), or H–4(H) in Appendix H to this part. A disclosure that does not include the shading shown in a model clause but otherwise follows the model clause's headings and format is substantially similar to that model clause. Where § 1026.18(s)(2)–(4) or the applicable model clause requires that a column or row of the table be labeled using the word ''monthly'' but the periodic payments are not due monthly, the creditor should use the appropriate term, such as ''bi-weekly'' or ''quarterly.'' In all cases, the table should have no more than five vertical columns corresponding to applicable interest rates at various times during the loan's term; corresponding payments would be shown in horizontal rows. Certain loan types and terms are defined for purposes of § 1026.18(s) in § 1026.18(s)(7).

2. *Amortizing loans.* Loans described as amortizing in §§ 1026.18(s)(2)(i) and 1026.18(s)(3) include interest-only loans if they do not also permit negative amortization. (For rules relating to loans with balloon payments, see § 1026.18(s)(5)). If an amortizing loan is an adjustable-rate mortgage with an introductory rate (less than the fully-indexed rate), creditors must provide a special explanation of introductory rates. *See* § 1026.18(s)(2)(iii).

3. *Negative amortization.* For negative amortization loans, creditors must follow the rules in §§ 1026.18(s)(2)(ii) and 1026.18(s)(4) in disclosing interest rates and monthly payments. Loans with negative amortization also require special explanatory disclosures about rates and payments. *See* § 1026.18(s)(6). Loans with negative amortization include ''payment option'' loans, in which the consumer is permitted to make minimum payments that will cover only some of the interest accruing each month. *See also* comment 17(c)(1)–12, regarding graduated-payment adjustable-rate mortgages.

18(s)(2) Interest Rates

18(s)(2)(i) Amortizing Loans

Paragraph 18(s)(2)(i)(A)

1. *Fixed rate loans—payment increases.* Although the interest rate will not change after consummation for a fixed-rate loan, some fixed-rate loans may have periodic payments that increase after consummation. For example, the terms of the legal obligation may permit the consumer to make interest-only payments for a specified period such as the first five years after consummation. In such cases, the creditor must include the increased payment under § 1026.18(s)(3)(ii)(B) in the payment row, and must show the interest rate in the column for that payment, even though the rate has not changed since consummation. See also comment 17(c)(1)–13, regarding growth equity mortgages.

Paragraph 18(s)(2)(i)(B)

1. *Adjustable-rate mortgages and step-rate mortgages.* Creditors must disclose more than one interest rate for adjustable-rate mortgages and step-rate mortgages, in accordance with § 1026.18(s)(2)(i)(B). Creditors must assume that an adjustable-rate mortgage's interest rate will increase after consummation as rapidly as possible, taking into account the terms of the legal obligation.

2. *Maximum interest rate during first five years—adjustable-rate mortgages and step-rate mortgages.* The creditor must disclose the maximum rate that could apply during the first five years after consummation. If there are no interest rate caps other than the maximum rate required under § 1026.30, then the creditor should disclose only the rate at consummation and the maximum rate. Such a table would have only two columns.

i. For an adjustable-rate mortgage, the creditor must take into account any interest rate caps when disclosing the maximum interest rate during the first five years. The creditor must also disclose the earliest date on which that adjustment may occur.

ii. If the transaction is a step-rate mortgage, the creditor should disclose the rate that will apply after consummation. For example, the legal obligation may provide that the rate is 6 percent for the first two years following consummation, and then increases to 7 percent for at least the next three years. The creditor should disclose the maximum rate during the first five years as 7 percent and the date on which the rate is scheduled to increase to 7 percent.

3. *Maximum interest rate at any time.* The creditor must disclose the maximum rate that could apply at any time during the term of the loan and the earliest date on which the maximum rate could apply.

i. For an adjustable-rate mortgage, the creditor must take into account any interest rate caps in disclosing the maximum interest rate. For example, if the legal obligation provides that at each annual adjustment the rate may increase by no more than 2 percentage points, the creditor must take this limit into account in determining the earliest date on which the maximum possible rate may be reached.

ii. For a step-rate mortgage, the creditor should disclose the highest rate that could apply under the terms of the legal obligation and the date on which that rate will first apply.

Paragraph 18(s)(2)(i)(C)

1. *Payment increases.* For some loans, the payment may increase following consummation for reasons unrelated to an interest rate adjustment. For example, an adjustable-rate mortgage may have an introductory fixed rate for the first five years following consummation and permit the borrower to make interest-only payments for the first three years. The disclosure requirement of § 1026.18(s)(2)(i)(C) applies to all amortizing loans, including interest-only loans, if the consumer's payment can increase in the manner described in § 1026.18(s)(3)(i)(B), even if it is not the type of loan covered by § 1026.18(s)(3)(i). Thus, § 1026.18(s)(2)(i)(C) requires that the creditor disclose the interest rate that corresponds to the first payment that includes principal as well as interest, even though the interest rate will not adjust at that time. In such cases, if the loan is an interest-only loan, the creditor also must disclose the corresponding periodic payment pursuant to § 1026.18(s)(3)(ii). The table would show, from left to right: The interest rate and payment at consummation with the payment itemized to show that the payment is being applied to interest only; the interest rate and payment when the interest-only option ends; the maximum interest rate and payment during the first five years; and the maximum possible interest rate and payment. The disclosure requirements of § 1026.18(s)(2)(i)(C) do not apply to minor payment variations resulting solely from the fact that months have different numbers of days.

18(s)(2)(ii) Negative Amortization Loans

1. *Rate at consummation.* In all cases the interest rate in effect at consummation must be disclosed, even if it will apply only for a short period such as one month.

2. *Rates for adjustable-rate mortgages.* The creditor must assume that interest rates rise as quickly as possible after consummation, in accordance with any interest rate caps under the legal obligation. For adjustable-rate mortgages with no rate caps except a lifetime maximum, creditors must assume that interest rate reaches the maximum at the first adjustment. For example, assume that the legal obligation provides for an interest rate at consummation of 1.5 percent. One month after consummation, the interest rate adjusts and will adjust monthly thereafter, according to changes in the index. The consumer may make payments that cover only part of the interest accrued each month, until the date the principal balance reaches 115 percent of its original balance, or until the end of the fifth year after consummation, whichever comes first. The maximum possible rate is 10.5 percent. No other limits on interest rates apply. The minimum required payment adjusts each year, and may increase by no more than 7.5 percent over the previous year's payment. The creditor should disclose the following rates and the dates when they are scheduled to occur: A rate of 1.5 percent for the first month following consummation and the minimum payment; a rate of 10.5 percent, and the corresponding minimum payment taking into account the 7.5 percent limit on payment increases, at the beginning of the second year; and a rate of 10.5 percent and the corresponding minimum payment taking into account the 7.5 percent payment increase limit, at the beginning of the third year. The creditor also must disclose the rate of 10.5 percent, the fully amortizing payment, and the date on which the consumer must first make such a payment under the terms of the legal obligation.

18(s)(2)(iii) Introductory Rate Disclosure for Amortizing Adjustable-Rate Mortgage

1. *Introductory rate.* In some adjustable-rate mortgages, creditors may set an initial interest rate that is lower than the fully indexed rate at consummation. For amortizing loans with an introductory rate,

creditors must disclose the information required in § 1026.18(s)(2)(iii) directly below the table.

Paragraph 18(s)(2)(iii)(B)

1. *Place in sequence.* ''Designation of the place in sequence'' refers to identifying the month or year, as applicable, of the change in the rate resulting from the expiration of an introductory rate by its place in the sequence of months or years, as applicable, of the transaction's term. For example, if a transaction has a discounted rate for the first three years, § 1026.18(s)(2)(iii)(B) requires a statement such as, ''In the fourth year, even if market rates do not change, this rate will increase to ____%.''

Paragraph 18(s)(2)(iii)(C)

1. *Fully indexed rate.* The fully indexed rate is defined in § 1026.18(s)(7) as the index plus the margin at consummation. For purposes of § 1026.18(s)(2)(iii)(C), ''at consummation'' refers to disclosures delivered at consummation, or three business days before consummation pursuant to § 1026.19(a)(2)(ii); for early disclosures delivered within three business days after receipt of a consumer's application pursuant to § 1026.19(a)(1), the fully indexed rate disclosed under § 1026.18(s)(2)(iii)(C) may be based on the index in effect at the time the disclosures are provided. The index in effect at consummation (or at the time of early disclosures) need not be used if a contract provides for a delay in the implementation of changes in an index value. For example, if the contract specifies that rate changes are based on the index value in effect 45 days before the change date, creditors may use any index value in effect during the 45 days before consummation (or any earlier date of disclosure) in calculating the fully indexed rate to be disclosed.

18(s)(3) Payments for Amortizing Loans

1. *Payments corresponding to interest rates.* Creditors must disclose the periodic payment that corresponds to each interest rate disclosed under § 1026.18(s)(2)(i)(A)–(C). The corresponding periodic payment is the regular payment for each such interest rate, without regard to any final payment that differs from others because of the rounding of periodic payments to account for payment amounts including fractions of cents. Balloon payments, however, must be disclosed as provided in § 1026.18(s)(5).

2. *Principal and interest payment amounts; examples.* i. For fixed-rate interest-only transactions, § 1026.18(s)(3)(ii)(B) requires scheduled increases in the regular periodic payment amounts to be disclosed along with the date of the increase. For example, in a fixed-rate interest-only loan, a scheduled increase in the payment amount from an interest-only payment to a fully amortizing payment must be disclosed. Similarly, in a fixed-rate balloon loan, the balloon payment must be disclosed in accordance with § 1026.18(s)(5).

ii. For adjustable-rate mortgage transactions, § 1026.18(s)(3)(i)(A) requires that for each interest rate required to be disclosed under § 1026.18(s)(2)(i) (the interest rate at consummation, the maximum rate during the first five years, and the maximum possible rate) a corresponding payment amount must be disclosed.

iii. The format of the payment disclosure varies depending on whether all regular periodic payment amounts will include principal and interest, and whether there will be an escrow account for taxes and insurance.

Paragraph 18(s)(3)(i)(C)

1. *Taxes and insurance.* An estimated payment amount for taxes and insurance must be disclosed if the creditor will establish an escrow account for such amounts. If the escrow account will include amounts for items other than taxes and insurance, such as homeowners association dues, the creditor may but is not required to include such items in the estimate. When such estimated escrow payments must be disclosed in multiple columns of the table, such as for adjustable- and step-rate transactions, each column should use the same estimate for taxes and insurance except that the estimate should reflect changes in periodic mortgage insurance premiums that are known to the creditor at the time the disclosure is made. The estimated amounts of mortgage insurance premiums should be based on the declining principal balance that will occur as a result of changes to the interest rate that are assumed for purposes of disclosing those rates under § 1026.18(s)(2) and accompanying commentary. The payment amount must include estimated amounts for property taxes and premiums for mortgage-related insurance required by the creditor, such as insurance against loss of or damage to property, or against liability arising out of the ownership or use of the property, or insurance protecting the creditor against the consumer's default or other credit loss. Premiums for credit insurance, debt suspension and debt cancellation agreements, however, should not be included. Except for periodic mortgage insurance premiums included in the escrow payment under § 1026.18(s)(3)(i)(C), amounts included in the escrow payment disclosure such as property taxes and homeowner's insurance generally are not finance charges under § 1026.4 and, therefore, do not affect other disclosures, including the finance charge and annual percentage rate.

2. *Mortgage insurance.* Payment amounts under § 1026.18(s)(3)(i) should reflect the consumer's mortgage insurance payments until the date on which the creditor must automatically terminate coverage under applicable law, even though the consumer may have a right to request that the insurance be cancelled earlier. The payment amount must reflect the terms of the legal obligation, as determined by applicable state or other law. For example, assume that under applicable law, mortgage insurance must terminate after the 130th scheduled monthly payment, and the creditor collects at closing and places in escrow two months of premiums. If, under the legal obligation, the creditor will include mortgage insurance premiums in 130 payments and refund the escrowed payments when the insurance is terminated, payment amounts disclosed through the 130th payment should reflect premium payments. If, under the legal obligation, the creditor will apply the amount escrowed to the two final insurance payments, payments disclosed through the 128th payment should reflect premium payments. The escrow amount reflected on the disclosure should include mortgage insurance premiums even if they are not escrowed and even if there is no escrow account established for the transaction.

Paragraph 18(s)(3)(i)(D)

1. *Total monthly payment.* For amortizing loans, each column should add up to a total estimated payment. The total estimated payment amount should be labeled. If periodic payments are not due monthly, the creditor should use the appropriate term such as ''quarterly'' or ''annually.''

18(s)(3)(ii) Interest-Only Payments

1. *Interest-only loans that are also negative amortization loans.* The rules in § 1026.18(s)(3)(ii) for disclosing payments on interest-only loans apply only if the loan is not also a negative amortization loan. If the loan is a negative amortization loan, even if it also has an interest-only feature, payments are disclosed under the rules in § 1026.18(s)(4).

Paragraph 18(s)(3)(ii)(C)

1. *Escrows.* See the commentary under § 1026.18(s)(3)(i)(C) for guidance on escrows for purposes of § 1026.18(s)(3)(ii)(C).

18(s)(4) Payments for Negative Amortization Loans

1. *Table.* Section 1026.18(s)(1) provides that tables shall include only the information required in § 1026.18(s)(2)–(4). Thus, a table for a negative amortization loan must contain no more than two horizontal rows of payments and no more than five vertical columns of interest rates.

2. *Payment amounts.* The payment amounts disclosed under § 1026.18(s)(4) are the minimum or fully amortizing periodic payments, as applicable, corresponding to the interest rates disclosed under § 1026.18(s)(2)(ii). The corresponding periodic payment is the regular payment for each such interest rate, without regard to any final payment that differs from the rest because of the rounding of periodic payments to account for payment amounts including fractions of cents.

Paragraph 18(s)(4)(i)

1. *Minimum required payments.* In one row of the table, the creditor must disclose the minimum required payment in each column of the table, corresponding to each interest rate or adjustment required in § 1026.18(s)(2)(ii). The payments in this row must be calculated based on an assumption that the consumer makes the minimum required payment for as long as possible under the terms of the legal obligation. This row should be identified as the minimum payment option, and the statement required by § 1026.18(s)(4)(i)(C) should be included in the heading for the row.

Paragraph 18(s)(4)(iii)

1. *Fully amortizing payments.* In one row of the table, the creditor must disclose the fully amortizing payment in each column of the table, corresponding to each interest rate required in § 1026.18(s)(2)(ii). The creditor

must assume, for purposes of calculating the amounts in this row that the consumer makes only fully amortizing payments starting with the first scheduled payment.

18(s)(5) Balloon Payments

1. *General.* A balloon payment is one that is more than two times the regular periodic payment. In a reverse mortgage transaction, the single payment is not considered a balloon payment. A balloon payment must be disclosed outside and below the table, unless the balloon payment coincides with an interest rate adjustment or a scheduled payment increase. In those cases, the balloon payment must be disclosed in the table.

18(s)(6) Special Disclosures for Loans With Negative Amortization

1. *Escrows.* See the commentary under § 1026.18(s)(3)(i)(C) for guidance on escrows for purposes of § 1026.18(s)(6). Under that guidance, because mortgage insurance payments decline over a loan's term, the payment amounts shown in the table should reflect the mortgage insurance payment that will be applicable at the time each disclosed periodic payment will be in effect. Accordingly, the disclosed mortgage insurance payment will be zero if it corresponds to a periodic payment that will occur after the creditor will be legally required to terminate mortgage insurance. On the other hand, because only one escrow amount is disclosed under § 1026.18(s)(6) for negative amortization loans and escrows are not itemized in the payment amounts, the single escrow amount disclosed should reflect the mortgage insurance amount that will be collected at the outset of the loan's term, even though that amount will decline in the future and ultimately will be discontinued pursuant to the terms of the mortgage insurance policy.

18(s)(7) Definitions

1. *Negative amortization loans.* Under § 1026.18(s)(7)(v), a negative amortization loan is one that requires only a minimum periodic payment that covers only a portion of the accrued interest, resulting in negative amortization. For such a loan, § 1026.18(s)(4)(iii) requires creditors to disclose the fully amortizing periodic payment for each interest rate disclosed under § 1026.18(s)(2)(ii), in addition to the minimum periodic payment, regardless of whether the legal obligation explicitly recites that the consumer may make the fully amortizing payment. Some loan types that result in negative amortization do not meet the definition of negative amortization loan for purposes of § 1026.18(s). These include, for example, loans requiring level, amortizing payments but having a payment schedule containing gaps during which interest accrues and is added to the principal balance before regular, amortizing payments begin (or resume). For example, ''seasonal income'' loans may provide for amortizing payments during nine months of the year and no payments for the other three months; the required minimum payments (when made) are amortizing payments, thus such loans are not negative amortization loans under § 1026.18(s)(7)(v). An adjustable-rate loan that has fixed periodic payments that do not adjust when the interest rate adjusts also would not be disclosed as a negative amortization loan under § 1026.18(s). For example, assume the initial rate is 4%, for which the fully amortizing payment is $1500. Under the terms of the legal obligation, the consumer will make $1500 monthly payments even if the interest rate increases, and the additional interest is capitalized. The possibility (but not certainty) of negative amortization occurring after consummation does not make this transaction a negative amortization loan for purposes of § 1026.18(s). Loans that do not meet the definition of negative amortization loan, even if they may have negative amortization, are amortizing loans and are disclosed under §§ 1026.18(s)(2)(i) and 1026.18(s)(3).

Section 1026.19—Certain Mortgage and Variable-Rate Transactions

19(a)(1)(i) Time of Disclosures

1. *Coverage.* This section requires early disclosure of credit terms in mortgage transactions that are secured by a consumer's dwelling (other than home equity lines of credit subject to § 1026.40 or mortgage transactions secured by an interest in a timeshare plan) that are also subject to the Real Estate Settlement Procedures Act (RESPA) and its implementing Regulation X. To be covered by § 1026.19, a transaction must be a federally related mortgage loan under RESPA. ''Federally related mortgage loan'' is defined under RESPA (12 U.S.C. 2602) and Regulation X (12 CFR 1024.2), and is subject to any interpretations by the Bureau.

2. *Timing and use of estimates.* The disclosures required by § 1026.19(a)(1)(i) must be delivered or mailed not later than three business days after the creditor receives the consumer's written application. The general definition of ''business day'' in § 1026.2(a)(6)—a day on which the creditor's offices are open to the public for substantially all of its business functions—is used for purposes of § 1026.19(a)(1)(i). *See* comment 2(a)(6)–1. This general definition is consistent with the definition of ''business day'' in Regulation X—a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. *See* 12 CFR 1024.2. Accordingly, the three-business-day period in § 1026.19(a)(1)(i) for making early disclosures coincides with the time period within which creditors subject to RESPA must provide good faith estimates of settlement costs. If the creditor does not know the precise credit terms, the creditor must base the disclosures on the best information reasonably available and indicate that the disclosures are estimates under § 1026.17(c)(2). If many of the disclosures are estimates, the creditor may include a statement to that effect (such as ''all numerical disclosures except the late-payment disclosure are estimates'') instead of separately labeling each estimate. In the alternative, the creditor may label as an estimate only the items primarily affected by unknown information. (*See* the commentary to § 1026.17(c)(2).) The creditor may provide explanatory material concerning the estimates and the contingencies that may affect the actual terms, in accordance with the commentary to § 1026.17(a)(1).

3. *Written application.* Creditors may rely on RESPA and Regulation X (including any interpretations issued by the Bureau) in deciding whether a ''written application'' has been received. In general, Regulation X defines ''application'' to mean the submission of a borrower's financial information in anticipation of a credit decision relating to a federally related mortgage loan. *See* 12 CFR 1024.2(b). An application is received when it reaches the creditor in any of the ways applications are normally transmitted—by mail, hand delivery, or through an intermediary agent or broker. (*See* comment 19(b)–3 for guidance in determining whether or not the transaction involves an intermediary agent or broker.) If an application reaches the creditor through an intermediary agent or broker, the application is received when it reaches the creditor, rather than when it reaches the agent or broker.

4. *Denied or withdrawn applications.* The creditor may determine within the three-business-day period that the application will not or cannot be approved on the terms requested, as, for example, when a consumer applies for a type or amount of credit that the creditor does not offer, or the consumer's application cannot be approved for some other reason. In that case, or if the consumer withdraws the application within the three-business-day period, the creditor need not make the disclosures under this section. If the creditor fails to provide early disclosures and the transaction is later consummated on the original terms, the creditor will be in violation of this provision. If, however, the consumer amends the application because of the creditor's unwillingness to approve it on its original terms, no violation occurs for not providing disclosures based on the original terms. But the amended application is a new application subject to § 1026.19(a)(1)(i).

5. *Itemization of amount financed.* In many mortgage transactions, the itemization of the amount financed required by § 1026.18(c) will contain items, such as origination fees or points, that also must be disclosed as part of the good faith estimates of settlement costs required under RESPA. Creditors furnishing the RESPA good faith estimates need not give consumers any itemization of the amount financed.

19(a)(1)(ii) Imposition of Fees

1. *Timing of fees.* The consumer must receive the disclosures required by this section before paying or incurring any fee imposed by a creditor or other person in connection with the consumer's application for a mortgage transaction that is subject to § 1026.19(a)(1)(i), except as provided in § 1026.19(a)(1)(iii). If the creditor delivers the disclosures to the consumer in person, a fee may be imposed anytime after delivery. If the creditor places the disclosures in the mail, the creditor may impose a fee after the consumer receives the disclosures or, in all cases, after midnight on the third business day following mailing of the disclosures. For purposes of § 1026.19(a)(1)(ii), the term ''business day'' means all calendar days except Sundays and legal public holidays referred to in § 1026.2(a)(6). *See* comment 2(a)(6)–2. For example, assuming that there are no intervening legal public holidays, a

creditor that receives the consumer's written application on Monday and mails the early mortgage loan disclosure on Tuesday may impose a fee on the consumer after midnight on Friday.

2. *Fees restricted.* A creditor or other person may not impose any fee, such as for an appraisal, underwriting, or broker services, until the consumer has received the disclosures required by § 1026.19(a)(1)(i). The only exception to the fee restriction allows the creditor or other person to impose a *bona fide* and reasonable fee for obtaining a consumer's credit history, such as for a credit report(s).

3. *Collection of fees.* A creditor complies with § 1026.19(a)(1)(ii) if:

i. The creditor receives a consumer's written application directly from the consumer and does not collect any fee, other than a fee for obtaining a consumer's credit history, until the consumer receives the early mortgage loan disclosure.

ii. A third party submits a consumer's written application to a creditor and both the creditor and third party do not collect any fee, other than a fee for obtaining a consumer's credit history, until the consumer receives the early mortgage loan disclosure from the creditor.

iii. A third party submits a consumer's written application to a second creditor following a prior creditor's denial of an application made by the same consumer (or following the consumer's withdrawal), and, if a fee already has been assessed, the new creditor or third party does not collect or impose any additional fee until the consumer receives an early mortgage loan disclosure from the new creditor.

19(a)(1)(iii) Exception to Fee Restriction

1. *Requirements.* A creditor or other person may impose a fee before the consumer receives the required disclosures if it is for obtaining the consumer's credit history, such as by purchasing a credit report(s) on the consumer. The fee also must be *bona fide* and reasonable in amount. For example, a creditor may collect a fee for obtaining a credit report(s) if it is in the creditor's ordinary course of business to obtain a credit report(s). If the criteria in § 1026.19(a)(1)(iii) are met, the creditor may describe or refer to this fee, for example, as an ''application fee.''

19(a)(2) Waiting Periods for Early Disclosures and Corrected Disclosures

1. *Business day definition.* For purposes of § 1026.19(a)(2), ''business day'' means all calendar days except Sundays and the legal public holidays referred to in § 1026.2(a)(6). *See* comment 2(a)(6)–2.

2. *Consummation after both waiting periods expire.* Consummation may not occur until both the seven-business-day waiting period and the three-business-day waiting period have expired. For example, assume a creditor delivers the early disclosures to the consumer in person or places them in the mail on Monday, June 1, and the creditor then delivers corrected disclosures in person to the consumer on Wednesday, June 3. Although Saturday, June 6 is the third business day after the consumer received the corrected disclosures, consummation may not occur before Tuesday, June 9, the seventh business day following delivery or mailing of the early disclosures.

Paragraph 19(a)(2)(i)

1. *Timing.* The disclosures required by § 1026.19(a)(1)(i) must be delivered or placed in the mail no later than the seventh business day before consummation. The seven-business-day waiting period begins when the creditor delivers the early disclosures or places them in the mail, not when the consumer receives or is deemed to have received the early disclosures. For example, if a creditor delivers the early disclosures to the consumer in person or places them in the mail on Monday, June 1, consummation may occur on or after Tuesday, June 9, the seventh business day following delivery or mailing of the early disclosures.

Paragraph 19(a)(2)(ii)

1. *Conditions for redisclosure.* If, at the time of consummation, the annual percentage rate disclosed is accurate under § 1026.22, the creditor does not have to make corrected disclosures under § 1026.19(a)(2). If, on the other hand, the annual percentage rate disclosed is not accurate under § 1026.22, the creditor must make corrected disclosures of all changed terms (including the annual percentage rate) so that the consumer receives them not later than the third business day before consummation. For example, assume consummation is scheduled for Thursday, June 11 and the early disclosures for a regular mortgage transaction disclose an annual percentage rate of 7.00%:

i. On Thursday, June 11, the annual percentage rate will be 7.10%. The creditor is not required to make corrected disclosures under § 1026.19(a)(2).

ii. On Thursday, June 11, the annual percentage rate will be 7.15%. The creditor must make corrected disclosures so that the consumer receives them on or before Monday, June 8.

2. *Content of new disclosures.* If redisclosure is required, the creditor may provide a complete set of new disclosures, or may redisclose only the changed terms. If the creditor chooses to provide a complete set of new disclosures, the creditor may but need not highlight the new terms, provided that the disclosures comply with the format requirements of § 1026.17(a). If the creditor chooses to disclose only the new terms, all the new terms must be disclosed. For example, a different annual percentage rate will almost always produce a different finance charge, and often a new schedule of payments; all of these changes would have to be disclosed. If, in addition, unrelated terms such as the amount financed or prepayment penalty vary from those originally disclosed, the accurate terms must be disclosed. However, no new disclosures are required if the only inaccuracies involve estimates other than the annual percentage rate, and no variable rate feature has been added. For a discussion of the requirement to redisclose when a variable-rate feature is added, *see* comment 17(f)–2. For a discussion of redisclosure requirements in general, *see* the commentary on § 1026.17(f).

3. *Timing.* When redisclosures are necessary because the annual percentage rate has become inaccurate, they must be received by the consumer no later than the third business day before consummation. (For redisclosures triggered by other events, the creditor must provide corrected disclosures before consummation. *See* § 1026.17(f).) If the creditor delivers the corrected disclosures to the consumer in person, consummation may occur any time on the third business day following delivery. If the creditor provides the corrected disclosures by mail, the consumer is considered to have received them three business days after they are placed in the mail, for purposes of determining when the three-business-day waiting period required under § 1026.19(a)(2)(ii) begins. Creditors that use electronic mail or a courier other than the postal service may also follow this approach.

4. *Basis for annual percentage rate comparison.* To determine whether a creditor must make corrected disclosures under § 1026.22, a creditor compares (a) what the annual percentage rate will be at consummation to (b) the annual percentage rate stated in the most recent disclosures the creditor made to the consumer. For example, assume consummation for a regular mortgage transaction is scheduled for Thursday, June 11, the early disclosures provided in May stated an annual percentage rate of 7.00%, and corrected disclosures received by the consumer on Friday, June 5 stated an annual percentage rate of 7.15%:

i. On Thursday, June 11, the annual percentage rate will be 7.25%, which exceeds the most recently disclosed annual percentage rate by less than the applicable tolerance. The creditor is not required to make additional corrected disclosures or wait an additional three business days under § 1026.19(a)(2).

ii. On Thursday, June 11, the annual percentage rate will be 7.30%, which exceeds the most recently disclosed annual percentage rate by more than the applicable tolerance. The creditor must make corrected disclosures such that the consumer receives them on or before Monday, June 8.

19(a)(3) Consumer's Waiver of Waiting Period Before Consummation

1. *Modification or waiver.* A consumer may modify or waive the right to a waiting period required by § 1026.19(a)(2) only after the creditor makes the disclosures required by § 1026.18. The consumer must have a *bona fide* personal financial emergency that necessitates consummating the credit transaction before the end of the waiting period. Whether these conditions are met is determined by the facts surrounding individual situations. The imminent sale of the consumer's home at foreclosure, where the foreclosure sale will proceed unless loan proceeds are made available to the consumer during the waiting period, is one example of a *bona fide* personal financial emergency. Each consumer who is primarily liable on the legal obligation must sign the written statement for the waiver to be effective.

2. *Examples of waivers within the seven-business-day waiting period.* Assume the early disclosures are delivered to the consumer in person on Monday, June 1, and at that time the consumer executes a waiver of the seven-business-day waiting period (which would end on Tuesday, June 9) so

that the loan can be consummated on Friday, June 5:

i. If the annual percentage rate on the early disclosures is inaccurate under § 1026.22, the creditor must provide a corrected disclosure to the consumer before consummation, which triggers the three-business-day waiting period in § 1026.19(a)(2)(ii). After the consumer receives the corrected disclosure, the consumer must execute a waiver of the three-business-day waiting period in order to consummate the transaction on Friday, June 5.

ii. If a change occurs that does not render the annual percentage rate on the early disclosures inaccurate under § 1026.22, the creditor must disclose the changed terms before consummation, consistent with § 1026.17(f). Disclosure of the changed terms does not trigger an additional waiting period, and the transaction may be consummated on June 5 without the consumer giving the creditor an additional modification or waiver.

3. *Examples of waivers made after the seven-business-day waiting period.* Assume the early disclosures are delivered to the consumer in person on Monday, June 1 and consummation is scheduled for Friday, June 19. On Wednesday, June 17, a change to the annual percentage rate occurs:

i. If the annual percentage rate on the early disclosures is inaccurate under § 1026.22, the creditor must provide a corrected disclosure to the consumer before consummation, which triggers the three-business-day waiting period in § 1026.19(a)(2). After the consumer receives the corrected disclosure, the consumer must execute a waiver of the three-business-day waiting period in order to consummate the transaction on Friday, June 19.

ii. If a change occurs that does not render the annual percentage rate on the early disclosures inaccurate under § 1026.22, the creditor must disclose the changed terms before consummation, consistent with § 1026.17(f). Disclosure of the changed terms does not trigger an additional waiting period, and the transaction may be consummated on Friday, June 19 without the consumer giving the creditor an additional modification or waiver.

19(a)(4) Notice

1. *Inclusion in other disclosures.* The notice required by § 1026.19(a)(4) must be grouped together with the disclosures required by § 1026.19(a)(1)(i) or § 1026.19(a)(2). *See* comment 17(a)(1)–2 for a discussion of the rules for segregating disclosures. In other cases, the notice set forth in § 1026.19(a)(4) may be disclosed together with or separately from the disclosures required under § 1026.18. *See* comment 17(a)(1)–5.xvi.

19(a)(5) Timeshare Plans

Paragraph 19(a)(5)(ii)

1. *Timing.* A mortgage transaction secured by a consumer's interest in a ''timeshare plan,'' as defined in 11 U.S.C. 101(53D), that is also a federally related mortgage loan under RESPA is subject to the requirements of § 1026.19(a)(5) instead of the requirements of § 1026.19(a)(1) through § 1026.19(a)(4). *See* comment 19(a)(1)(i)–1. Early disclosures for transactions subject to § 1026.19(a)(5) must be given (a) before consummation or (b) within three business days after the creditor receives the consumer's written application, whichever is earlier. The general definition of ''business day'' in § 1026.2(a)(6)—a day on which the creditor's offices are open to the public for substantially all of its business functions—applies for purposes of § 1026.19(a)(5)(ii). *See* comment 2(a)(6)–1. These timing requirements are different from the timing requirements under § 1026.19(a)(1)(i). Timeshare transactions covered by § 1026.19(a)(5) may be consummated any time after the disclosures required by § 1026.19(a)(5)(ii) are provided.

2. *Use of estimates.* If the creditor does not know the precise credit terms, the creditor must base the disclosures on the best information reasonably available and indicate that the disclosures are estimates under § 1026.17(c)(2). If many of the disclosures are estimates, the creditor may include a statement to that effect (such as ''all numerical disclosures except the late-payment disclosure are estimates'') instead of separately labeling each estimate. In the alternative, the creditor may label as an estimate only the items primarily affected by unknown information. (*See* the commentary to § 1026.17(c)(2).) The creditor may provide explanatory material concerning the estimates and the contingencies that may affect the actual terms, in accordance with the commentary to § 1026.17(a)(1).

3. *Written application.* For timeshare transactions, creditors may rely on comment 19(a)(1)(i)–3 in determining whether a ''written application'' has been received.

4. *Denied or withdrawn applications.* For timeshare transactions, creditors may rely on comment 19(a)(1)(i)–4 in determining that disclosures are not required by § 1026.19(a)(5)(ii) because the consumer's application will not or cannot be approved on the terms requested or the consumer has withdrawn the application.

5. *Itemization of amount financed.* For timeshare transactions, creditors may rely on comment 19(a)(1)(i)–5 in determining whether providing the good faith estimates of settlement costs required by RESPA satisfies the requirement of § 1026.18(c) to provide an itemization of the amount financed.

Paragraph 19(a)(5)(iii)

1. *Consummation or settlement.* For extensions of credit secured by a consumer's timeshare plan, when corrected disclosures are required, they must be given no later than ''consummation or settlement.'' ''Consummation'' is defined in § 1026.2(a). ''Settlement'' is defined in Regulation X (12 CFR 1024.2(b)) and is subject to any interpretations issued by the Bureau. In some cases, a creditor may delay redisclosure until settlement, which may be at a time later than consummation. If a creditor chooses to redisclose at settlement, disclosures may be based on the terms in effect at settlement, rather than at consummation. For example, in a variable-rate transaction, a creditor may choose to base disclosures on the terms in effect at settlement, despite the general rule in comment 17(c)(1)–8 that variable-rate disclosures should be based on the terms in effect at consummation.

2. *Content of new disclosures.* Creditors may rely on comment 19(a)(2)(ii)–2 in determining the content of corrected disclosures required under § 1026.19(a)(5)(iii).

19(b) Certain Variable-Rate Transactions

1. *Coverage.* Section 1026.19(b) applies to all closed-end variable-rate transactions that are secured by the consumer's principal dwelling and have a term greater than one year. The requirements of this section apply not only to transactions financing the initial acquisition of the consumer's principal dwelling, but also to any other closed-end variable-rate transaction secured by the principal dwelling. Closed-end variable-rate transactions that are not secured by the principal dwelling, or are secured by the principal dwelling but have a term of one year or less, are subject to the disclosure requirements of § 1026.18(f)(1) rather than those of § 1026.19(b). (Furthermore, ''shared-equity'' or ''shared-appreciation'' mortgages are subject to the disclosure requirements of § 1026.18(f)(1) rather than those of § 1026.19(b) regardless of the general coverage of those sections.) For purposes of this section, the term of a variable-rate demand loan is determined in accordance with the commentary to § 1026.17(c)(5). In determining whether a construction loan that may be permanently financed by the same creditor is covered under this section, the creditor may treat the construction and the permanent phases as separate transactions with distinct terms to maturity or as a single combined transaction. For purposes of the disclosures required under § 1026.18, the creditor may nevertheless treat the two phases either as separate transactions or as a single combined transaction in accordance with § 1026.17(c)(6). Finally, in any assumption of a variable-rate transaction secured by the consumer's principal dwelling with a term greater than one year, disclosures need not be provided under §§ 1026.18(f)(2)(ii) or 1026.19(b).

2. *Timing.* A creditor must give the disclosures required under this section at the time an application form is provided or before the consumer pays a nonrefundable fee, whichever is earlier.

i. *Intermediary agent or broker.* In cases where a creditor receives a written application through an intermediary agent or broker, however, § 1026.19(b) provides a substitute timing rule requiring the creditor to deliver the disclosures or place them in the mail not later than three business days after the creditor receives the consumer's written application. (See comment 19(b)–3 for guidance in determining whether or not the transaction involves an intermediary agent or broker.) This three-day rule also applies where the creditor takes an application over the telephone.

ii. *Telephone request.* In cases where the consumer merely requests an application over the telephone, the creditor must include the early disclosures required under this section with the application that is sent to the consumer.

iii. *Mail solicitations.* In cases where the creditor solicits applications through the

mail, the creditor must also send the disclosures required under this section if an application form is included with the solicitation.

iv. *Conversion.* In cases where an open-end credit account will convert to a closed-end transaction subject to this section under a written agreement with the consumer, disclosures under this section may be given at the time of conversion. (See the commentary to § 1026.20(a) for information on the timing requirements for § 1026.19(b)(2) disclosures when a variable-rate feature is later added to a transaction.)

v. *Form of electronic disclosures provided on or with electronic applications.* Creditors must provide the disclosures required by this section (including the brochure) on or with a blank application that is made available to the consumer in electronic form, such as on a creditor's Internet Web site. Creditors have flexibility in satisfying this requirement. There are various methods creditors could use to satisfy the requirement. Whatever method is used, a creditor need not confirm that the consumer has read the disclosures. Methods include, but are not limited to, the following examples:

A. The disclosures could automatically appear on the screen when the application appears;

B. The disclosures could be located on the same web page as the application (whether or not they appear on the initial screen), if the application contains a clear and conspicuous reference to the location of the disclosures and indicates that the disclosures contain rate, fee, and other cost information, as applicable;

C. Creditors could provide a link to the electronic disclosures on or with the application as long as consumers cannot bypass the disclosures before submitting the application. The link would take the consumer to the disclosures, but the consumer need not be required to scroll completely through the disclosures; or

D. The disclosures could be located on the same web page as the application without necessarily appearing on the initial screen, immediately preceding the button that the consumer will click to submit the application.

3. *Intermediary agent or broker.* i. In certain transactions involving an ''intermediary agent or broker,'' a creditor may delay providing disclosures. A creditor may not delay providing disclosures in transactions involving either a legal agent (as determined by applicable law) or any other third party that is not an ''intermediary agent or broker.'' In determining whether or not a transaction involves an ''intermediary agent or broker'' the following factors should be considered:

A. The number of applications submitted by the broker to the creditor as compared to the total number of applications received by the creditor. The greater the percentage of total loan applications submitted by the broker in any given period of time, the less likely it is that the broker would be considered an ''intermediary agent or broker'' of the creditor during the next period.

B. The number of applications submitted by the broker to the creditor as compared to the total number of applications received by the broker. (This factor is applicable only if the creditor has such information.) The greater the percentage of total loan applications received by the broker that is submitted to a creditor in any given period of time, the less likely it is that the broker would be considered an ''intermediary agent or broker'' of the creditor during the next period.

C. The amount of work (such as document preparation) the creditor expects to be done by the broker on an application based on the creditor's prior dealings with the broker and on the creditor's requirements for accepting applications, taking into consideration the customary practice of brokers in a particular area. The more work that the creditor expects the broker to do on an application, in excess of what is usually expected of a broker in that area, the less likely it is that the broker would be considered an ''intermediary agent or broker'' of the creditor.

ii. An example of an ''intermediary agent or broker'' is a broker who, customarily within a brief period of time after receiving an application, inquires about the credit terms of several creditors with whom the broker does business and submits the application to one of them. The broker is responsible for only a small percentage of the applications received by that creditor. During the time the broker has the application, it might request a credit report and an appraisal (or even prepare an entire loan package if customary in that particular area).

4. *Other variable-rate regulations.* Transactions in which the creditor is required to comply with and has complied with the disclosure requirements of the variable-rate regulations of other Federal agencies are exempt from the requirements of § 1026.19(b), by virtue of § 1026.19(d), and are exempt from the requirements of § 1026.20(c), by virtue of § 1026.20(d). The exception is also available to creditors that are required by state law to comply with the Federal variable-rate regulations noted above. Creditors using this exception should comply with the timing requirements of those regulations rather than the timing requirements of Regulation Z in making the variable-rate disclosures.

5. *Examples of variable-rate transactions.* i. The following transactions, if they have a term greater than one year and are secured by the consumer's principal dwelling, constitute variable-rate transactions subject to the disclosure requirements of § 1026.19(b).

A. Renewable balloon-payment instruments where the creditor is both unconditionally obligated to renew the balloon-payment loan at the consumer's option (or is obligated to renew subject to conditions within the consumer's control) and has the option of increasing the interest rate at the time of renewal. (See comment 17(c)(1)–11 for a discussion of conditions within a consumer's control in connection with renewable balloon-payment loans.)

B. Preferred-rate loans where the terms of the legal obligation provide that the initial underlying rate is fixed but will increase upon the occurrence of some event, such as an employee leaving the employ of the creditor, and the note reflects the preferred rate. The disclosures under §§ 1026.19(b)(1) and 1026.19(b)(2)(v), (viii), (ix), and (xii) are not applicable to such loans.

C. ''Price-level-adjusted mortgages'' or other indexed mortgages that have a fixed rate of interest but provide for periodic adjustments to payments and the loan balance to reflect changes in an index measuring prices or inflation. The disclosures under § 1026.19(b)(1) are not applicable to such loans, nor are the following provisions to the extent they relate to the determination of the interest rate by the addition of a margin, changes in the interest rate, or interest rate discounts: Section 1026.19(b)(2) (i), (iii), (iv), (v), (vi), (vii), (viii), and (ix). (See comments 20(c)–2 and 30–1 regarding the inapplicability of variable-rate adjustment notices and interest rate limitations to price-level-adjusted or similar mortgages.)

ii. Graduated-payment mortgages and step-rate transactions without a variable-rate feature are not considered variable-rate transactions.

Paragraph 19(b)(1)

1. *Substitute.* Creditors who wish to use publications other than the *Consumer Handbook on Adjustable Rate Mortgages,* available on the Bureau's Web site, must make a good faith determination that their brochures are suitable substitutes to the *Consumer Handbook.* A substitute is suitable if it is, at a minimum, comparable to the Consumer Handbook in substance and comprehensiveness. Creditors are permitted to provide more detailed information than is contained in the *Consumer Handbook.*

2. *Applicability.* The *Consumer Handbook* need not be given for variable-rate transactions subject to this section in which the underlying interest rate is fixed. (See comment 19(b)–5 for an example of a variable-rate transaction where the underlying interest rate is fixed.)

Paragraph 19(b)(2)

1. *Disclosure for each variable-rate program.* A creditor must provide disclosures to the consumer that fully describe each of the creditor's variable-rate loan programs in which the consumer expresses an interest. If a program is made available only to certain customers of an institution, a creditor need not provide disclosures for that program to other consumers who express a general interest in a creditor's ARM programs. Disclosures must be given at the time an application form is provided or before the consumer pays a nonrefundable fee, whichever is earlier. If program disclosures cannot be provided because a consumer expresses an interest in individually negotiating loan terms that are not generally offered, disclosures reflecting those terms may be provided as soon as reasonably possible after the terms have been decided upon, but not later than the time a non-refundable fee is paid. If a consumer who has received program disclosures subsequently expresses an interest in other available variable-rate programs subject to 1026.19(b)(2), or the creditor and consumer decide on a program for which the consumer has not received disclosures, the creditor

must provide appropriate disclosures as soon as reasonably possible. The creditor, of course, is permitted to give the consumer information about additional programs subject to § 1026.19(b) initially.

2. *Variable-rate loan program defined.* i. Generally, if the identification, the presence or absence, or the exact value of a loan feature must be disclosed under this section, variable-rate loans that differ as to such features constitute separate loan programs. For example, separate loan programs would exist based on differences in any of the following loan features:

A. The index or other formula used to calculate interest rate adjustments.

B. The rules relating to changes in the index value, interest rate, payments, and loan balance.

C. The presence or absence of, and the amount of, rate or payment caps.

D. The presence of a demand feature.

E. The possibility of negative amortization.

F. The possibility of interest rate carryover.

G. The frequency of interest rate and payment adjustments.

H. The presence of a discount feature.

I. In addition, if a loan feature must be taken into account in preparing the disclosures required by § 1026.19(b)(2)(viii), variable-rate loans that differ as to that feature constitute separate programs under § 1026.19(b)(2).

ii. If, however, a representative value may be given for a loan feature or the feature need not be disclosed under § 1026.19(b)(2), variable-rate loans that differ as to such features do not constitute separate loan programs. For example, separate programs would not exist based on differences in the following loan features:

A. The amount of a discount.

B. The amount of a margin.

3. *Form of program disclosures.* A creditor may provide separate program disclosure forms for each ARM program it offers or a single disclosure form that describes multiple programs. A disclosure form may consist of more than one page. For example, a creditor may attach a separate page containing the historical payment example for a particular program. A disclosure form describing more than one program need not repeat information applicable to each program that is described. For example, a form describing multiple programs may disclose the information applicable to all of the programs in one place with the various program features (such as options permitting conversion to a fixed rate) disclosed separately. The form, however, must state if any program feature that is described is available only in conjunction with certain other program features. Both the separate and multiple program disclosures may illustrate more than one loan maturity or payment amortization—for example, by including multiple payment and loan balance columns in the historical payment example. Disclosures may be inserted or printed in the *Consumer Handbook* (or a suitable substitute) as long as they are identified as the creditor's loan program disclosures.

4. *As applicable.* The disclosures required by this section need only be made as applicable. Any disclosure not relevant to a particular transaction may be eliminated. For example, if the transaction does not contain a demand feature, the disclosure required under § 1026.19(b)(2)(x) need not be given. As used in this section, *payment* refers only to a payment based on the interest rate, loan balance and loan term, and does not refer to payment of other elements such as mortgage insurance premiums.

5. *Revisions.* A creditor must revise the disclosures required under this section once a year as soon as reasonably possible after the new index value becomes available. Revisions to the disclosures also are required when the loan program changes.

Paragraph 19(b)(2)(i)

1. *Change in interest rate, payment, or term.* A creditor must disclose the fact that the terms of the legal obligation permit the creditor, after consummation of the transaction, to increase (or decrease) the interest rate, payment, or term of the loan initially disclosed to the consumer. For example, the disclosures for a variable-rate program in which the interest rate and payment (but not loan term) can change might read, ''Your interest rate and payment can change yearly.'' In transactions where the term of the loan may change due to rate fluctuations, the creditor must state that fact.

Paragraph 19(b)(2)(ii)

1. *Identification of index or formula.* If a creditor ties interest rate changes to a particular index, this fact must be disclosed, along with a source of information about the index. For example, if a creditor uses the weekly average yield on U.S. Treasury Securities adjusted to a constant maturity as its index, the disclosure might read, ''Your index is the weekly average yield on U.S. Treasury Securities adjusted to a constant maturity of one year published weekly in the *Wall Street Journal.''* If no particular index is used, the creditor must briefly describe the formula used to calculate interest rate changes.

2. *Changes at creditor's discretion.* If interest rate changes are at the creditor's discretion, this fact must be disclosed. If an index is internally defined, such as by a creditor's prime rate, the creditor should either briefly describe that index or state that interest rate changes are at the creditor's discretion.

Paragraph 19(b)(2)(iii)

1. *Determination of interest rate and payment.* This provision requires an explanation of how the creditor will determine the consumer's interest rate and payment. In cases where a creditor bases its interest rate on a specific index and adjusts the index through the addition of a margin, for example, the disclosure might read, ''Your interest rate is based on the index plus a margin, and your payment will be based on the interest rate, loan balance, and remaining loan term.'' In transactions where paying the periodic payments will not fully amortize the outstanding balance at the end of the loan term and where the final payment will equal the periodic payment plus the remaining unpaid balance, the creditor must disclose this fact. For example, the disclosure might read, ''Your periodic payments will not fully amortize your loan and you will be required to make a single payment of the periodic payment plus the remaining unpaid balance at the end of the loan term.'' The creditor, however, need not reflect any irregular final payment in the historical example or in the disclosure of the initial and maximum rates and payments. If applicable, the creditor should also disclose that the rate and payment will be rounded.

Paragraph 19(b)(2)(iv)

1. *Current margin value and interest rate.* Because the disclosures can be prepared in advance, the interest rate and margin may be several months old when the disclosures are delivered. A statement, therefore, is required alerting consumers to the fact that they should inquire about the current margin value applied to the index and the current interest rate. For example, the disclosure might state, ''Ask us for our current interest rate and margin.''

Paragraph 19(b)(2)(v)

1. *Discounted and premium interest rate.* In some variable-rate transactions, creditors may set an initial interest rate that is not determined by the index or formula used to make later interest rate adjustments. Typically, this initial rate charged to consumers is lower than the rate would be if it were calculated using the index or formula. However, in some cases the initial rate may be higher. If the initial interest rate will be a discount or a premium rate, creditors must alert the consumer to this fact. For example, if a creditor discounted a consumer's initial rate, the disclosure might state, ''Your initial interest rate is not based on the index used to make later adjustments.'' (See the commentary to § 1026.17(c)(1) for a further discussion of discounted and premium variable-rate transactions.) In addition, the disclosure must suggest that consumers inquire about the amount that the program is currently discounted. For example, the disclosure might state, ''Ask us for the amount our adjustable rate mortgages are currently discounted.'' In a transaction with a consumer buydown or with a third-party buydown that will be incorporated in the legal obligation, the creditor should disclose the program as a discounted variable-rate transaction, but need not disclose additional information regarding the buydown in its program disclosures. (See the commentary to § 1026.19(b)(2)(viii) for a discussion of how to reflect the discount or premium in the historical example or the maximum rate and payment disclosure).

Paragraph 19(b)(2)(vi)

1. *Frequency.* The frequency of interest rate and payment adjustments must be disclosed. If interest rate changes will be imposed more frequently or at different intervals than payment changes, a creditor must disclose the frequency and timing of both types of changes. For example, in a variable-rate transaction where interest rate changes are made monthly, but payment changes occur on an annual basis, this fact must be disclosed. In certain ARM transactions, the interval between loan closing and the initial adjustment is not known and may be

different from the regular interval for adjustments. In such cases, the creditor may disclose the initial adjustment period as a range of the minimum and maximum amount of time from consummation or closing. For example, the creditor might state: ''The first adjustment to your interest rate and payment will occur no sooner than 6 months and no later than 18 months after closing. Subsequent adjustments may occur once each year after the first adjustment.'' (See comments 19(b)(2)(viii)(A)–7 and 19(b)(2)(viii)(B)–4 for guidance on other disclosures when this alternative disclosure rule is used.)

Paragraph 19(b)(2)(vii)

1. *Rate and payment caps.* The creditor must disclose limits on changes (increases or decreases) in the interest rate or payment. If an initial discount is not taken into account in applying overall or periodic rate limitations, that fact must be disclosed. If separate overall or periodic limitations apply to interest rate increases resulting from other events, such as the exercise of a fixed-rate conversion option or leaving the creditor's employ, those limitations must also be stated. Limitations do not include legal limits in the nature of usury or rate ceilings under state or Federal statutes or regulations. (See § 1026.30 for the rule requiring that a maximum interest rate be included in certain variable-rate transactions.) The creditor need not disclose each periodic or overall rate limitation that is currently available. As an alternative, the creditor may disclose the range of the lowest and highest periodic and overall rate limitations that may be applicable to the creditor's ARM transactions. For example, the creditor might state: ''The limitation on increases to your interest rate at each adjustment will be set at an amount in the following range: Between 1 and 2 percentage points at each adjustment. The limitation on increases to your interest rate over the term of the loan will be set at an amount in the following range: Between 4 and 7 percentage points above the initial interest rate.'' A creditor using this alternative rule must include a statement in its program disclosures suggesting that the consumer ask about the overall rate limitations currently offered for the creditor's ARM programs. (See comments 19(b)(2)(viii)(A)–6 and 19(b)(2)(viii)(B)–3 for an explanation of the additional requirements for a creditor using this alternative rule for disclosure of periodic and overall rate limitations.)

2. *Negative amortization and interest rate carryover.* A creditor must disclose, where applicable, the possibility of negative amortization. For example, the disclosure might state, ''If any of your payments is not sufficient to cover the interest due, the difference will be added to your loan amount.'' Loans that provide for more than one way to trigger negative amortization are separate variable-rate programs requiring separate disclosures. (See the commentary to § 1026.19(b)(2) for a discussion on the definition of a variable-rate loan program and the format for disclosure.) If a consumer is given the option to cap monthly payments that may result in negative amortization, the creditor must fully disclose the rules relating to the option, including the effects of exercising the option (such as negative amortization will occur and the principal loan balance will increase); however, the disclosure in § 1026.19(b)(2)(viii) need not be provided.

3. *Conversion option.* If a loan program permits consumers to convert their variable-rate loans to fixed-rate loans, the creditor must disclose that the interest rate may increase if the consumer converts the loan to a fixed-rate loan. The creditor must also disclose the rules relating to the conversion feature, such as the period during which the loan may be converted, that fees may be charged at conversion, and how the fixed rate will be determined. The creditor should identify any index or other measure or formula used to determine the fixed rate and state any margin to be added. In disclosing the period during which the loan may be converted and the margin, the creditor may use information applicable to the conversion feature during the six months preceding preparation of the disclosures and state that the information is representative of conversion features recently offered by the creditor. The information may be used until the program disclosures are otherwise revised. Although the rules relating to the conversion option must be disclosed, the effect of exercising the option should not be reflected elsewhere in the disclosures, such as in the historical example or in the calculation of the initial and maximum interest rate and payments.

4. *Preferred-rate loans.* Section 1026.19(b) applies to preferred-rate loans, where the rate will increase upon the occurrence of some event, such as an employee leaving the creditor's employ, whether or not the underlying rate is fixed or variable. In these transactions, the creditor must disclose the event that would allow the creditor to increase the rate such as that the rate may increase if the employee leaves the creditor's employ. The creditor must also disclose the rules relating to termination of the preferred rate, such as that fees may be charged when the rate is changed and how the new rate will be determined.

Paragraph 19(b)(2)(viii)

1. *Historical example and initial and maximum interest rates and payments.* A creditor may disclose both the historical example and the initial and maximum interest rates and payments.

Paragraph 19(b)(2)(viii)(A)

1. *Index movement.* This section requires a creditor to provide an historical example, based on a $10,000 loan amount originating in 1977, showing how interest rate changes implemented according to the terms of the loan program would have affected payments and the loan balance at the end of each year during a 15-year period. (In all cases, the creditor need only calculate the payments and loan balance for the term of the loan. For example, in a five-year loan, a creditor would show the payments and loan balance for the five-year term, from 1977 to 1981, with a zero loan balance reflected for 1981. For the remaining ten years, 1982–1991, the creditor need only show the remaining index values, margin and interest rate and must continue to reflect all significant loan program terms such as rate limitations affecting them.) Pursuant to this section, the creditor must provide a history of index values for the preceding 15 years. Initially, the disclosures would give the index values from 1977 to the present. Each year thereafter, the revised program disclosures should include an additional year's index value until 15 years of values are shown. If the values for an index have not been available for 15 years, a creditor need only go back as far as the values are available in giving a history and payment example. In all cases, only one index value per year need be shown. Thus, in transactions where interest rate adjustments are implemented more frequently than once per year, a creditor may assume that the interest rate and payment resulting from the index value chosen will stay in effect for the entire year for purposes of calculating the loan balance as of the end of the year and for reflecting other loan program terms. In cases where interest rate changes are at the creditor's discretion (see the commentary to § 1026.19(b)(2)(ii)), the creditor must provide a history of the rates imposed for the preceding 15 years, beginning with the rates in 1977. In giving this history, the creditor need only go back as far as the creditor's rates can reasonably be determined.

2. *Selection of index values.* The historical example must reflect the method by which index values are determined under the program. If a creditor uses an average of index values or any other index formula, the history given should reflect those values. The creditor should select one date or, when an average of single values is used as an index, one period and should base the example on index values measured as of that same date or period for each year shown in the history. A date or period at any time during the year may be selected, but the same date or period must be used for each year in the historical example. For example, a creditor could use values for the first business day in July or for the first week ending in July for each of the 15 years shown in the example.

3. *Selection of margin.* For purposes of the disclosure required under § 1026.19(b)(2)(viii)(A), a creditor may select a representative margin that has been used during the six months preceding preparation of the disclosures, and should disclose that the margin is one that the creditor has used recently. The margin selected may be used until a creditor revises the disclosure form.

4. *Amount of discount or premium.* For purposes of the disclosure required under § 1026.19(b)(2)(viii)(A), a creditor may select a discount or premium (amount and term) that has been used during the six months preceding preparation of the disclosures, and should disclose that the discount or premium is one that the creditor has used recently. The discount or premium should be reflected in the historical example for as long as the discount or premium is in effect. A creditor may assume that a discount that would have been in effect for any part of a year was in effect for the full year for purposes of reflecting it in the historical example. For example, a 3-month discount may be treated as being in effect for the entire first year of

the example; a 15-month discount may be treated as being in effect for the first two years of the example. In illustrating the effect of the discount or premium, creditors should adjust the value of the interest rate in the historical example, and should not adjust the margin or index values. For example, if during the six months preceding preparation of the disclosures the fully indexed rate would have been 10% but the first year's rate under the program was 8%, the creditor would discount the first interest rate in the historical example by 2 percentage points.

5. *Term of the loan.* In calculating the payments and loan balances in the historical example, a creditor need not base the disclosures on each term to maturity or payment amortization that it offers. Instead, disclosures for ARMs may be based upon terms to maturity or payment amortizations of 5, 15 and 30 years, as follows: ARMs with terms or amortizations from over 1 year to 10 years may be based on a 5-year term or amortization; ARMs with terms or amortizations from over 10 years to 20 years may be based on a 15-year term or amortization; and ARMs with terms or amortizations over 20 years may be based on a 30-year term or amortization. Thus, disclosures for ARMs offered with any term from over 1 year to 40 years may be based solely on terms of 5, 15 and 30 years. Of course, a creditor may always base the disclosures on the actual terms or amortizations offered. If the creditor bases the disclosures on 5-, 15- or 30-year terms or payment amortization as provided above, the term or payment amortization used in making the disclosure must be stated.

6. *Rate caps.* A creditor using the alternative rule described in comment 19(b)(2)(vii)–1 for disclosure of rate limitations must base the historical example upon the highest periodic and overall rate limitations disclosed under § 1026.19(b)(2)(vii). In addition, the creditor must state the limitations used in the historical example. (See comment 19(b)(2)(viii)(B)–3 for an explanation of the use of the highest rate limitation in other disclosures.)

7. *Frequency of adjustments.* In certain transactions, creditors may use the alternative rule described in comment 19(b)(2)(vi)–1 for disclosure of the frequency of rate and payment adjustments. In such cases, the creditor may assume for purposes of the historical example that the first adjustment occurred at the end of the first full year in which the adjustment could occur. For example, in an ARM in which the first adjustment may occur between 6 and 18 months after closing and annually thereafter, the creditor may assume that the first adjustment occurred at the end of the first year in the historical example. (See comment 19(b)(2)(viii)(B)–4 for an explanation of how to compute the maximum interest rate and payment when the initial adjustment period is not known.)

Paragraph 19(b)(2)(viii)(B)

1. *Initial and maximum interest rates and payments.* The disclosure form must state the initial and maximum interest rates and payments for a $10,000 loan originated at an initial interest rate (index value plus margin adjusted by the amount of any discount or premium) in effect as of an identified month and year for the loan program disclosure. (See comment 19(b)(2)–5 on revisions to the loan program disclosure.) In calculating the maximum payment under this paragraph, a creditor should assume that the interest rate increases as rapidly as possible under the loan program, and the maximum payment disclosed should reflect the amortization of the loan during this period. Thus, in a loan with 2 percentage point annual (and 5 percentage point overall) interest rate limitations or ''caps,'' the maximum interest rate would be 5 percentage points higher than the initial interest rate disclosed. Moreover, the loan would not reach the maximum interest rate until the fourth year because of the 2 percentage point annual rate limitations, and the maximum payment disclosed would reflect the amortization of the loan during this period. If the loan program includes a discounted or premium initial interest rate, the initial interest rate should be adjusted by the amount of the discount or premium.

2. *Term of the loan.* In calculating the initial and maximum payments, the creditor need not base the disclosures on each term to maturity or payment amortization offered under the program. Instead, the creditor may follow the rules set out in comment 19(b)(2)(viii)(A)–5. If a historical example is provided under § 1026.19(b)(2)(viii)(A), the terms to maturity or payment amortization used in the historical example must be used in calculating the initial and maximum payment. In addition, creditors must state the term or payment amortization used in making the disclosures under this section.

3. *Rate caps.* A creditor using the alternative rule for disclosure of interest rate limitations described in comment 19(b)(2)(vii)–1 must calculate the maximum interest rate and payment based upon the highest periodic and overall rate limitations disclosed under § 1026.19(b)(2)(vii). In addition, the creditor must state the rate limitations used in calculating the maximum interest rate and payment. (See comment 19(b)(2)(viii)(A)–6 for an explanation of the use of the highest rate limitation in other disclosures.)

4. *Frequency of adjustments.* In certain transactions, a creditor may use the alternative rule for disclosure of the frequency of rate and payment adjustments described in comment 19(b)(2)(vi)–1. In such cases, the creditor must base the calculations of the initial and maximum rates and payments upon the earliest possible first adjustment disclosed under § 1026.19(b)(2)(vi). (See comment 19(b)(2)(viii)(A)–7 for an explanation of how to disclose the historical example when the initial adjustment period is not known.)

5. *Periodic payment statement.* The statement that the periodic payment may increase or decrease substantially may be satisfied by the disclosure in paragraph 19(b)(2)(vi) if it states for example, ''your monthly payment can increase or decrease substantially based on annual changes in the interest rate.''

Paragraph 19(b)(2)(ix)

1. *Calculation of payments.* A creditor is required to include a statement on the disclosure form that explains how a consumer may calculate his or her actual monthly payments for a loan amount other than $10,000. The example should be based upon the most recent payment shown in the historical example or upon the initial interest rate reflected in the maximum rate and payment disclosure. In transactions in which the latest payment shown in the historical example is not for the latest year of index values shown (such as in a five-year loan), a creditor may provide additional examples based on the initial and maximum payments disclosed under § 1026.19(b)(2)(viii)(B). The creditor, however, is not required to calculate the consumer's payments. (See the model clauses in Appendix H–4(C).)

Paragraph 19(b)(2)(x)

1. *Demand feature.* If a variable-rate loan subject to § 1026.19(b) requirements contains a demand feature as discussed in the commentary to § 1026.18(i), this fact must be disclosed. (Pursuant to § 1026.18(i), creditors would also disclose the demand feature in the standard disclosures given later.)

Paragraph 19(b)(2)(xi)

1. *Adjustment notices.* A creditor must disclose to the consumer the type of information that will be contained in subsequent notices of adjustments and when such notices will be provided. (See the commentary to § 1026.20(c) regarding notices of adjustments.) For example, the disclosure might state, ''You will be notified at least 25, but no more than 120 days before the due date of a payment at a new level. This notice will contain information about the index and interest rates, payment amount, and loan balance.'' In transactions where there may be interest rate adjustments without accompanying payment adjustments in a year, the disclosure might read, ''You will be notified once each year during which interest rate adjustments, but no payment adjustments, have been made to your loan. This notice will contain information about the index and interest rates, payment amount, and loan balance.''

Paragraph 19(b)(2)(xii)

1. *Multiple loan programs.* A creditor that offers multiple variable-rate loan programs is required to have disclosures for each variable-rate loan program subject to § 1026.19(b)(2). Unless disclosures for all of its variable-rate programs are provided initially, the creditor must inform the consumer that other closed-end variable-rate programs exist, and that disclosure forms are available for these additional loan programs. For example, the disclosure form might state, ''Information on other adjustable rate mortgage programs is available upon request.''

19(c) Electronic Disclosures

1. *Form of disclosures.* Whether disclosures must be in electronic form depends upon the following:

i. If a consumer accesses an ARM loan application electronically (other than as described under ii. below), such as online at

a home computer, the creditor must provide the disclosures in electronic form (such as with the application form on its Web site) in order to meet the requirement to provide disclosures in a timely manner on or with the application. If the creditor instead mailed paper disclosures to the consumer, this requirement would not be met.

ii. In contrast, if a consumer is physically present in the creditor's office, and accesses an ARM loan application electronically, such as via a terminal or kiosk (or if the consumer uses a terminal or kiosk located on the premises of an affiliate or third party that has arranged with the creditor to provide applications to consumers), the creditor may provide disclosures in either electronic or paper form, provided the creditor complies with the timing, delivery, and retainability requirements of the regulation.

Section 1026.20 Subsequent Disclosure Requirements

20(a) Refinancings

1. *Definition.* A refinancing is a new transaction requiring a complete new set of disclosures. Whether a refinancing has occurred is determined by reference to whether the original obligation has been satisfied or extinguished and replaced by a new obligation, based on the parties' contract and applicable law. The refinancing may involve the consolidation of several existing obligations, disbursement of new money to the consumer or on the consumer's behalf, or the rescheduling of payments under an existing obligation. In any form, the new obligation must completely replace the prior one.

i. Changes in the terms of an existing obligation, such as the deferral of individual installments, will not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation.

ii. A substitution of agreements that meets the refinancing definition will require new disclosures, even if the substitution does not substantially alter the prior credit terms.

2. *Exceptions.* A transaction is subject to § 1026.20(a) only if it meets the general definition of a refinancing. Section 1026.20(a)(1) through (5) lists 5 events that are not treated as refinancings, even if they are accomplished by cancellation of the old obligation and substitution of a new one.

3. *Variable-rate.* i. If a variable-rate feature was properly disclosed under the regulation, a rate change in accord with those disclosures is not a refinancing. For example, no new disclosures are required when the variable-rate feature is invoked on a renewable balloon-payment mortgage that was previously disclosed as a variable-rate transaction.

ii. Even if it is not accomplished by the cancellation of the old obligation and substitution of a new one, a new transaction subject to new disclosures results if the creditor either:

A. Increases the rate based on a variable-rate feature that was not previously disclosed; or

B. Adds a variable-rate feature to the obligation. A creditor does not add a variable-rate feature by changing the index of a variable-rate transaction to a comparable index, whether the change replaces the existing index or substitutes an index for one that no longer exists.

iii. If either of the events in paragraph 20(a)–3.ii.A or ii.B occurs in a transaction secured by a principal dwelling with a term longer than one year, the disclosures required under § 1026.19(b) also must be given at that time.

4. *Unearned finance charge.* In a transaction involving precomputed finance charges, the creditor must include in the finance charge on the refinanced obligation any unearned portion of the original finance charge that is not rebated to the consumer or credited against the underlying obligation. For example, in a transaction with an add-on finance charge, a creditor advances new money to a consumer in a fashion that extinguishes the original obligation and replaces it with a new one. The creditor neither refunds the unearned finance charge on the original obligation to the consumer nor credits it to the remaining balance on the old obligation. Under these circumstances, the unearned finance charge must be included in the finance charge on the new obligation and reflected in the annual percentage rate disclosed on refinancing. Accrued but unpaid finance charges are included in the amount financed in the new obligation.

5. *Coverage.* Section 1026.20(a) applies only to refinancings undertaken by the original creditor or a holder or servicer of the original obligation. A ''refinancing'' by any other person is a new transaction under the regulation, not a refinancing under this section.

Paragraph 20(a)(1)

1. *Renewal.* This exception applies both to obligations with a single payment of principal and interest and to obligations with periodic payments of interest and a final payment of principal. In determining whether a new obligation replacing an old one is a renewal of the original terms or a refinancing, the creditor may consider it a renewal even if:

i. Accrued unpaid interest is added to the principal balance.

ii. Changes are made in the terms of renewal resulting from the factors listed in § 1026.17(c)(3).

iii. The principal at renewal is reduced by a curtailment of the obligation.

Paragraph 20(a)(2)

1. *Annual percentage rate reduction.* A reduction in the annual percentage rate with a corresponding change in the payment schedule is not a refinancing. If the annual percentage rate is subsequently increased (even though it remains below its original level) and the increase is effected in such a way that the old obligation is satisfied and replaced, new disclosures must then be made.

2. *Corresponding change.* A corresponding change in the payment schedule to implement a lower annual percentage rate would be a shortening of the maturity, or a reduction in the payment amount or the number of payments of an obligation. The exception in § 1026.20(a)(2) does not apply if the maturity is lengthened, or if the payment amount or number of payments is increased beyond that remaining on the existing transaction.

Paragraph 20(a)(3)

1. *Court agreements.* This exception includes, for example, agreements such as reaffirmations of debts discharged in bankruptcy, settlement agreements, and post-judgment agreements. (See the commentary to § 1026.2(a)(14) for a discussion of court-approved agreements that are not considered ''credit.'')

Paragraph 20(a)(4)

1. *Workout agreements.* A workout agreement is not a refinancing unless the annual percentage rate is increased or additional credit is advanced beyond amounts already accrued plus insurance premiums.

Paragraph 20(a)(5)

1. *Insurance renewal.* The renewal of optional insurance added to an existing credit transaction is not a refinancing, assuming that appropriate Truth in Lending disclosures were provided for the initial purchase of the insurance.

20(b) Assumptions

1. *General definition.* i. An assumption as defined in § 1026.20(b) is a new transaction and new disclosures must be made to the subsequent consumer. An assumption under the regulation requires the following three elements:

A. A residential mortgage transaction.

B. An express acceptance of the subsequent consumer by the creditor.

C. A written agreement.

ii. The assumption of a nonexempt consumer credit obligation requires no disclosures unless all three elements are present. For example, an automobile dealer need not provide Truth in Lending disclosures to a customer who assumes an existing obligation secured by an automobile. However, a residential mortgage transaction with the elements described in § 1026.20(b) is an assumption that calls for new disclosures; the disclosures must be given whether or not the assumption is accompanied by changes in the terms of the obligation. (See comment 2(a)(24)–5 for a discussion of assumptions that are not considered residential mortgage transactions.)

2. *Existing residential mortgage transaction.* A transaction may be a residential mortgage transaction as to one consumer and not to the other consumer. In that case, the creditor must look to the assuming consumer in determining whether a residential mortgage transaction exists. To illustrate: The original consumer obtained a mortgage to purchase a home for vacation purposes. The loan was not a residential mortgage transaction as to that consumer. The mortgage is assumed by a consumer who will use the home as a principal dwelling. As to that consumer, the loan is a residential mortgage transaction. For purposes of § 1026.20(b), the assumed loan is an ''existing residential mortgage transaction'' requiring disclosures, if the other criteria for an assumption are met.

3. *Express agreement. Expressly agrees* means that the creditor's agreement must relate specifically to the new debtor and must unequivocally accept that debtor as a primary obligor. The following events are not construed to be express agreements between the creditor and the subsequent consumer:

i. Approval of creditworthiness.

ii. Notification of a change in records.

iii. Mailing of a coupon book to the subsequent consumer.

iv. Acceptance of payments from the new consumer.

4. *Retention of original consumer.* The retention of the original consumer as an obligor in some capacity does not prevent the change from being an assumption, provided the new consumer becomes a primary obligor. But the mere addition of a guarantor to an obligation for which the original consumer remains primarily liable does not give rise to an assumption. However, if neither party is designated as the primary obligor but the creditor accepts payment from the subsequent consumer, an assumption exists for purposes of § 1026.20(b).

5. *Status of parties.* Section 1026.20(b) applies only if the previous debtor was a consumer and the obligation is assumed by another consumer. It does not apply, for example, when an individual takes over the obligation of a corporation.

6. *Disclosures.* For transactions that are assumptions within this provision, the creditor must make disclosures based on the ''remaining obligation.'' For example:

i. The amount financed is the remaining principal balance plus any arrearages or other accrued charges from the original transaction.

ii. If the finance charge is computed from time to time by application of a percentage rate to an unpaid balance, in determining the amount of the finance charge and the annual percentage rate to be disclosed, the creditor should disregard any prepaid finance charges paid by the original obligor, but must include in the finance charge any prepaid finance charge imposed in connection with the assumption.

iii. If the creditor requires the assuming consumer to pay any charges as a condition of the assumption, those sums are prepaid finance charges as to that consumer, unless exempt from the finance charge under § 1026.4. If a transaction involves add-on or discount finance charges, the creditor may make abbreviated disclosures, as outlined in § 1026.20(b)(1) through (5). Creditors providing disclosures pursuant to this section for assumptions of variable-rate transactions secured by the consumer's principal dwelling with a term longer than one year need not provide new disclosures under § 1026.18(f)(2)(ii) or § 1026.19(b). In such transactions, a creditor may disclose the variable-rate feature solely in accordance with § 1026.18(f)(1).

7. *Abbreviated disclosures.* The abbreviated disclosures permitted for assumptions of transactions involving add-on or discount finance charges must be made clearly and conspicuously in writing in a form that the consumer may keep. However, the creditor need not comply with the segregation requirement of § 1026.17(a)(1). The terms *annual percentage rate* and *total of payments,* when disclosed according to § 1026.20(b)(4) and (5), are not subject to the description requirements of § 1026.18(e) and (h). The term *annual percentage rate* disclosed under § 1026.20(b)(4) need not be more conspicuous than other disclosures.

20(c) Variable-Rate Adjustments

1. *Timing of adjustment notices.* This section requires a creditor (or a subsequent holder) to provide certain disclosures in cases where an adjustment to the interest rate is made in a variable-rate transaction subject to § 1026.19(b). There are two timing rules, depending on whether payment changes accompany interest rate changes. A creditor is required to provide at least one notice each year during which interest rate adjustments have occurred without accompanying payment adjustments. For payment adjustments, a creditor must deliver or place in the mail notices to borrowers at least 25, but not more than 120, calendar days before a payment at a new level is due. The timing rules also apply to the notice required to be given in connection with the adjustment to the rate and payment that follows conversion of a transaction subject to § 1026.19(b) to a fixed-rate transaction. (In cases where an open-end account is converted to a closed-end transaction subject to § 1026.19(b), the requirements of this section do not apply until adjustments are made following conversion.)

2. *Exceptions.* Section 1026.20(c) does not apply to ''shared-equity,'' ''shared-appreciation,'' or ''price level adjusted'' or similar mortgages.

3. *Basis of disclosures.* The disclosures required under this section shall reflect the terms of the parties' legal obligation, as required under § 1026.17(c)(1).

Paragraph 20(c)(1)

1. *Current and prior interest rates.* The requirements under this paragraph are satisfied by disclosing the interest rate used to compute the new adjusted payment amount (''current rate'') and the adjusted interest rate that was disclosed in the last adjustment notice, as well as all other interest rates applied to the transaction in the period since the last notice (''prior rates''). (If there has been no prior adjustment notice, the prior rates are the interest rate applicable to the transaction at consummation, as well as all other interest rates applied to the transaction in the period since consummation.) If no payment adjustment has been made in a year, the current rate is the new adjusted interest rate for the transaction, and the prior rates are the adjusted interest rate applicable to the loan at the time of the last adjustment notice, and all other rates applied to the transaction in the period between the current and last adjustment notices. In disclosing all other rates applied to the transaction during the period between notices, a creditor may disclose a range of the highest and lowest rates applied during that period.

Paragraph 20(c)(2)

1. *Current and prior index values.* This section requires disclosure of the index or formula values used to compute the current and prior interest rates disclosed in § 1026.20(c)(1). The creditor need not disclose the margin used in computing the rates. If the prior interest rate was not based on an index or formula value, the creditor also need not disclose the value of the index that would otherwise have been used to compute the prior interest rate.

Paragraph 20(c)(3)

1. *Unapplied index increases.* The requirement that the consumer receive information about the extent to which the creditor has foregone any increase in the interest rate is applicable only to those transactions permitting interest rate carryover. The amount of increase that is foregone at an adjustment is the amount that, subject to rate caps, can be applied to future adjustments independently to increase, or offset decreases in, the rate that is determined according to the index or formula.

Paragraph 20(c)(4)

1. *Contractual effects of the adjustment.* The contractual effects of an interest rate adjustment must be disclosed including the payment due after the adjustment is made whether or not the payment has been adjusted. A contractual effect of a rate adjustment would include, for example, disclosure of any change in the term or maturity of the loan if the change resulted from the rate adjustment. In transactions where paying the periodic payments will not fully amortize the outstanding balance at the end of the loan term and where the final payment will equal the periodic payment plus the remaining unpaid balance, the amount of the adjusted payment must be disclosed if such payment has changed as a result of the rate adjustment. A statement of the loan balance also is required. The balance required to be disclosed is the balance on which the new adjusted payment is based. If no payment adjustment is disclosed in the notice, the balance disclosed should be the loan balance on which the payment disclosed under § 1026.20(c)(5) is based, if applicable, or the balance at the time the disclosure is prepared.

Paragraph 20(c)(5)

1. *Fully-amortizing payment.* This paragraph requires a disclosure only when negative amortization occurs as a result of the adjustment. A disclosure is not required simply because a loan calls for non-amortizing or partially amortizing payments. For example, in a transaction with a five-year term and payments based on a longer amortization schedule, and where the final payment will equal the periodic payment plus the remaining unpaid balance, the creditor would not have to disclose the payment necessary to fully amortize the loan in the remainder of the five-year term. A disclosure is required, however, if the payment disclosed under § 1026.20(c)(4) is not sufficient to prevent negative amortization in the loan. The adjustment notice must state the payment required to prevent negative amortization. (This paragraph does not apply if the payment disclosed in § 1026.20(c)(4) is sufficient to prevent negative amortization in the loan but the final payment will be a different amount due to rounding.)

Section 1026.21—Treatment of Credit Balances

Paragraph 21(a)

1. *Credit balance.* A credit balance arises whenever the creditor receives or holds funds in an account in excess of the total balance due from the consumer on that account. A balance might result, for example, from the debtor's paying off a loan by transmitting funds in excess of the total balance owed on the account, or from the early payoff of a loan entitling the consumer to a rebate of insurance premiums and finance charges. However, § 1026.21 does not determine whether the creditor in fact owes or holds sums for the consumer. For example, if a creditor has no obligation to rebate any portion of precomputed finance charges on prepayment, the consumer's early payoff would not create a credit balance with respect to those charges. Similarly, nothing in this provision interferes with any rights the creditor may have under the contract or under state law with respect to set-off, cross collateralization, or similar provisions.

2. *Total balance due.* The phrase *total balance due* refers to the total outstanding balance. Thus, this provision does not apply where the consumer has simply paid an amount in excess of the payment due for a given period.

3. *Timing of refund.* The creditor may also fulfill its obligation under this section by:

i. Refunding any credit balance to the consumer immediately.

ii. Refunding any credit balance prior to a written request from the consumer.

iii. Making a good faith effort to refund any credit balance before 6 months have passed. If that attempt is unsuccessful, the creditor need not try again to refund the credit balance at the end of the 6-month period.

Paragraph 21(b)

1. *Written requests—standing orders.* The creditor is not required to honor standing orders requesting refunds of any credit balance that may be created on the consumer's account.

Paragraph 21(c)

1. *Good faith effort to refund.* The creditor must take positive steps to return any credit balance that has remained in the account for over 6 months. This includes, if necessary, attempts to trace the consumer through the consumer's last known address or telephone number, or both.

2. *Good faith effort unsuccessful.* Section 1026.21 imposes no further duties on the creditor if a good faith effort to return the balance is unsuccessful. The ultimate disposition of the credit balance (or any credit balance of $1 or less) is to be determined under other applicable law.

Section 1026.22—Determination of Annual Percentage Rate

22(a) Accuracy of Annual Percentage Rate

Paragraph 22(a)(1)

1. *Calculation method.* The regulation recognizes both the actuarial method and the United States Rule Method (U.S. Rule) as measures of an exact annual percentage rate. Both methods yield the same annual percentage rate when payment intervals are equal. They differ in their treatment of unpaid accrued interest.

2. *Actuarial method.* When no payment is made, or when the payment is insufficient to pay the accumulated finance charge, the actuarial method requires that the unpaid finance charge be added to the amount financed and thereby capitalized. Interest is computed on interest since in succeeding periods the interest rate is applied to the unpaid balance including the unpaid finance charge. Appendix J provides instructions and examples for calculating the annual percentage rate using the actuarial method.

3. *U.S. Rule.* The U.S. Rule produces no compounding of interest in that any unpaid accrued interest is accumulated separately and is not added to principal. In addition, under the U.S. Rule, no interest calculation is made until a payment is received.

4. *Basis for calculations.* When a transaction involves ''step rates'' or ''split rates''—that is, different rates applied at different times or to different portions of the principal balance—a single composite annual percentage rate must be calculated and disclosed for the entire transaction. Assume, for example, a step-rate transaction in which a $10,000 loan is repayable in 5 years at 10 percent interest for the first 2 years, 12 percent for years 3 and 4, and 14 percent for year 5. The monthly payments are $210.71 during the first 2 years of the term, $220.25 for years 3 and 4, and $222.59 for year 5. The composite annual percentage rate, using a calculator with a ''discounted cash flow analysis'' or ''internal rate of return'' function, is 10.75 percent.

5. *Good faith reliance on faulty calculation tools.* Section 1026.22(a)(1) absolves a creditor of liability for an error in the annual percentage rate or finance charge that resulted from a corresponding error in a calculation tool used in good faith by the creditor. Whether or not the creditor's use of the tool was in good faith must be determined on a case-by-case basis, but the creditor must in any case have taken reasonable steps to verify the accuracy of the tool, including any instructions, before using it. Generally, the creditor is not liable only for errors directly attributable to the calculation tool itself, including software programs; § 1026.22(a)(1) is not intended to absolve a creditor of liability for its own errors, or for errors arising from improper use of the tool, from incorrect data entry, or from misapplication of the law.

Paragraph 22(a)(2)

1. *Regular transactions.* The annual percentage rate for a regular transaction is considered accurate if it varies in either direction by not more than ⅛ of 1 percentage point from the actual annual percentage rate. For example, when the exact annual percentage rate is determined to be 101/8%, a disclosed annual percentage rate from 10% to 10 ¼%, or the decimal equivalent, is deemed to comply with the regulation.

Paragraph 22(a)(3)

1. *Irregular transactions.* The annual percentage rate for an irregular transaction is considered accurate if it varies in either direction by not more than ¼ of 1 percentage point from the actual annual percentage rate. This tolerance is intended for more complex transactions that do not call for a single advance and a regular series of equal payments at equal intervals. The ¼ of 1 percentage point tolerance may be used, for example, in a construction loan where advances are made as construction progresses, or in a transaction where payments vary to reflect the consumer's seasonal income. It may also be used in transactions with graduated payment schedules where the contract commits the consumer to several series of payments in different amounts. It does not apply, however, to loans with variable rate features where the initial disclosures are based on a regular amortization schedule over the life of the loan, even though payments may later change because of the variable rate feature.

22(a)(4) Mortgage Loans

1. *Example.* If a creditor improperly omits a $75 fee from the finance charge on a regular transaction, the understated finance charge is considered accurate under § 1026.18(d)(1), and the annual percentage rate corresponding to that understated finance charge also is considered accurate even if it falls outside the tolerance of ⅛ of 1 percentage point provided under § 1026.22(a)(2). Because a $75 error was made, an annual percentage rate corresponding to a $100 understatement of the finance charge would not be considered accurate.

22(a)(5) Additional Tolerance for Mortgage Loans

1. *Example.* This paragraph contains an additional tolerance for a disclosed annual percentage rate that is incorrect but is closer to the actual annual percentage rate than the rate that would be considered accurate under the tolerance in § 1026.22(a)(4). To illustrate: in an irregular transaction subject to a ¼ of 1 percentage point tolerance, if the actual annual percentage rate is 9.00 percent and a $75 omission from the finance charge corresponds to a rate of 8.50 percent that is considered accurate under § 1026.22(a)(4), a disclosed APR of 8.65 percent is within the tolerance in § 1026.22(a)(5). In this example of an understated finance charge, a disclosed annual percentage rate below 8.50 or above 9.25 percent will not be considered accurate.

22(b) Computation Tools

Paragraph 22(b)(1)

1. *Bureau tables.* Volumes I and II of the Bureau's Annual Percentage Rate Tables provide a means of calculating annual percentage rates for regular and irregular transactions, respectively. An annual percentage rate computed in accordance with the instructions in the tables is deemed to comply with the regulation, even where use of the tables produces a rate that falls outside the general standard of accuracy. To illustrate:Volume I may be used for single advance transactions with completely regular payment schedules or with payment schedules that are regular except for an odd first payment, odd first period or odd final payment. When used for a transaction with a large final balloon payment, Volume I may produce a rate that is considerably higher than the exact rate produced using a

computer program based directly on Appendix J. However, the Volume I rate—produced using certain adjustments in that volume—is considered to be in compliance.

Paragraph 22(b)(2)

1. *Other calculation tools.* Creditors need not use the Bureau tables in calculating the annual percentage rates. Any computation tools may be used, so long as they produce annual percentage rates within ⅛ or ¼ of 1 percentage point, as applicable, of the precise actuarial or U.S. Rule annual percentage rate.

22(c) Single Add-On Rate Transactions

1. *General rule.* Creditors applying a single add-on rate to all transactions up to 60 months in length may disclose the same annual percentage rate for all those transactions, although the actual annual percentage rate varies according to the length of the transaction. Creditors utilizing this provision must show the highest of those rates. For example, an add-on rate of 10 percent converted to an annual percentage rate produces the following actual annual percentage rates at various maturities: At 3 months, 14.94 percent; at 21 months, 18.18 percent; and at 60 months, 17.27 percent. The creditor must disclose an annual percentage rate of 18.18 percent (the highest annual percentage rate) for any transaction up to 5 years, even though that rate is precise only for a transaction of 21 months.

22(d) Certain Transactions Involving Ranges of Balances

1. *General rule.* Creditors applying a fixed dollar finance charge to all balances within a specified range of balances may understate the annual percentage rate by up to 8 percent of that rate, by disclosing for all those balances the annual percentage rate computed on the median balance within that range. For example: If a finance charge of $9 applies to all balances between $91 and $100, an annual percentage rate of 10 percent (the rate on the median balance) may be disclosed as the annual percentage rate for all balances, even though a $9 finance charge applied to the lowest balance ($91) would actually produce an annual percentage rate of 10.7 percent.

Section 1026.23—Right of Rescission

1. *Transactions not covered.* Credit extensions that are not subject to the regulation are not covered by § 1026.23 even if a customer's principal dwelling is the collateral securing the credit. For example, the right of rescission does not apply to a business purpose loan, even though the loan is secured by the customer's principal dwelling.

23(a) Consumer's Right to Rescind

Paragraph 23(a)(1)

1. *Security interest arising from transaction.* i. In order for the right of rescission to apply, the security interest must be retained as part of the credit transaction. For example:

A. A security interest that is acquired by a contractor who is also extending the credit in the transaction.

B. A mechanic's or materialman's lien that is retained by a subcontractor or supplier of the contractor-creditor, even when the latter has waived its own security interest in the consumer's home.

ii. The security interest is not part of the credit transaction and therefore the transaction is not subject to the right of rescission when, for example:

A. A mechanic's or materialman's lien is obtained by a contractor who is not a party to the credit transaction but is merely paid with the proceeds of the consumer's unsecured bank loan.

B. All security interests that may arise in connection with the credit transaction are validly waived.

C. The creditor obtains a lien and completion bond that in effect satisfies all liens against the consumer's principal dwelling as a result of the credit transaction.

iii. Although liens arising by operation of law are not considered security interests for purposes of disclosure under § 1026.2, that section specifically includes them in the definition for purposes of the right of rescission. Thus, even though an interest in the consumer's principal dwelling is not a required disclosure under § 1026.18(m), it may still give rise to the right of rescission.

2. *Consumer.* To be a consumer within the meaning of § 1026.2, that person must at least have an ownership interest in the dwelling that is encumbered by the creditor's security interest, although that person need not be a signatory to the credit agreement. For example, if only one spouse signs a credit contract, the other spouse is a consumer if the ownership interest of that spouse is subject to the security interest.

3. *Principal dwelling.* A consumer can only have one principal dwelling at a time. (But see comment 23(a)(1)–4.) A vacation or other second home would not be a principal dwelling. A transaction secured by a second home (such as a vacation home) that is not currently being used as the consumer's principal dwelling is not rescindable, even if the consumer intends to reside there in the future. When a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within one year or upon completion of construction, the new dwelling is considered the principal dwelling if it secures the acquisition or construction loan. In that case, the transaction secured by the new dwelling is a residential mortgage transaction and is not rescindable. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a construction loan to finance B and secured by B is a residential mortgage transaction. Dwelling, as defined in § 1026.2, includes structures that are classified as personalty under state law. For example, a transaction secured by a mobile home, trailer, or houseboat used as the consumer's principal dwelling may be rescindable.

4. *Special rule for principal dwelling.* Notwithstanding the general rule that consumers may have only one principal dwelling, when the consumer is acquiring or constructing a new principal dwelling, any loan subject to Regulation Z and secured by the equity in the consumer's current principal dwelling (for example, a bridge loan) is subject to the right of rescission regardless of the purpose of that loan. For example, if a consumer whose principal dwelling is currently A builds B, to be occupied by the consumer upon completion of construction, a construction loan to finance B and secured by A is subject to the right of rescission. A loan secured by both A and B is, likewise, rescindable.

5. *Addition of a security interest.* Under § 1026.23(a), the addition of a security interest in a consumer's principal dwelling to an existing obligation is rescindable even if the existing obligation is not satisfied and replaced by a new obligation, and even if the existing obligation was previously exempt under § 1026.3(b). The right of rescission applies only to the added security interest, however, and not to the original obligation. In those situations, only the § 1026.23(b) notice need be delivered, not new material disclosures; the rescission period will begin to run from the delivery of the notice.

Paragraph 23(a)(2)

1. *Consumer's exercise of right.* The consumer must exercise the right of rescission in writing but not necessarily on the notice supplied under § 1026.23(b). Whatever the means of sending the notification of rescission—mail, telegram or other written means—the time period for the creditor's performance under § 1026.23(d)(2) does not begin to run until the notification has been received. The creditor may designate an agent to receive the notification so long as the agent's name and address appear on the notice provided to the consumer under § 1026.23(b). Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivering notification to the person or address to which the consumer has been directed to send, payments constitutes delivery to the creditor or assignee. State law determines whether delivery of the notification to a third party other than the person to whom payments are made is delivery to the creditor or assignee, in the case where the creditor fails to designate an address for sending the notification of rescission.

Paragraph 23(a)(3)

1. *Rescission period.* i. The period within which the consumer may exercise the right to rescind runs for 3 business days from the last of 3 events:

A. Consummation of the transaction.

B. Delivery of all material disclosures.

C. Delivery to the consumer of the required rescission notice.

ii. For example:

A. If a transaction is consummated on Friday, June 1, and the disclosures and notice of the right to rescind were given on Thursday, May 31, the rescission period will expire at midnight of the third business day after June 1—that is, Tuesday, June 5.

B. If the disclosures are given and the transaction consummated on Friday, June 1, and the rescission notice is given on Monday, June 4, the rescission period expires at midnight of the third business day after June 4—that is, Thursday, June 7. The consumer must place the rescission notice in the mail, file it for telegraphic transmission, or deliver

it to the creditor's place of business within that period in order to exercise the right.

2. *Material disclosures.* Section 1026.23(a)(3)(ii) sets forth the material disclosures that must be provided before the rescission period can begin to run. Failure to provide information regarding the annual percentage rate also includes failure to inform the consumer of the existence of a variable rate feature. Failure to give the other required disclosures does not prevent the running of the rescission period, although that failure may result in civil liability or administrative sanctions.

3. *Unexpired right of rescission.* i. When the creditor has failed to take the action necessary to start the three-business day rescission period running, the right to rescind automatically lapses on the occurrence of the earliest of the following three events:

A. The expiration of three years after consummation of the transaction.

B. Transfer of all the consumer's interest in the property.

C. Sale of the consumer's interest in the property, including a transaction in which the consumer sells the dwelling and takes back a purchase money note and mortgage or retains legal title through a device such as an installment sale contract.

ii. Transfer of all the consumers' interest includes such transfers as bequests and gifts. A sale or transfer of the property need not be voluntary to terminate the right to rescind. For example, a foreclosure sale would terminate an unexpired right to rescind. As provided in Section 125 of the Act, the three-year limit may be extended by an administrative proceeding to enforce the provisions of this section. A partial transfer of the consumer's interest, such as a transfer bestowing co-ownership on a spouse, does not terminate the right of rescission.

Paragraph 23(a)(4)

1. *Joint owners.* When more than one consumer has the right to rescind a transaction, any of them may exercise that right and cancel the transaction on behalf of all. For example, if both husband and wife have the right to rescind a transaction, either spouse acting alone may exercise the right and both are bound by the rescission.

Paragraph 23(b)

23(b)(1) Notice of Right To Rescind

1. *Who receives notice.* Each consumer entitled to rescind must be given two copies of the rescission notice and the material disclosures. In a transaction involving joint owners, both of whom are entitled to rescind, both must receive the notice of the right to rescind and disclosures. For example, if both spouses are entitled to rescind a transaction, each must receive two copies of the rescission notice (one copy to each if the notice is provided in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act) and one copy of the disclosures.

2. *Format.* The notice must be on a separate piece of paper, but may appear with other information such as the itemization of the amount financed. The material must be clear and conspicuous, but no minimum type size or other technical requirements are imposed. The notices in Appendix H provide models that creditors may use in giving the notice.

3. *Content.* The notice must include all of the information outlined in Section 1026.23(b)(1)(i) through (v). The requirement in § 1026.23(b) that the transaction be identified may be met by providing the date of the transaction. The creditor may provide a separate form that the consumer may use to exercise the right of rescission, or that form may be combined with the other rescission disclosures, as illustrated in Appendix H. The notice may include additional information related to the required information, such as:

i. A description of the property subject to the security interest.

ii. A statement that joint owners may have the right to rescind and that a rescission by one is effective for all.

iii. The name and address of an agent of the creditor to receive notice of rescission.

4. *Time of providing notice.* The notice required by § 1026.23(b) need not be given before consummation of the transaction. The creditor may deliver the notice after the transaction is consummated, but the rescission period will not begin to run until the notice is given. For example, if the creditor provides the notice on May 15, but disclosures were given and the transaction was consummated on May 10, the 3-business day rescission period will run from May 15.

23(c) Delay of Creditor's Performance

1. *General rule.* Until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded, the creditor must not, either directly or through a third party:

i. Disburse loan proceeds to the consumer.

ii. Begin performing services for the consumer.

iii. Deliver materials to the consumer.

2. *Escrow.* The creditor may disburse loan proceeds during the rescission period in a valid escrow arrangement. The creditor may not, however, appoint the consumer as ''trustee'' or ''escrow agent'' and distribute funds to the consumer in that capacity during the delay period.

3. *Actions during the delay period.* Section 1026.23(c) does not prevent the creditor from taking other steps during the delay, short of beginning actual performance. Unless otherwise prohibited, such as by state law, the creditor may, for example:

i. Prepare the loan check.

ii. Perfect the security interest.

iii. Prepare to discount or assign the contract to a third party.

iv. Accrue finance charges during the delay period.

4. *Delay beyond rescission period.* i. The creditor must wait until it is reasonably satisfied that the consumer has not rescinded. For example, the creditor may satisfy itself by doing one of the following:

A. Waiting a reasonable time after expiration of the rescission period to allow for delivery of a mailed notice.

B. Obtaining a written statement from the consumer that the right has not been exercised.

ii. When more than one consumer has the right to rescind, the creditor cannot reasonably rely on the assurance of only one consumer, because other consumers may exercise the right.

23(d) Effects of Rescission

Paragraph 23(d)(1)

1. *Termination of security interest.* Any security interest giving rise to the right of rescission becomes void when the consumer exercises the right of rescission. The security interest is automatically negated regardless of its status and whether or not it was recorded or perfected. Under § 1026.23(d)(2), however, the creditor must take any action necessary to reflect the fact that the security interest no longer exists.

Paragraph 23(d)(2)

1. *Refunds to consumer.* The consumer cannot be required to pay any amount in the form of money or property either to the creditor or to a third party as part of the credit transaction. Any amounts of this nature already paid by the consumer must be refunded. ''Any amount'' includes finance charges already accrued, as well as other charges, such as broker fees, application and commitment fees, or fees for a title search or appraisal, whether paid to the creditor, paid directly to a third party, or passed on from the creditor to the third party. It is irrelevant that these amounts may not represent profit to the creditor.

2. *Amounts not refundable to consumer.* Creditors need not return any money given by the consumer to a third party outside of the credit transaction, such as costs incurred for a building permit or for a zoning variance. Similarly, the term *any amount* does not apply to any money or property given by the creditor to the consumer; those amounts must be tendered by the consumer to the creditor under § 1026.23(d)(3).

3. *Reflection of security interest termination.* The creditor must take whatever steps are necessary to indicate that the security interest is terminated. Those steps include the cancellation of documents creating the security interest, and the filing of release or termination statements in the public record. In a transaction involving subcontractors or suppliers that also hold security interests related to the credit transaction, the creditor must insure that the termination of their security interests is also reflected. The 20-day period for the creditor's action refers to the time within which the creditor must begin the process. It does not require all necessary steps to have been completed within that time, but the creditor is responsible for seeing the process through to completion.

Paragraph 23(d)(3)

1. *Property exchange.* Once the creditor has fulfilled its obligations under § 1026.23(d)(2), the consumer must tender to the creditor any property or money the creditor has already delivered to the consumer. At the consumer's option, property may be tendered at the location of the property. For example, if lumber or fixtures have been delivered to the consumer's home, the consumer may tender them to the creditor by making them available for pick-up at the home, rather than

physically returning them to the creditor's premises. Money already given to the consumer *must* be tendered at the creditor's place of business.

2. *Reasonable value.* If returning the property would be extremely burdensome to the consumer, the consumer may offer the creditor its reasonable value rather than returning the property itself. For example, if building materials have already been incorporated into the consumer's dwelling, the consumer may pay their reasonable value.

Paragraph 23(d)(4)

1. *Modifications.* The procedures outlined in § 1026.23(d)(2) and (3) may be modified by a court. For example, when a consumer is in bankruptcy proceedings and prohibited from returning anything to the creditor, or when the equities dictate, a modification might be made. The sequence of procedures under § 1026.23(d)(2) and (3), or a court's modification of those procedures under § 1026.23(d)(4), does not affect a consumer's substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind and determine the amounts owed before establishing the procedures for the parties to tender any money or property.

23(e) Consumer's Waiver of Right to Rescind

1. *Need for waiver.* To waive the right to rescind, the consumer must have a bona fide personal financial emergency that must be met before the end of the rescission period. The existence of the consumer's waiver will not, of itself, automatically insulate the creditor from liability for failing to provide the right of rescission.

2. *Procedure.* To waive or modify the right to rescind, the consumer must give a written statement that specifically waives or modifies the right, and also includes a brief description of the emergency. Each consumer entitled to rescind must sign the waiver statement. In a transaction involving multiple consumers, such as a husband and wife using their home as collateral, the waiver must bear the signatures of both spouses.

23(f) Exempt Transactions

1. *Residential mortgage transaction.* Any transaction to construct or acquire a principal dwelling, whether considered real or personal property, is exempt. (See the commentary to § 1026.23(a).) For example, a credit transaction to acquire a mobile home or houseboat to be used as the consumer's principal dwelling would not be rescindable.

2. *Lien status.* The lien status of the mortgage is irrelevant for purposes of the exemption in § 1026.23(f)(1); the fact that a loan has junior lien status does not by itself preclude application of this exemption. For example, a home buyer may assume the existing first mortgage and create a second mortgage to finance the balance of the purchase price. Such a transaction would not be rescindable.

3. *Combined-purpose transaction.* A loan to acquire a principal dwelling and make improvements to that dwelling is exempt if treated as one transaction. If, on the other hand, the loan for the acquisition of the principal dwelling and the subsequent advances for improvements are treated as more than one transaction, then only the transaction that finances the acquisition of that dwelling is exempt.

4. *New advances.* The exemption in § 1026.23(f)(2) applies only to refinancings (including consolidations) by the original creditor. The original creditor is the creditor to whom the written agreement was initially made payable. In a merger, consolidation or acquisition, the successor institution is considered the original creditor for purposes of the exemption in § 1026.23(f)(2). If the refinancing involves a new advance of money, the amount of the new advance is rescindable. In determining whether there is a new advance, a creditor may rely on the amount financed, refinancing costs, and other figures stated in the latest Truth in Lending disclosures provided to the consumer and is not required to use, for example, more precise information that may only become available when the loan is closed. For purposes of the right of rescission, a new advance does not include amounts attributed solely to the costs of the refinancing. These amounts would include § 1026.4(c)(7) charges (such as attorneys fees and title examination and insurance fees, if bona fide and reasonable in amount), as well as insurance premiums and other charges that are not finance charges. (Finance charges on the new transaction—points, for example—would not be considered in determining whether there is a new advance of money in a refinancing since finance charges are not part of the amount financed.) To illustrate, if the sum of the outstanding principal balance plus the earned unpaid finance charge is $50,000 and the new amount financed is $51,000, then the refinancing would be exempt if the extra $1,000 is attributed solely to costs financed in connection with the refinancing that are not finance charges. Of course, if new advances of money are made (for example, to pay for home improvements) and the consumer exercises the right of rescission, the consumer must be placed in the same position as he or she was in prior to entering into the new credit transaction. Thus, all amounts of money (which would include all the costs of the refinancing) already paid by the consumer to the creditor or to a third party as part of the refinancing would have to be refunded to the consumer. (See the commentary to § 1026.23(d)(2) for a discussion of refunds to consumers.) A model rescission notice applicable to transactions involving new advances appears in Appendix H. The general rescission notice (model form H–8) is the appropriate form for use by creditors not considered original creditors in refinancing transactions.

5. *State creditors.* Cities and other political subdivisions of states acting as creditors are not exempted from this section.

6. *Multiple advances.* Just as new disclosures need not be made for subsequent advances when treated as one transaction, no new rescission rights arise so long as the appropriate notice and disclosures are given at the outset of the transaction. For example, the creditor extends credit for home improvements secured by the consumer's principal dwelling, with advances made as repairs progress. As permitted by § 1026.17(c)(6), the creditor makes a single set of disclosures at the beginning of the construction period, rather than separate disclosures for each advance. The right of rescission does not arise with each advance. However, if the advances are treated as separate transactions, the right of rescission applies to each advance.

7. *Spreader clauses.* When the creditor holds a mortgage or deed of trust on the consumer's principal dwelling and that mortgage or deed of trust contains a ''spreader clause,'' subsequent loans made are separate transactions and are subject to the right of rescission. Those loans are rescindable unless the creditor effectively waives its security interest under the spreader clause with respect to the subsequent transactions.

8. *Converting open-end to closed-end credit.* Under certain state laws, consummation of a closed-end credit transaction may occur at the time a consumer enters into the initial open-end credit agreement. As provided in the commentary to § 1026.17(b), closed-end credit disclosures may be delayed under these circumstances until the conversion of the open-end account to a closed-end transaction. In accounts secured by the consumer's principal dwelling, no new right of rescission arises at the time of conversion. Rescission rights under § 1026.15 are unaffected.

23(g) Tolerances for Accuracy

23(g)(2) One Percent Tolerance

1. *New advance.* The phrase ''new advance'' has the same meaning as in comment 23(f)–4.

23(h) Special Rules for Foreclosures

1. *Rescission.* Section 1026.23(h) applies only to transactions that are subject to rescission under § 1026.23(a)(1).

Paragraph 23(h)(1)(i)

1. *Mortgage broker fees.* A consumer may rescind a loan in foreclosure if a mortgage broker fee that should have been included in the finance charge was omitted, without regard to the dollar amount involved. If the amount of the mortgage broker fee is included but misstated the rule in § 1026.23(h)(2) applies.

23(h)(2) Tolerance for Disclosures

1. *General.* This section is based on the accuracy of the total finance charge rather than its component charges.

Section 1026.24—Advertising

24(a) Actually Available Terms

1. *General rule.* To the extent that an advertisement mentions specific credit terms, it may state only those terms that the creditor is actually prepared to offer. For example, a creditor may not advertise a very low annual percentage rate that will not in fact be available at any time. This provision is not intended to inhibit the promotion of new credit programs, but to bar the advertising of terms that are not and will not be available. For example, a creditor may advertise terms that will be offered for only a limited period,

or terms that will become available at a future date.

24(b) Clear and Conspicuous Standard

1. *Clear and conspicuous standard—general.* This section is subject to the general ''clear and conspicuous'' standard for this subpart, *see* § 1026.17(a)(1), but prescribes no specific rules for the format of the necessary disclosures, other than the format requirements related to the advertisement of rates and payments as described in comment 24(b)–2 below. The credit terms need not be printed in a certain type size nor need they appear in any particular place in the advertisement. For example, a merchandise tag that is an advertisement under the regulation complies with this section if the necessary credit terms are on both sides of the tag, so long as each side is accessible.

2. *Clear and conspicuous standard—rates and payments in advertisements for credit secured by a dwelling.* For purposes of § 1026.24(f), a clear and conspicuous disclosure means that the required information in §§ 1026.24(f)(2)(i) and 1026.24(f)(3)(i)(A) and (B) is disclosed with equal prominence and in close proximity to the advertised rates or payments triggering the required disclosures, and that the required information in § 1026.24(f)(3)(i)(C) is disclosed prominently and in close proximity to the advertised rates or payments triggering the required disclosures. If the required information in §§ 1026.24(f)(2)(i) and 1026.24(f)(3)(i)(A) and (B) is the same type size as the advertised rates or payments triggering the required disclosures, the disclosures are deemed to be equally prominent. The information in § 1026.24(f)(3)(i)(C) must be disclosed prominently, but need not be disclosed with equal prominence or be the same type size as the payments triggering the required disclosures. If the required information in §§ 1026.24(f)(2)(i) and 1026.24(f)(3)(i) is located immediately next to or directly above or below the advertised rates or payments triggering the required disclosures, without any intervening text or graphical displays, the disclosures are deemed to be in close proximity. Notwithstanding the above, for electronic advertisements that disclose rates or payments, compliance with the requirements of § 1026.24(e) is deemed to satisfy the clear and conspicuous standard.

3. *Clear and conspicuous standard—Internet advertisements for credit secured by a dwelling.* For purposes of this section, a clear and conspicuous disclosure for visual text advertisements on the Internet for credit secured by a dwelling means that the required disclosures are not obscured by techniques such as graphical displays, shading, coloration, or other devices and comply with all other requirements for clear and conspicuous disclosures under § 1026.24. *See also* comment 24(e)–4.

4. *Clear and conspicuous standard—televised advertisements for credit secured by a dwelling.* For purposes of this section, including alternative disclosures as provided for by § 1026.24(g), a clear and conspicuous disclosure in the context of visual text advertisements on television for credit secured by a dwelling means that the required disclosures are not obscured by techniques such as graphical displays, shading, coloration, or other devices, are displayed in a manner that allows a consumer to read the information required to be disclosed, and comply with all other requirements for clear and conspicuous disclosures under § 1026.24. For example, very fine print in a television advertisement would not meet the clear and conspicuous standard if consumers cannot see and read the information required to be disclosed.

5. *Clear and conspicuous standard—oral advertisements for credit secured by a dwelling.* For purposes of this section, including alternative disclosures as provided for by § 1026.24(g), a clear and conspicuous disclosure in the context of an oral advertisement for credit secured by a dwelling, whether by radio, television, or other medium, means that the required disclosures are given at a speed and volume sufficient for a consumer to hear and comprehend them. For example, information stated very rapidly at a low volume in a radio or television advertisement would not meet the clear and conspicuous standard if consumers cannot hear and comprehend the information required to be disclosed.

24(c) Advertisement of Rate of Finance Charge

1. *Annual percentage rate.* Advertised rates must be stated in terms of an *annual percentage rate,* as defined in § 1026.22. Even though state or local law permits the use of add-on, discount, time-price differential, or other methods of stating rates, advertisements must state them as annual percentage rates. Unlike the transactional disclosure of an annual percentage rate under § 1026.18(e), the advertised annual percentage rate need not include a descriptive explanation of the term and may be expressed using the abbreviation *APR.* The advertisement must state that the rate is subject to increase after consummation if that is the case, but the advertisement need not describe the rate increase, its limits, or how it would affect the payment schedule. As under § 1026.18(f), relating to disclosure of a variable rate, the rate increase disclosure requirement in this provision does not apply to any rate increase due to delinquency (including late payment), default, acceleration, assumption, or transfer of collateral.

2. *Simple or periodic rates.* The advertisement may not simultaneously state any other rate, except that a simple annual rate or periodic rate applicable to an unpaid balance may appear along with (but not more conspicuously than) the annual percentage rate. An advertisement for credit secured by a dwelling may not state a periodic rate, other than a simple annual rate, that is applied to an unpaid balance. For example, in an advertisement for credit secured by a dwelling, a simple annual interest rate may be shown in the same type size as the annual percentage rate for the advertised credit, subject to the requirements of § 1026.24(f). A simple annual rate or periodic rate that is applied to an unpaid balance is the rate at which interest is accruing; those terms do not include a rate lower than the rate at which interest is accruing, such as an effective rate, payment rate, or qualifying rate.

3. *Buydowns.* When a third party (such as a seller) or a creditor wishes to promote the availability of reduced interest rates (consumer or seller buydowns), the advertised annual percentage rate must be determined in accordance with the commentary to § 1026.17(c) regarding the basis of transactional disclosures for buydowns. The seller or creditor may advertise the reduced simple interest rate, provided the advertisement shows the limited term to which the reduced rate applies and states the simple interest rate applicable to the balance of the term. The advertisement may also show the effect of the buydown agreement on the payment schedule for the buydown period, but this will trigger the additional disclosures under § 1026.24(d)(2).

4. *Discounted variable-rate transactions.* The advertised annual percentage rate for discounted variable-rate transactions must be determined in accordance with comment 17(c)(1)–10 regarding the basis of transactional disclosures for such financing.

i. A creditor or seller may promote the availability of the initial rate reduction in such transactions by advertising the reduced simple annual rate, provided the advertisement shows with equal prominence and in close proximity the limited term to which the reduced rate applies and the annual percentage rate that will apply after the term of the initial rate reduction expires. *See* § 1026.24(f).

ii. Limits or caps on periodic rate or payment adjustments need not be stated. To illustrate using the second example in comment 17(c)(1)–10, the fact that the rate is presumed to be 11 percent in the second year and 12 percent for the remaining 28 years need not be included in the advertisement.

iii. The advertisement may also show the effect of the discount on the payment schedule for the discount period, but this will trigger the additional disclosures under § 1026.24(d).

24(d) Advertisement of Terms That Require Additional Disclosures

1. *General rule.* Under § 1026.24(d)(1), whenever certain triggering terms appear in credit advertisements, the additional credit terms enumerated in § 1026.24(d)(2) must also appear. These provisions apply even if the triggering term is not stated explicitly but may be readily determined from the advertisement. For example, an advertisement may state ''80 percent financing available,'' which is in fact indicating that a 20 percent downpayment is required.

24(d)(1) Triggering Terms

1. *Downpayment.* i. The dollar amount of a downpayment or a statement of the downpayment as a percentage of the price requires further information. By virtue of the definition of *downpayment* in § 1026.2, this triggering term is limited to credit sale transactions. It includes such statements as:

A. Only 5% down.

B. As low as $100 down.

C. Total move-in costs of $800.

ii. This provision applies only if a downpayment is actually required; statements such as *no downpayment* or *no*

trade-in required do not trigger the additional disclosures under this paragraph.

2. *Payment period.* i. The number of payments required or the total period of repayment includes such statements as:

A. 48-month payment terms.

B. 30-year mortgage.

C. Repayment in as many as 36 monthly installments.

ii. But it does not include such statements as ''pay weekly,'' ''monthly payment terms arranged,'' or ''take years to repay,'' since these statements do not indicate a time period over which a loan may be financed.

3. *Payment amount.* i. The dollar amount of any payment includes statements such as:

A. ''Payable in installments of $103.''

B. ''$25 weekly.''

C. ''$500,000 loan for just $1,650 per month.''

D. ''$1,200 balance payable in 10 equal installments.''

ii. In the last example, the amount of each payment is readily determinable, even though not explicitly stated. But statements such as ''monthly payments to suit your needs'' or ''regular *monthly* payments'' are not deemed to be statements of the amount of any payment.

4. *Finance charge.* i. The dollar amount of the finance charge or any portion of it includes statements such as:

A. ''$500 total cost of credit.''

B. ''$2 monthly carrying charge.''

C. ''$50,000 mortgages, 2 points to the borrower.''

ii. In the last example, the $1,000 prepaid finance charge can be readily determined from the information given. Statements of the annual percentage rate or statements that there is no particular charge for credit (such as ''no closing costs'') are not triggering terms under this paragraph.

24(d)(2) Additional Terms

1. *Disclosure of downpayment.* The total downpayment as a dollar amount or percentage must be shown, but the word ''downpayment'' need not be used in making this disclosure. For example, ''10% cash required from buyer'' or ''credit terms require minimum $100 trade-in'' would suffice.

2. *Disclosure of repayment terms.* The phrase ''terms of repayment'' generally has the same meaning as the ''payment schedule'' required to be disclosed under § 1026.18(g). Section 1026.24(d)(2)(ii) provides flexibility to creditors in making this disclosure for advertising purposes. Repayment terms may be expressed in a variety of ways in addition to an exact repayment schedule; this is particularly true for advertisements that do not contemplate a single specific transaction. Repayment terms, however, must reflect the consumer's repayment obligations over the full term of the loan, including any balloon payment, *see* comment 24(d)(2)–3, not just the repayment terms that will apply for a limited period of time. For example:

i. A creditor may use a unit-cost approach in making the required disclosure, such as ''48 monthly payments of $27.83 per $1,000 borrowed.''

ii. In an advertisement for credit secured by a dwelling, when any series of payments varies because of the inclusion of mortgage insurance premiums, a creditor may state the number and timing of payments, the fact that payments do not include amounts for mortgage insurance premiums, and that the actual payment obligation will be higher.

iii. In an advertisement for credit secured by a dwelling, when one series of monthly payments will apply for a limited period of time followed by a series of higher monthly payments for the remaining term of the loan, the advertisement must state the number and time period of each series of payments, and the amounts of each of those payments. For this purpose, the creditor must assume that the consumer makes the lower series of payments for the maximum allowable period of time.

3. *Balloon payment; disclosure of repayment terms.* In some transactions, a balloon payment will occur when the consumer only makes the minimum payments specified in an advertisement. A balloon payment results if paying the minimum payments does not fully amortize the outstanding balance by a specified date or time, usually the end of the term of the loan, and the consumer must repay the entire outstanding balance at such time. If a balloon payment will occur when the consumer only makes the minimum payments specified in an advertisement, the advertisement must state with equal prominence and in close proximity to the minimum payment statement the amount and timing of the balloon payment that will result if the consumer makes only the minimum payments for the maximum period of time that the consumer is permitted to make such payments.

4. *Annual percentage rate.* The advertised annual percentage rate may be expressed using the abbreviation ''APR.'' The advertisement must also state, if applicable, that the annual percentage rate is subject to increase after consummation.

5. *Use of examples.* A creditor may use illustrative credit transactions to make the necessary disclosures under § 1026.24(d)(2). That is, where a range of possible combinations of credit terms is offered, the advertisement may use examples of typical transactions, so long as each example contains all of the applicable terms required by § 1026.24(d). The examples must be labeled as such and must reflect representative credit terms made available by the creditor to present and prospective customers.

24(e) Catalogs or Other Multiple-Page Advertisements; Electronic Advertisements

1. *Definition.* The multiple-page advertisements to which this section refers are advertisements consisting of a series of sequentially numbered pages—for example, a supplement to a newspaper. A mailing consisting of several separate flyers or pieces of promotional material in a single envelope does not constitute a single multiple-page advertisement for purposes of § 1026.24(e).

2. *General.* Section 1026.24(e) permits creditors to put credit information together in one place in a catalog or other multiple-page advertisement or in an electronic advertisement (such as an advertisement appearing on an Internet Web site). The rule applies only if the advertisement contains one or more of the triggering terms from § 1026.24(d)(1). A list of different annual percentage rates applicable to different balances, for example, does not trigger further disclosures under § 1026.24(d)(2) and so is not covered by § 1026.24(e).

3. *Representative examples.* The table or schedule must state all the necessary information for a representative sampling of amounts of credit. This must reflect amounts of credit the creditor actually offers, up to and including the higher-priced items. This does not mean that the chart must make the disclosures for the single most expensive item the seller offers, but only that the chart cannot be limited to information about less expensive sales when the seller commonly offers a distinct level of more expensive goods or services. The range of transactions shown in the table or schedule in a particular catalog or multiple-page advertisement need not exceed the range of transactions actually offered in that advertisement.

4. *Electronic advertisement.* If an electronic advertisement (such as an advertisement appearing on an Internet Web site) contains the table or schedule permitted under § 1026.24(e)(1), any statement of terms set forth in § 1026.24(d)(1) appearing anywhere else in the advertisement must clearly direct the consumer to the location where the table or schedule begins. For example, a term triggering additional disclosures may be accompanied by a link that directly takes the consumer to the additional information.

24(f) Disclosure of Rates and Payments in Advertisements for Credit Secured by a Dwelling

1. *Applicability.* The requirements of § 1026.24(f)(2) apply to advertisements for loans where more than one simple annual rate of interest will apply. The requirements of § 1026.24(f)(3)(i)(A) require a clear and conspicuous disclosure of each payment that will apply over the term of the loan. In determining whether a payment will apply when the consumer may choose to make a series of lower monthly payments that will apply for a limited period of time, the creditor must assume that the consumer makes the series of lower payments for the maximum allowable period of time. *See* comment 24(d)(2)–2.iii. However, for purposes of § 1026.24(f), the creditor may, but need not, assume that specific events which trigger changes to the simple annual rate of interest or to the applicable payments will occur. For example:

i. *Fixed-rate conversion loans.* If a loan program permits consumers to convert their variable-rate loans to fixed rate loans, the creditor need not assume that the fixed-rate conversion option, by itself, means that more than one simple annual rate of interest will apply to the loan under § 1026.24(f)(2) and need not disclose as a separate payment under § 1026.24(f)(3)(i)(A) the payment that would apply if the consumer exercised the fixed-rate conversion option.

ii. *Preferred-rate loans.* Some loans contain a preferred-rate provision, where the rate will increase upon the occurrence of some event, such as the consumer-employee leaving the creditor's employ or the consumer closing an existing deposit account with the creditor or the consumer revoking an election to make automated payments. A creditor need not

assume that the preferred-rate provision, by itself, means that more than one simple annual rate of interest will apply to the loan under § 1026.24(f)(2) and the payments that would apply upon occurrence of the event that triggers the rate increase need not be disclosed as a separate payment under § 1026.24(f)(3)(i)(A).

iii. *Rate reductions.* Some loans contain a provision where the rate will decrease upon the occurrence of some event, such as if the consumer makes a series of payments on time. A creditor need not assume that the rate reduction provision, by itself, means that more than one simple annual rate of interest will apply to the loan under § 1026.24(f)(2) and need not disclose the payments that would apply upon occurrence of the event that triggers the rate reduction as a separate payment under § 1026.24(f)(3)(i)(A).

2. *Equal prominence, close proximity.* Information required to be disclosed under §§ 1026.24(f)(2)(i) and 1026.24(f)(3)(i) that is immediately next to or directly above or below the simple annual rate or payment amount (but not in a footnote) is deemed to be closely proximate to the listing. Information required to be disclosed under §§ 1026.24(f)(2)(i) and 1026.24(f)(3)(i)(A) and (B) that is in the same type size as the simple annual rate or payment amount is deemed to be equally prominent.

3. *Clear and conspicuous standard.* For more information about the applicable clear and conspicuous standard, see comment 24(b)–2.

4. *Comparisons in advertisements.* When making any comparison in an advertisement between actual or hypothetical credit payments or rates and the payments or rates available under the advertised product, the advertisement must state all applicable payments or rates for the advertised product and the time periods for which those payments or rates will apply, as required by this section.

5. *Application to variable-rate transactions—disclosure of rates.* In advertisements for variable-rate transactions, if a simple annual rate that applies at consummation is not based on the index and margin that will be used to make subsequent rate adjustments over the term of the loan, the requirements of § 1026.24(f)(2)(i) apply.

6. *Reasonably current index and margin.* For the purposes of this section, an index and margin is considered reasonably current if:

i. For direct mail advertisements, it was in effect within 60 days before mailing;

ii. For advertisements in electronic form it was in effect within 30 days before the advertisement is sent to a consumer's email address, or in the case of an advertisement made on an Internet Web site, when viewed by the public; or

iii. For printed advertisements made available to the general public, including ones contained in a catalog, magazine, or other generally available publication, it was in effect within 30 days before printing.

24(f)(3) Disclosure of Payments

1. *Amounts and time periods of payments.* Section 1026.24(f)(3)(i) requires disclosure of the amounts and time periods of all payments that will apply over the term of the loan. This section may require disclosure of several payment amounts, including any balloon payment. For example, if an advertisement for credit secured by a dwelling offers $300,000 of credit with a 30-year loan term for a payment of $600 per month for the first six months, increasing to $1,500 per month after month six, followed by a balloon payment of $30,000 at the end of the loan term, the advertisement must disclose the amount and time periods of each of the two monthly payment streams, as well as the amount and timing of the balloon payment, with equal prominence and in close proximity to each other. However, if the final scheduled payment of a fully amortizing loan is not greater than two times the amount of any other regularly scheduled payment, the final payment need not be disclosed.

2. *Application to variable-rate transactions—disclosure of payments.* In advertisements for variable-rate transactions, if the payment that applies at consummation is not based on the index and margin that will be used to make subsequent payment adjustments over the term of the loan, the requirements of § 1026.24(f)(3)(i) apply.

24(g) Alternative Disclosures—Television or Radio Advertisements

1. *Multi-purpose telephone number.* When an advertised telephone number provides a recording, disclosures should be provided early in the sequence to ensure that the consumer receives the required disclosures. For example, in providing several options—such as providing directions to the advertiser's place of business—the option allowing the consumer to request disclosures should be provided early in the telephone message to ensure that the option to request disclosures is not obscured by other information.

2. *Statement accompanying telephone number.* Language must accompany a telephone number indicating that disclosures are available by calling the telephone number, such as ''call 1–(800) 000–0000 for details about credit costs and terms.''

24(i) Prohibited Acts or Practices in Advertisements for Credit Secured by a Dwelling

1. *Comparisons in advertisements.* The requirements of § 1026.24(i)(2) apply to all advertisements for credit secured by a dwelling, including radio and television advertisements. A comparison includes a claim about the amount a consumer may save under the advertised product. For example, a statement such as ''save $300 per month on a $300,000 loan'' constitutes an implied comparison between the advertised product's payment and a consumer's current payment.

2. *Misrepresentations about government endorsement.* A statement that the Federal Community Reinvestment Act entitles the consumer to refinance his or her mortgage at the low rate offered in the advertisement is prohibited because it conveys a misleading impression that the advertised product is endorsed or sponsored by the Federal government.

3. *Misleading claims of debt elimination.* The prohibition against misleading claims of debt elimination or waiver or forgiveness does not apply to legitimate statements that the advertised product may reduce debt payments, consolidate debts, or shorten the term of the debt. Examples of misleading claims of debt elimination or waiver or forgiveness of loan terms with, or obligations to, another creditor of debt include: ''Wipe-Out Personal Debts!'', ''New DEBT–FREE Payment'', ''Set yourself free; get out of debt today'', ''Refinance today and wipe your debt clean!'', ''Get yourself out of debt * * * Forever!'', and ''Pre-payment Penalty Waiver.''

Subpart D—Miscellaneous

Section 1026.25—Record Retention

25(a) General Rule

1. *Evidence of required actions.* The creditor must retain evidence that it performed the required actions as well as made the required disclosures. This includes, for example, evidence that the creditor properly handled adverse credit reports in connection with amounts subject to a billing dispute under § 1026.13, and properly handled the refunding of credit balances under §§ 1026.11 and 1026.21.

2. *Methods of retaining evidence.* Adequate evidence of compliance does not necessarily mean actual paper copies of disclosure statements or other business records. The evidence may be retained on microfilm, microfiche, or by any other method that reproduces records accurately (including computer programs). The creditor need retain only enough information to reconstruct the required disclosures or other records. Thus, for example, the creditor need not retain each open-end periodic statement, so long as the specific information on each statement can be retrieved.

3. *Certain variable-rate transactions.* In variable-rate transactions that are subject to the disclosure requirements of § 1026.19(b), written procedures for compliance with those requirements as well as a sample disclosure form for each loan program represent adequate evidence of compliance. (See comment 25(a)–2 pertaining to permissible methods of retaining the required disclosures.)

4. *Home equity plans.* In home equity plans that are subject to the requirements of § 1026.40, written procedures for compliance with those requirements as well as a sample disclosure form and contract for each home equity program represent adequate evidence of compliance. (See comment 25(a)–2 pertaining to permissible methods of retaining the required disclosures.)

5. *Prohibited payments to loan originators.* For each transaction subject to the loan originator compensation provisions in § 1026.36(d)(1), a creditor should maintain records of the compensation it provided to the loan originator for the transaction as well as the compensation agreement in effect on the date the interest rate was set for the transaction. See § 1026.35(a) and comment 35(a)(2)(iii)–3 for additional guidance on when a transaction's rate is set. For example, where a loan originator is a mortgage broker, a disclosure of compensation or other broker agreement required by applicable state law that complies with § 1026.25 would be presumed to be a record of the amount actually paid to the loan originator in connection with the transaction.

Section 1026.26—Use of Annual Percentage Rate in Oral Disclosures

1. *Application of rules.* The restrictions of § 1026.26 apply only if the creditor chooses to respond orally to the consumer's request for credit cost information. Nothing in the regulation requires the creditor to supply rate information orally. If the creditor volunteers information (including rate information) through oral solicitations directed generally to prospective customers, as through a telephone solicitation, those communications may be advertisements subject to the rules in §§ 1026.16 and 1026.24.

26(a) Open-End Credit

1. *Information that may be given.* The creditor may state periodic rates in addition to the required annual percentage rate, but it need not do so. If the annual percentage rate is unknown because transaction charges, loan fees, or similar finance charges may be imposed, the creditor must give the corresponding annual percentage rate (that is, the periodic rate multiplied by the number of periods in a year, as described in §§ 1026.6(a)(1)(ii) and (b)(4)(i)(A) and 1026.7(a)(4) and (b)(4)). In such cases, the creditor may, but need not, also give the consumer information about other finance charges and other charges.

26(b) Closed-End Credit

1. *Information that may be given.* The creditor may state other annual or periodic rates that are applied to an unpaid balance, along with the required annual percentage rate. This rule permits disclosure of a simple interest rate, for example, but not an add-on, discount, or similar rate. If the creditor cannot give a precise annual percentage rate in its oral response because of variables in the transaction, it must give the annual percentage rate for a comparable sample transaction; in this case, other cost information may, but need not, be given. For example, the creditor may be unable to state a precise annual percentage rate for a mortgage loan without knowing the exact amount to be financed, the amount of loan fees or mortgage insurance premiums, or similar factors. In this situation, the creditor should state an annual percentage rate for a sample transaction; it may also provide information about the consumer's specific case, such as the contract interest rate, points, other finance charges, and other charges.

Section 1026.27—Language of Disclosures

1. *Subsequent disclosures.* If a creditor provides account-opening disclosures in a language other than English, subsequent disclosures need not be in that other language. For example, if the creditor gave Spanish-language account-opening disclosures, periodic statements and change-in-terms notices may be made in English.

Section 1026.28—Effect on State Laws

28(a) Inconsistent Disclosure Requirements

1. *General.* There are 3 sets of preemption criteria: 1 applies to the general disclosure and advertising rules of the regulation, and 2 apply to the credit billing provisions. Section 1026.28 also provides for Bureau determinations of preemption.

2. *Rules for chapters 1, 2, and 3.* The standard for judging whether state laws that cover the types of requirements in chapters 1 (General provisions), 2 (Credit transactions), and 3 (Credit advertising) of the Act are inconsistent and therefore preempted, is contradiction of the Federal law. Examples of laws that would be preempted include:

i. A state law that requires use of the term *finance charge,* but defines the term to include fees that the Federal law excludes, or to exclude fees the Federal law includes.

ii. A state law that requires a label such as *nominal annual interest rate* to be used for what the Federal law calls the *annual percentage rate.*

3. *Laws not contradictory to chapters 1, 2, and 3.* i. Generally, state law requirements that call for the disclosure of items of information not covered by the Federal law, or that require more detailed disclosures, do not contradict the Federal requirements. Examples of laws that are not preempted include:

A. A state law that requires disclosure of the minimum periodic payment for open-end credit, even though not required by § 1026.7.

B. A state law that requires contracts to contain warnings such as: ''Read this contract before you sign. Do not sign if any spaces are left blank. You are entitled to a copy of this contract.''

ii. Similarly, a state law that requires itemization of the amount financed does not automatically contradict the permissive itemization under § 1026.18(c). However, a state law requirement that the itemization appear with the disclosure of the amount financed in the segregated closed-end credit disclosures is inconsistent, and this location requirement would be preempted.

4. *Creditor's options.* Before the Bureau makes a determination about a specific state law, the creditor has certain options.

i. Since the prohibition against giving the state disclosures does not apply until the Bureau makes its determination, the creditor may choose to give state disclosures until the Bureau formally determines that the state law is inconsistent. (The Bureau will provide sufficient time for creditors to revise forms and procedures as necessary to conform to its determinations.) Under this first approach, as in all cases, the Federal disclosures must be clear and conspicuous, and the closed-end disclosures must be properly segregated in accordance with § 1026.17(a)(1). This ability to give state disclosures relieves any uncertainty that the creditor might have prior to Bureau determinations of inconsistency.

ii. As a second option, the creditor may apply the preemption standards to a state law, conclude that it is inconsistent, and choose not to give the state-required disclosures. However, nothing in § 1026.28(a) provides the creditor with immunity for violations of state law if the creditor chooses *not* to make state disclosures and the Bureau later determines that the state law is not preempted.

5. *Rules for correction of billing errors and regulation of credit reports.* The preemption criteria for the fair credit billing provisions set forth in § 1026.28 have two parts. With respect to the rules on correction of billing errors and regulation of credit reports (which are in § 1026.13), § 1026.28(a)(2)(i) provides that a state law is inconsistent and preempted if its requirements are different from the Federal law. An exception is made, however, for state laws that allow the consumer to inquire about an account and require the creditor to respond to such inquiries beyond the time limits in the Federal law. Such a state law is not preempted with respect to the extra time period. For example, § 1026.13 requires the consumer to submit a written notice of billing error within 60 days after transmittal of the periodic statement showing the alleged error. If a state law allows the consumer 90 days to submit a notice, the state law remains in effect to provide the extra 30 days. Any state law disclosures concerning this extended state time limit must reflect the qualifications and conform to the format specified in § 1026.28(a)(2)(i). Examples of laws that would be preempted include:

i. A state law that has a narrower or broader definition of *billing error.*

ii. A state law that requires the creditor to take different steps to resolve errors.

iii. A state law that provides different timing rules for error resolution (subject to the exception discussed above).

6. *Rules for other fair credit billing provisions.* The second part of the criteria for fair credit billing relates to the other rules implementing chapter 4 of the Act (addressed in §§ 1026.4(c)(8), 1026.5(b)(2)(ii), 1026.6(a)(5) and (b)(5)(iii), 1026.7(a)(9) and (b)(9), 1026.9(a), 1026.10, 1026.11, 1026.12(c) through (f), 1026.13, and 1026.21). Section 1026.28(a)(2)(ii) provides that the test of inconsistency is whether the creditor can comply with state law without violating Federal law. For example:

i. A state law that allows the card issuer to offset the consumer's credit-card indebtedness against funds held by the card issuer would be preempted, since § 1026.12(d) prohibits such action.

ii. A state law that requires periodic statements to be sent more than 14 days before the end of a free-ride period would not be preempted.

iii. A state law that permits consumers to assert claims and defenses against the card issuer without regard to the $50 and 100-mile limitations of § 1026.12(c)(3)(ii) would not be preempted.

iv. In paragraphs ii. and iii. of this comment, compliance with state law would involve no violation of the Federal law.

7. *Who may receive a chapter 4 determination.* Only states (through their authorized officials) may request and receive determinations on inconsistency with respect to the fair credit billing provisions.

8. *Preemption determination—Arizona.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1983, the Board of Governors determined that the following provisions in the state law of Arizona are preempted by the Federal law:

i. Section 44–287 B.5—Disclosure of final cash price balance. This provision is

preempted in those transactions in which the amount of the final cash price balance is the same as the Federal amount financed, since in such transactions the state law requires the use of a term different from the Federal term to represent the same amount.

ii. Section 44–287 B.6—Disclosure of finance charge. This provision is preempted in those transactions in which the amount of the finance charge is different from the amount of the Federal finance charge, since in such transactions the state law requires the use of the same term as the Federal law to represent a different amount.

iii. Section 44–287 B.7—Disclosure of the time balance. The time balance disclosure provision is preempted in those transactions in which the amount is the same as the amount of the Federal total of payments, since in such transactions the state law requires the use of a term different from the Federal term to represent the same amount.

9. *Preemption determination—Florida.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1983, the Board of Governors determined that the following provisions in the state law of Florida are preempted by the Federal law:

i. Sections 520.07(2)(f) and 520.34(2)(f)—Disclosure of amount financed. This disclosure is preempted in those transactions in which the amount is different from the Federal amount financed, since in such transactions the state law requires the use of the same term as the Federal law to represent a different amount.

ii. Sections 520.07(2)(g), 520.34(2)(g), and 520.35(2)(d)—Disclosure of finance charge and a description of its components. The finance charge disclosure is preempted in those transactions in which the amount of the finance charge is different from the Federal amount, since in such transactions the state law requires the use of the same term as the Federal law to represent a different amount. The requirement to describe or itemize the components of the finance charge, which is also included in these provisions, is not preempted.

iii. Sections 520.07(2)(h) and 520.34(2)(h)—Disclosure of total of payments. The total of payments disclosure is preempted in those transactions in which the amount differs from the amount of the Federal total of payments, since in such transactions the state law requires the use of the same term as the Federal law to represent a different amount than the Federal law.

iv. Sections 520.07(2)(i) and 520.34(2)(i)—Disclosure of deferred payment price. This disclosure is preempted in those transactions in which the amount is the same as the Federal total sale price, since in such transactions the state law requires the use of a different term than the Federal law to represent the same amount as the Federal law.

10. *Preemption determination—Missouri.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1983, the Board of Governors determined that the following provisions in the state law of Missouri are preempted by the Federal law:

i. Sections 365.070–6(9) and 408.260–5(6)—Disclosure of principal balance. This disclosure is preempted in those transactions in which the amount of the principal balance is the same as the Federal amount financed, since in such transactions the state law requires the use of a term different from the Federal term to represent the same amount.

ii. Sections 365.070–6(10) and 408.260–5(7)—Disclosure of time price differential and time charge, respectively. These disclosures are preempted in those transactions in which the amount is the same as the Federal finance charge, since in such transactions the state law requires the use of a term different from the Federal law to represent the same amount.

iii. Sections 365.070–2 and 408.260–2—Use of the terms *time price differential* and *time charge* in certain notices to the buyer. In those transactions in which the state disclosure of the time price differential or time charge is preempted, the use of the terms in this notice also is preempted. The notice itself is not preempted.

iv. Sections 365.070–6(11) and 408.260–5(8)—Disclosure of time balance. The time balance disclosure is preempted in those transactions in which the amount is the same as the amount of the Federal total of payments, since in such transactions the state law requires the use of a different term than the Federal law to represent the same amount.

v. Sections 365.070–6(12) and 408.260–5(9)—Disclosure of time sale price. This disclosure is preempted in those transactions in which the amount is the same as the Federal total sale price, since in such transactions the state law requires the use of a different term from the Federal law to represent the same amount.

11. *Preemption determination—Mississippi.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1984, the Board of Governors determined that the following provision in the state law of Mississippi is preempted by the Federal law:

i. Section 63–19–31(2)(g)—Disclosure of finance charge. This disclosure is preempted in those cases in which the term *finance charge* would be used under state law to describe a different amount than the finance charge disclosed under Federal law.

12. *Preemption determination—South Carolina.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1984, the Board of Governors determined that the following provision in the state law of South Carolina is preempted by the Federal law.

i. Section 37–10–102(c)—Disclosure of due-on-sale clause. This provision is preempted, but only to the extent that the creditor is required to include the disclosure with the segregated Federal disclosures. If the creditor may comply with the state law by placing the due-on-sale notice apart from the Federal disclosures, the state law is not preempted.

13. *Preemption determination—Arizona.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination.

i. Effective October 1, 1986, the Board of Governors determined that the following provision in the state law of Arizona is preempted by the Federal law:

A. Section 6–621A.2—Use of the term *the total sum of* $____ in certain notices provided to borrowers. This term describes the same item that is disclosed under Federal law as the *total of payments.* Since the state law requires the use of a different term than Federal law to describe the same item, the state-required term is preempted. The notice itself is not preempted.

ii. Note: The state disclosure notice that incorporated the above preempted term was amended on May 4, 1987, to provide that disclosures must now be made pursuant to the Federal disclosure provisions.

14. *Preemption determination—Indiana.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1988, the Board of Governors determined that the following provision in the state law of Indiana is preempted by the Federal law:

i. Section 23–2–5–8—Inclusion of the loan broker's fees and charges in the calculation of, among other items, the finance charge and annual percentage rate disclosed to potential borrowers. This disclosure is inconsistent with section 106(a) and § 1026.4(a) of the Federal statute and regulation, respectively, and is preempted in those instances where the use of the same term would disclose a different amount than that required to be disclosed under Federal law.

15. *Preemption determination—Wisconsin.* The Bureau recognizes state law preemption determinations made by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1991, the Board of Governors determined that the following provisions in the state law of Wisconsin are preempted by the Federal law:

i. Section 422.308(1)—the disclosure of the annual percentage rate in cases where the amount of the annual percentage rate disclosed to consumers under the state law differs from the amount that would be disclosed under Federal law, since in those cases the state law requires the use of the same term as the Federal law to represent a different amount than the Federal law.

ii. Section 766.565(5)—the provision permitting a creditor to include in an open-end home equity agreement authorization to declare the account balance due and payable

upon receiving notice of termination from a non-obligor spouse, since such provision is inconsistent with the purpose of the Federal law.

28(b) Equivalent Disclosure Requirements

1. *General.* A state disclosure may be substituted for a Federal disclosure only *after* the Bureau has made a finding of substantial similarity. Thus, the creditor may not unilaterally choose to make a state disclosure in place of a Federal disclosure, even if it believes that the state disclosure is substantially similar. Since the rule stated in § 1026.28(b) does not extend to any requirement relating to the finance charge or annual percentage rate, no state provision on computation, description, or disclosure of these terms may be substituted for the Federal provision.

28(d) Special Rule for Credit and Charge Cards

1. *General.* The standard that applies to preemption of state laws as they affect transactions of the type subject to §§ 1026.60 and 1026.9(e) differs from the preemption standards generally applicable under the Truth in Lending Act. The Fair Credit and Charge Card Disclosure Act fully preempts state laws relating to the disclosure of credit information in consumer credit or charge card applications or solicitations. (For purposes of this section, a single credit or charge card application or solicitation that may be used to open either an account for consumer purposes or an account for business purposes is deemed to be a ''consumer credit or charge card application or solicitation.'') For example, a state law requiring disclosure of credit terms in direct mail solicitations for consumer credit card accounts is preempted. A state law requiring disclosures in telephone applications for consumer credit card accounts also is preempted, even if it applies to applications initiated by the consumer rather than the issuer, because the state law relates to the disclosure of credit information in applications or solicitations within the general field of preemption, that is, consumer credit and charge cards.

2. *Limitations on field of preemption.* Preemption under the Fair Credit and Charge Card Disclosure Act does not extend to state laws applying to types of credit other than open-end consumer credit and charge card accounts. Thus, for example, a state law is not preempted as it applies to disclosures in credit and charge card applications and solicitations solely for business-purpose accounts. On the other hand, state credit disclosure laws will not apply to a single application or solicitation to open either an account for consumer purposes or an account for business purposes. Such ''dual purpose'' applications and solicitations are treated as ''consumer credit or charge card applications or solicitations'' under this section and state credit disclosure laws applicable to them are preempted. Preemption under this statute does not extend to state laws applicable to home equity plans; preemption determinations in this area are based on the Home Equity Loan Consumer Protection Act, as implemented in § 1026.40 of the regulation.

3. *Laws not preempted.* State laws relating to disclosures concerning credit and charge cards other than in applications, solicitations, or renewal notices are not preempted under § 1026.28(d). In addition, state laws regulating the terms of credit and charge card accounts are not preempted, nor are laws preempted that regulate the form or content of information unrelated to the information required to be disclosed under §§ 1026.60 and 1026.9(e). Finally, state laws concerning the enforcement of the requirements of §§ 1026.60 and 1026.9(e) and state laws prohibiting unfair or deceptive acts or practices concerning credit and charge card applications, solicitations and renewals are not preempted. Examples of laws that are not preempted include:

i. A state law that requires card issuers to offer a grace period or that prohibits certain fees in credit and charge card transactions.

ii. A state retail installment sales law or a state plain language law, except to the extent that it regulates the disclosure of credit information in applications, solicitations and renewals of accounts of the type subject to §§ 1026.60 and 1026.9(e).

iii. A state law requiring notice of a consumer's rights under antidiscrimination or similar laws or a state law requiring notice about credit information available from state authorities.

Section 1026.29—State Exemptions

29(a) General Rule

1. *Classes eligible.* The state determines the classes of transactions for which it will request an exemption, and makes its application for those classes. Classes might be, for example, all open-end credit transactions, all open-end and closed-end transactions, or all transactions in which the creditor is a bank.

2. *Substantial similarity.* The ''substantially similar'' standard requires that state statutory or regulatory provisions and state interpretations of those provisions be generally the same as the Federal Act and Regulation Z. This includes the requirement that state provisions for reimbursement to consumers for overcharges be at least equivalent to those required in section 108 of the Act. A state will be eligible for an exemption even if its law covers classes of transactions not covered by the Federal law. For example, if a state's law covers agricultural credit, this will not prevent the Bureau from granting an exemption for consumer credit, even though agricultural credit is not covered by the Federal law.

3. *Adequate enforcement.* The standard requiring adequate provision for enforcement generally means that appropriate state officials must be authorized to enforce the state law through procedures and sanctions comparable to those available to Federal enforcement agencies. Furthermore, state law must make adequate provision for enforcement of the reimbursement rules.

4. *Exemptions granted.* The Bureau recognizes exemptions granted by the Board of Governors of the Federal Reserve System prior to July 21, 2011, until and unless the Bureau makes and publishes any contrary determination. Effective October 1, 1982, the Board of Governors granted the following exemptions from portions of the revised Truth in Lending Act:

i. *Maine.* Credit or lease transactions subject to the Maine Consumer Credit Code and its implementing regulations are exempt from chapters 2, 4 and 5 of the Federal Act. (The exemption does not apply to transactions in which a federally chartered institution is a creditor or lessor.)

ii. *Connecticut.* Credit transactions subject to the Connecticut Truth in Lending Act are exempt from chapters 2 and 4 of the Federal Act. (The exemption does not apply to transactions in which a federally chartered institution is a creditor.)

iii. *Massachusetts.* Credit transactions subject to the Massachusetts Truth in Lending Act are exempt from chapters 2 and 4 of the Federal Act. (The exemption does not apply to transactions in which a federally chartered institution is a creditor.)

iv. *Oklahoma.* Credit or lease transactions subject to the Oklahoma Consumer Credit Code are exempt from chapters 2 and 5 of the Federal Act. (The exemption does not apply to sections 132 through 135 of the Federal Act, nor does it apply to transactions in which a federally chartered institution is a creditor or lessor.)

v. *Wyoming.* Credit transactions subject to the Wyoming Consumer Credit Code are exempt from chapter 2 of the Federal Act. (The exemption does not apply to transactions in which a federally chartered institution is a creditor.)

29(b) Civil Liability

1. *Not eligible for exemption.* The provision that an exemption may not extend to sections 130 and 131 of the Act assures that consumers retain access to both Federal and state courts in seeking damages or civil penalties for violations, while creditors retain the defenses specified in those sections.

Section 1026.30—Limitation on Rates

1. *Scope of coverage.* i. The requirement of this section applies to consumer credit obligations secured by a dwelling (as dwelling is defined in § 1026.2(a)(19)) in which the annual percentage rate may increase after consummation (or during the term of the plan, in the case of open-end credit) as a result of an increase in the interest rate component of the finance charge—whether those increases are tied to an index or formula or are within a creditor's discretion. The section applies to credit sales as well as loans. Examples of credit obligations subject to this section include:

A. Dwelling-secured credit obligations that require variable-rate disclosures under the regulation because the interest rate may increase during the term of the obligation.

B. Dwelling-secured open-end credit plans entered into before November 7, 1989 (the effective date of the home equity rules) that are not considered variable-rate obligations for purposes of disclosure under the regulation but where the creditor reserves the contractual right to increase the interest rate—periodic rate and corresponding annual percentage rate—during the term of the plan.

ii. In contrast, credit obligations in which there is no contractual right to increase the interest rate during the term of the obligation

are not subject to this section. Examples include:

A. ''Shared-equity'' or ''shared-appreciation'' mortgage loans that have a fixed rate of interest and a shared-appreciation feature based on the consumer's equity in the mortgaged property. (The appreciation share is payable in a lump sum at a specified time.)

B. Dwelling-secured fixed-rate closed-end balloon-payment mortgage loans and dwelling-secured fixed-rate open-end plans with a stated term that the creditor may renew at maturity. (Contrast with the renewable balloon-payment mortgage instrument described in comment 17(c)(1)–11.)

C. Dwelling-secured fixed-rate closed-end multiple advance transactions in which each advance is disclosed as a separate transaction.

D. ''Price level adjusted mortgages'' or other indexed mortgages that have a fixed rate of interest but provide for periodic adjustments to payments and the loan balance to reflect changes in an index measuring prices or inflation.

iii. The requirement of this section does not apply to credit obligations entered into prior to December 9, 1987. Consequently, new advances under open-end credit plans existing prior to December 9, 1987, are not subject to this section.

2. *Refinanced obligations.* On or after December 9, 1987, when a credit obligation is refinanced, as defined in § 1026.20(a), the new obligation is subject to this section if it is dwelling-secured and allows for increases in the interest rate.

3. *Assumptions.* On or after December 9, 1987, when a credit obligation is assumed, as defined in § 1026.20(b), the obligation becomes subject to this section if it is dwelling-secured and allows for increases in the interest rate.

4. *Modifications of obligations.* The modification of an obligation, regardless of when the obligation was entered into, is generally not covered by this section. For example, increasing the credit limit on a dwelling-secured, open-end plan with a variable interest rate entered into before the effective date of the rule does not make the obligation subject to this section. If, however, a security interest in a dwelling is added on or after December 9, 1987, to a credit obligation that allows for interest rate increases, the obligation becomes subject to this section. Similarly, if a variable interest rate feature is added to a dwelling-secured credit obligation, the obligation becomes subject to this section.

5. *Land trusts.* In some states, a land trust is used in residential real estate transactions. (See discussion in comment 3(a)–8.) If a consumer-purpose loan that allows for interest rate increases is secured by an assignment of a beneficial interest in a land trust that holds title to a consumer's dwelling, that loan is subject to this section.

6. *Relationship to other sections.* Unless otherwise provided for in the commentary to this section, other provisions of the regulation such as definitions, exemptions, rules and interpretations also apply to this section where appropriate. To illustrate:

i. An adjustable interest rate business-purpose loan is not subject to this section even if the loan is secured by a dwelling because such credit extensions are not subject to the regulation. (See generally § 1026.3(a).)

ii. Creditors subject to this section are only those that fall within the definition of a creditor in § 1026.2(a)(17).

7. *Consumer credit contract.* Creditors are required to specify a lifetime maximum interest rate in their credit contracts—the instrument that creates personal liability and generally contains the terms and conditions of the agreement (for example, a promissory note or home-equity line of credit agreement). In some states, the signing of a commitment letter may create a binding obligation, for example, constituting *consummation* as defined in § 1026.2(a)(13). The maximum interest rate must be included in the credit contract, but a creditor may include the rate ceiling in the commitment instrument as well.

8. *Manner of stating the maximum interest rate.* The maximum interest rate must be stated in the credit contract either as a specific amount or in any other manner that would allow the consumer to easily ascertain, at the time of entering into the obligation, what the rate ceiling will be over the term of the obligation.

i. For example, the following statements would be sufficiently specific:

A. The maximum interest rate will not exceed X%.

B. The interest rate will never be higher than X percentage points above the initial rate of Y%.

C. The interest rate will not exceed X%, or X percentage points above [a rate to be determined at some future point in time], whichever is less.

D. The maximum interest rate will not exceed X%, or the state usury ceiling, whichever is less.

ii. The following statements would not comply with this section:

A. The interest rate will never be higher than X percentage points over the prevailing market rate.

B. The interest rate will never be higher than X percentage points above [a rate to be determined at some future point in time].

C. The interest rate will not exceed the state usury ceiling which is currently X%.

iii. A creditor may state the maximum rate in terms of a maximum annual percentage rate that may be imposed. Under an open-end credit plan, this normally would be the corresponding annual percentage rate. (*See generally* § 1026.6(a)(1)(ii) and (b)(4)(i)(A).)

9. *Multiple interest rate ceilings.* Creditors are not prohibited from setting multiple interest rate ceilings. For example, on loans with multiple variable-rate features, creditors may establish a maximum interest rate for each feature. To illustrate, in a variable-rate loan that has an option to convert to a fixed rate, a creditor may set one maximum interest rate for the initially imposed index-based variable-rate feature and another for the conversion option. Of course, a creditor may establish one maximum interest rate applicable to all features.

10. *Interest rate charged after default.* State law may allow an interest rate after default higher than the contract rate in effect at the time of default; however, the interest rate after default is subject to a maximum interest rate set forth in a credit obligation that is otherwise subject to this section. This rule applies only in situations in which a post-default agreement is still considered part of the original obligation.

11. *Increasing the maximum interest rate—general rule.* Generally, a creditor may not increase the maximum interest rate originally set on a credit obligation subject to this section unless the consumer and the creditor enter into a new obligation. Therefore, under an open-end plan, a creditor may not increase the rate ceiling imposed merely because there is an increase in the credit limit. If an open-end plan is closed and another opened, a new rate ceiling may be imposed. Furthermore, where an open-end plan has a fixed maturity and a creditor renews the plan at maturity, or enters into a closed-end credit transaction, a new maximum interest rate may be set at that time. If the open-end plan provides for a repayment phase, the maximum interest rate cannot be increased when the repayment phase begins unless the agreement provided for such an increase. For a closed-end credit transaction, a new maximum interest rate may be set only if the transaction is satisfied and replaced by a new obligation. (The exceptions in § 1026.20(a)(1)–(5) which limit what transactions are considered refinancings for purposes of disclosure do not apply with respect to increasing a rate ceiling that has been imposed; if a transaction is satisfied and replaced, the rate ceiling may be increased.)

12. *Increasing the maximum interest rate—assumption of an obligation.* If an obligation subject to this section is assumed by a new obligor and the original obligor is released from liability, the maximum interest rate set on the obligation may be increased as part of the assumption agreement. (This rule applies whether or not the transaction constitutes an assumption as defined in § 1026.20(b).)

Subpart E—Special Rules for Certain Home Mortgage Transactions

Section 1026.31—General Rules

31(c) Timing of Disclosure

1. *Furnishing disclosures.* Disclosures are considered furnished when received by the consumer.

31(c)(1) Disclosures for Certain Closed-End Home Mortgages

1. *Pre-consummation waiting period.* A creditor must furnish § 1026.32 disclosures at least three business days prior to consummation. Under § 1026.32, ''business day'' has the same meaning as the rescission rule in comment 2(a)(6)–2—all calendar days except Sundays and the Federal legal holidays listed in 5 U.S.C. 6103(a). However, while the disclosure rule under §§ 1026.15 and 1026.23 extends to midnight of the third business day, the rule under § 1026.32 does not. For example, under § 1026.32, if disclosures were provided on a Friday, consummation could occur any time on Tuesday, the third business day following receipt of the disclosures. If the timing of the rescission rule were to be used,

consummation could not occur until after midnight on Tuesday.

31(c)(1)(i) Change in Terms

1. *Redisclosure required.* Creditors must provide new disclosures when a change in terms makes disclosures previously provided under § 1026.32(c) inaccurate, including disclosures based on and labeled as an estimate. A change in terms may result from a formal written agreement or otherwise.

2. *Sale of optional products at consummation.* If the consumer finances the purchase of optional products such as credit insurance and as a result the monthly payment differs from what was previously disclosed under § 1026.32, redisclosure is required and a new three-day waiting period applies. (See comment 32(c)(3)–1 on when optional items may be included in the regular payment disclosure.)

31(c)(1)(ii) Telephone Disclosures

1. *Telephone disclosures.* Disclosures by telephone must be furnished at least three business days prior to consummation, calculated in accord with the timing rules under § 1026.31(c)(1).

31(c)(1)(iii) Consumer's Waiver of Waiting Period Before Consummation

1. *Modification or waiver.* A consumer may modify or waive the right to the three-day waiting period only after receiving the disclosures required by § 1026.32 and only if the circumstances meet the criteria for establishing a bona fide personal financial emergency under § 1026.23(e). Whether these criteria are met is determined by the facts surrounding individual situations. The imminent sale of the consumer's home at foreclosure during the three-day period is one example of a bona fide personal financial emergency. Each consumer entitled to the three-day waiting period must sign the handwritten statement for the waiver to be effective.

31(c)(2) Disclosures for Reverse Mortgages

1. *Business days.* For purposes of providing reverse mortgage disclosures, ''business day'' has the same meaning as in comment 31(c)(1)–1—all calendar days except Sundays and the Federal legal holidays listed in 5 U.S.C. 6103(a). This means if disclosures are provided on a Friday, consummation could occur any time on Tuesday, the third business day following receipt of the disclosures.

2. *Open-end plans.* Disclosures for open-end reverse mortgages must be provided at least three business days before the first transaction under the plan (*see* § 1026.5(b)(1)).

31(d) Basis of Disclosures and Use of Estimates

1. *Redisclosure.* Section 1026.31(d) allows the use of estimates when information necessary for an accurate disclosure is unknown to the creditor, provided that the disclosure is clearly identified as an estimate. For purposes of Subpart E, the rule in § 1026.31(c)(1)(i) requiring new disclosures when the creditor changes terms also applies to disclosures labeled as estimates.

31(d)(3) Per-Diem Interest

1. *Per-diem interest.* This paragraph applies to the disclosure of any numerical amount (such as the finance charge, annual percentage rate, or payment amount) that is affected by the amount of the per-diem interest charge that will be collected at consummation. If the amount of per-diem interest used in preparing the disclosures for consummation is based on the information known to the creditor at the time the disclosure document is prepared, the disclosures are considered accurate under this rule, and affected disclosures are also considered accurate, even if the disclosures were not labeled as estimates. (See comment 17(c)(2)(ii)–1 generally.)

Section 1026.32—Requirements for Certain Closed-End Home Mortgages

32(a) Coverage

Paragraph 32(a)(1)(i)

1. *Application date.* An application is deemed received when it reaches the creditor in any of the ways applications are normally transmitted. (See § 1026.19(a).) For example, if a borrower applies for a 10-year loan on September 30 and the creditor counteroffers with a 7-year loan on October 10, the application is deemed received in September and the creditor must measure the annual percentage rate against the appropriate Treasury security yield as of August 15. An application transmitted through an intermediary agent or broker is received when it reaches the creditor, rather than when it reaches the agent or broker. (See comment 19(b)–3 to determine whether a transaction involves an intermediary agent or broker.)

2. *When fifteenth is not a business day.* If the 15th day of the month immediately preceding the application date is not a business day, the creditor must use the yield as of the business day immediately preceding the 15th.

3. *Calculating annual percentage rates for variable-rate loans and discount loans.* Creditors must use the rules set out in the commentary to § 1026.17(c)(1) in calculating the annual percentage rate for variable-rate loans (assume the rate in effect at the time of disclosure remains unchanged) and for discount, premium, and stepped-rate transactions (which must reflect composite annual percentage rates).

4. *Treasury securities.* To determine the yield on comparable Treasury securities for the annual percentage rate test, creditors may use the yield on actively traded issues adjusted to constant maturities published in the Federal Reserve Board's ''Selected Interest Rates'' (statistical release H–15). Creditors must use the yield corresponding to the constant maturity that is closest to the loan's maturity. If the loan's maturity is exactly halfway between security maturities, the annual percentage rate on the loan should be compared with the yield for Treasury securities having the lower yield. In determining the loan's maturity, creditors may rely on the rules in § 1026.17(c)(4) regarding irregular first payment periods. For example:

i. If the H–15 contains a yield for Treasury securities with constant maturities of 7 years and 10 years and no maturity in between, the annual percentage rate for an 8-year mortgage loan is compared with the yield of securities having a 7-year maturity, and the annual percentage rate for a 9-year mortgage loan is compared with the yield of securities having a 10-year maturity.

ii. If a mortgage loan has a term of 15 years, and the H–15 contains a yield of 5.21 percent for constant maturities of 10 years, and also contains a yield of 6.33 percent for constant maturities of 20 years, then the creditor compares the annual percentage rate for a 15-year mortgage loan with the yield for constant maturities of 10 years.

iii. If a mortgage loan has a term of 30 years, and the H–15 does not contain a yield for 30-year constant maturities, but contains a yield for 20-year constant maturities, and an average yield for securities with remaining terms to maturity of 25 years and over, then the annual percentage rate on the loan is compared with the yield for 20-year constant maturities.

Paragraph 32(a)(1)(ii)

1. *Total loan amount.* For purposes of the ''points and fees'' test, the total loan amount is calculated by taking the amount financed, as determined according to § 1026.18(b), and deducting any cost listed in § 1026.32(b)(1)(iii) and § 1026.32(b)(1)(iv) that is both included as points and fees under § 1026.32(b)(1) and financed by the creditor. Some examples follow, each using a $10,000 amount borrowed, a $300 appraisal fee, and $400 in points. A $500 premium for optional credit life insurance is used in one example.

i. If the consumer finances a $300 fee for a creditor-conducted appraisal and pays $400 in points at closing, the amount financed under § 1026.18(b) is $9,900 ($10,000 plus the $300 appraisal fee that is paid to and financed by the creditor, less $400 in prepaid finance charges). The $300 appraisal fee paid to the creditor is added to other points and fees under § 1026.32(b)(1)(iii). It is deducted from the amount financed ($9,900) to derive a total loan amount of $9,600.

ii. If the consumer pays the $300 fee for the creditor-conducted appraisal in cash at closing, the $300 is included in the points and fees calculation because it is paid to the creditor. However, because the $300 is not financed by the creditor, the fee is not part of the amount financed under § 1026.18(b). In this case, the amount financed is the same as the total loan amount: $9,600 ($10,000, less $400 in prepaid finance charges).

iii. If the consumer finances a $300 fee for an appraisal conducted by someone other than the creditor or an affiliate, the $300 fee is not included with other points and fees under § 1026.32(b)(1)(iii). The amount financed under § 1026.18(b) is $9,900 ($10,000 plus the $300 fee for an independently-conducted appraisal that is financed by the creditor, less the $400 paid in cash and deducted as prepaid finance charges).

iv. If the consumer finances a $300 fee for a creditor-conducted appraisal and a $500 single premium for optional credit life insurance, and pays $400 in points at closing, the amount financed under § 1026.18(b) is $10,400 ($10,000, plus the $300 appraisal fee that is paid to and financed by the creditor,

plus the $500 insurance premium that is financed by the creditor, less $400 in prepaid finance charges). The $300 appraisal fee paid to the creditor is added to other points and fees under § 1026.32(b)(1)(iii), and the $500 insurance premium is added under 1026.32(b)(1)(iv). The $300 and $500 costs are deducted from the amount financed ($10,400) to derive a total loan amount of $9,600.

2. *Annual adjustment of $400 amount.* A mortgage loan is covered by § 1026.32 if the total points and fees payable by the consumer at or before loan consummation exceed the greater of $400 or 8 percent of the total loan amount. The $400 figure is adjusted annually on January 1 by the annual percentage change in the CPI that was in effect on the preceding June 1. The Bureau will publish adjustments after the June figures become available each year. The adjustment for the upcoming year will be included in any proposed commentary published in the fall, and incorporated into the commentary the following spring. The adjusted figures are:

i. For 1996, $412, reflecting a 3.00 percent increase in the CPI–U from June 1994 to June 1995, rounded to the nearest whole dollar.

ii. For 1997, $424, reflecting a 2.9 percent increase in the CPI–U from June 1995 to June 1996, rounded to the nearest whole dollar.

iii. For 1998, $435, reflecting a 2.5 percent increase in the CPI–U from June 1996 to June 1997, rounded to the nearest whole dollar.

iv. For 1999, $441, reflecting a 1.4 percent increase in the CPI–U from June 1997 to June 1998, rounded to the nearest whole dollar.

v. For 2000, $451, reflecting a 2.3 percent increase in the CPI–U from June 1998 to June 1999, rounded to the nearest whole dollar.

vi. For 2001, $465, reflecting a 3.1 percent increase in the CPI–U from June 1999 to June 2000, rounded to the nearest whole dollar.

vii. For 2002, $480, reflecting a 3.27 percent increase in the CPI–U from June 2000 to June 2001, rounded to the nearest whole dollar.

viii. For 2003, $488, reflecting a 1.64 percent increase in the CPI–U from June 2001 to June 2002, rounded to the nearest whole dollar.

ix. For 2004, $499, reflecting a 2.22 percent increase in the CPI–U from June 2002 to June 2003, rounded to the nearest whole dollar.

x. For 2005, $510, reflecting a 2.29 percent increase in the CPI–U from June 2003 to June 2004, rounded to the nearest whole dollar.

xi. For 2006, $528, reflecting a 3.51 percent increase in the CPI–U from June 2004 to June 2005, rounded to the nearest whole dollar.

xii. For 2007, $547, reflecting a 3.55 percent increase in the CPI–U from June 2005 to June 2006, rounded to the nearest whole dollar.

xiii. For 2008, $561, reflecting a 2.56 percent increase in the CPI–U from June 2006 to June 2007, rounded to the nearest whole dollar.

xiv. For 2009, $583, reflecting a 3.94 percent increase in the CPI–U from June 2007 to June 2008, rounded to the nearest whole dollar.

xv. For 2010, $579, reflecting a 0.74 percent decrease in the CPI–U from June 2008 to June 2009, rounded to the nearest whole dollar.

xvi. For 2011, $592, reflecting a 2.2 percent increase in the CPI–U from June 2009 to June 2010, rounded to the nearest whole dollar.

xvii. For 2012, $611, reflecting a 3.2 percent increase in the CPI–U from June 2010 to June 2011, rounded to the nearest whole dollar.

Paragraph 32(a)(2)

1. *Exemption limited.* Section 1026.32(a)(2) lists certain transactions exempt from the provisions of § 1026.32. Nevertheless, those transactions may be subject to the provisions of § 1026.35, including any provisions of § 1026.32 to which § 1026.35 refers. *See* § 1026.35(a).

32(b) Definitions

Paragraph 32(b)(1)(i)

1. *General.* Section 1026.32(b)(1)(i) includes in the total ''points and fees'' items defined as finance charges under §§ 1026.4(a) and 1026.(4)(b). Items excluded from the finance charge under other provisions of § 1026.4 are not included in the total ''points and fees'' under paragraph 32(b)(1)(i), but may be included in ''points and fees'' under paragraphs 32(b)(1)(ii) and 32(b)(1)(iii). Interest, including per-diem interest, is excluded from ''points and fees'' under § 1026.32(b)(1).

Paragraph 32(b)(1)(ii)

1. *Mortgage broker fees.* In determining ''points and fees'' for purposes of this section, compensation paid by a consumer to a mortgage broker (directly or through the creditor for delivery to the broker) is included in the calculation whether or not the amount is disclosed as a finance charge. Mortgage broker fees that are not paid by the consumer are not included. Mortgage broker fees already included in the calculation as finance charges under § 1026.32(b)(1)(i) need not be counted again under § 1026.32(b)(1)(ii).

2. *Example.* Section 1026.32(b)(1)(iii) defines ''points and fees'' to include all items listed in § 1026.4(c)(7), other than amounts held for the future payment of taxes. An item listed in § 1026.4(c)(7) may be excluded from the ''points and fees'' calculation, however, if the charge is reasonable, the creditor receives no direct or indirect compensation from the charge, and the charge is not paid to an affiliate of the creditor. For example, a reasonable fee paid by the consumer to an independent, third-party appraiser may be excluded from the ''points and fees'' calculation (assuming no compensation is paid to the creditor). A fee paid by the consumer for an appraisal performed by the creditor must be included in the calculation, even though the fee may be excluded from the finance charge if it is bona fide and reasonable in amount.

Paragraph 32(b)(1)(iv)

1. *Premium amount.* In determining ''points and fees'' for purposes of this section, premiums paid at or before closing for credit insurance are included whether they are paid in cash or financed, and whether the amount represents the entire premium for the coverage or an initial payment.

32(c) Disclosures

1. *Format.* The disclosures must be clear and conspicuous but need not be in any particular type size or typeface, nor presented in any particular manner. The disclosures need not be a part of the note or mortgage document.

32(c)(3) Regular Payment; Balloon Payment

1. *General.* The regular payment is the amount due from the borrower at regular intervals, such as monthly, bimonthly, quarterly, or annually. There must be at least two payments, and the payments must be in an amount and at such intervals that they fully amortize the amount owed. In disclosing the regular payment, creditors may rely on the rules set forth in § 1026.18(g); however, the amounts for voluntary items, such as credit life insurance, may be included in the regular payment disclosure only if the consumer has previously agreed to the amounts.

i. If the loan has more than one payment level, the regular payment for each level must be disclosed. For example:

A. In a 30-year graduated payment mortgage where there will be payments of $300 for the first 120 months, $400 for the next 120 months, and $500 for the last 120 months, each payment amount must be disclosed, along with the length of time that the payment will be in effect.

B. If interest and principal are paid at different times, the regular amount for each must be disclosed.

C. In discounted or premium variable-rate transactions where the creditor sets the initial interest rate and later rate adjustments are determined by an index or formula, the creditor must disclose both the initial payment based on the discount or premium and the payment that will be in effect thereafter. Additional explanatory material which does not detract from the required disclosures may accompany the disclosed amounts. For example, if a monthly payment is $250 for the first six months and then increases based on an index and margin, the creditor could use language such as the following: ''Your regular monthly payment will be $250 for six months. After six months your regular monthly payment will be based on an index and margin, which currently would make your payment $350. Your actual payment at that time may be higher or lower.''

32(c)(4) Variable-Rate

1. *Calculating ''worst-case'' payment example.* Creditors may rely on instructions in § 1026.19(b)(2)(viii)(B) for calculating the maximum possible increases in rates in the shortest possible timeframe, based on the face amount of the note (not the hypothetical loan amount of $10,000 required by § 1026.19(b)(2)(viii)(B)). The creditor must provide a maximum payment for each payment level, where a payment schedule provides for more than one payment level and more than one maximum payment amount is possible.

32(c)(5) Amount Borrowed

1. *Optional insurance; debt-cancellation coverage.* This disclosure is required when the amount borrowed in a refinancing

includes premiums or other charges for credit life, accident, health, or loss-of-income insurance, or debt-cancellation coverage (whether or not the debt-cancellation coverage is insurance under applicable law) that provides for cancellation of all or part of the consumer's liability in the event of the loss of life, health, or income or in the case of accident. See comment 4(d)(3)–2 and comment app. G and H–2 regarding terminology for debt-cancellation coverage.

32(d) Limitations

1. *Additional prohibitions applicable under other sections.* Section 1026.34 sets forth certain prohibitions in connection with mortgage credit subject to § 1026.32, in addition to the limitations in § 1026.32(d). Further, § 1026.35(b) prohibits certain practices in connection with transactions that meet the coverage test in § 1026.35(a). Because the coverage test in § 1026.35(a) is generally broader than the coverage test in § 1026.32(a), most § 1026.32 mortgage loans are also subject to the prohibitions set forth in § 1026.35(b) (such as escrows), in addition to the limitations in § 1026.32(d).

32(d)(1)(i) Balloon Payment

1. *Regular periodic payments.* The repayment schedule for a § 1026.32 mortgage loan with a term of less than five years must fully amortize the outstanding principal balance through ''regular periodic payments.'' A payment is a ''regular periodic payment'' if it is not more than twice the amount of other payments.

32(d)(2) Negative Amortization

1. *Negative amortization.* The prohibition against negative amortization in a mortgage covered by § 1026.32 does not preclude reasonable increases in the principal balance that result from events permitted by the legal obligation unrelated to the payment schedule. For example, when a consumer fails to obtain property insurance and the creditor purchases insurance, the creditor may add a reasonable premium to the consumer's principal balance, to the extent permitted by the legal obligation.

32(d)(4) Increased Interest Rate

1. *Variable-rate transactions.* The limitation on interest rate increases does not apply to rate increases resulting from changes in accordance with the legal obligation in a variable-rate transaction, even if the increase occurs after default by the consumer.

32(d)(5) Rebates

1. *Calculation of refunds.* The limitation applies only to refunds of precomputed (such as add-on) interest and not to any other charges that are considered finance charges under § 1026.4 (for example, points and fees paid at closing). The calculation of the refund of interest includes odd-days interest, whether paid at or after consummation.

32(d)(6) Prepayment Penalties

1. *State law.* For purposes of computing a refund of unearned interest, if using the actuarial method defined by applicable state law results in a refund that is greater than the refund calculated by using the method described in section 933(d) of the Housing and Community Development Act of 1992, creditors should use the state law definition in determining if a refund is a prepayment penalty.

32(d)(7) Prepayment Penalty Exception

Paragraph 32(d)(7)(iii)

1. *Calculating debt-to-income ratio.* ''Debt'' does not include amounts paid by the borrower in cash at closing or amounts from the loan proceeds that directly repay an existing debt. Creditors may consider combined debt-to-income ratios for transactions involving joint applicants. For more information about obligations and inflows that may constitute ''debt'' or ''income'' for purposes of § 1026.32(d)(7)(iii), see comment 34(a)(4)–6 and comment 34(a)(4)(iii)(C)–1.

2. *Verification.* Creditors shall verify income in the manner described in § 1026.34(a)(4)(ii) and the related comments. Creditors may verify debt with a credit report. However, a credit report may not reflect certain obligations undertaken just before or at consummation of the transaction and secured by the same dwelling that secures the transaction. Section 1026.34(a)(4) may require creditors to consider such obligations; see comment 34(a)(4)–3 and comment 34(a)(4)(ii)(C)–1.

3. *Interaction with Regulation B.* Section 1026.32(d)(7)(iii) does not require or permit the creditor to make inquiries or verifications that would be prohibited by Regulation B, 12 CFR part 1002.

Paragraph 32(d)(7)(iv)

1. *Payment change.* Section 1026.32(d)(7) sets forth the conditions under which a mortgage transaction subject to this section may have a prepayment penalty. Section 1026.32(d)(7)(iv) lists as a condition that the amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation. The following examples show whether prepayment penalties are permitted or prohibited under § 1026.32(d)(7)(iv) in particular circumstances.

i. Initial payments for a variable-rate transaction consummated on January 1, 2010 are $1,000 per month. Under the loan agreement, the first possible date that a payment in a different amount may be due is January 1, 2014. A prepayment penalty is permitted with this mortgage transaction provided that the other § 1026.32(d)(7) conditions are met, that is: provided that the prepayment penalty is permitted by other applicable law, the penalty expires on or before December 31, 2011, the penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or its affiliate, and at consummation the consumer's total monthly debts do not exceed 50 percent of the consumer's monthly gross income, as verified.

ii. Initial payments for a variable-rate transaction consummated on January 1, 2010 are $1,000 per month. Under the loan agreement, the first possible date that a payment in a different amount may be due is December 31, 2013. A prepayment penalty is prohibited with this mortgage transaction because the payment may change within the four-year period following consummation.

iii. Initial payments for a graduated-payment transaction consummated on January 1, 2010 are $1,000 per month. Under the loan agreement, the first possible date that a payment in a different amount may be due is January 1, 2014. A prepayment penalty is permitted with this mortgage transaction provided that the other § 1026.32(d)(7) conditions are met, that is: provided that the prepayment penalty is permitted by other applicable law, the penalty expires on or before December 31, 2011, the penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or its affiliate, and at consummation the consumer's total monthly debts do not exceed 50 percent of the consumer's monthly gross income, as verified.

iv. Initial payments for a step-rate transaction consummated on January 1, 2010 are $1,000 per month. Under the loan agreement, the first possible date that a payment in a different amount may be due is December 31, 2013. A prepayment penalty is prohibited with this mortgage transaction because the payment may change within the four-year period following consummation.

2. *Payment changes excluded.* Payment changes due to the following circumstances are not considered payment changes for purposes of this section:

i. A change in the amount of a periodic payment that is allocated to principal or interest that does not change the total amount of the periodic payment.

ii. The borrower's actual unanticipated late payment, delinquency, or default; and

iii. The borrower's voluntary payment of additional amounts (for example when a consumer chooses to make a payment of interest and principal on a loan that only requires the consumer to pay interest).

32(d)(8) Due-on-Demand Clause

Paragraph 32(d)(8)(ii)

1. *Failure to meet repayment terms.* A creditor may terminate a loan and accelerate the balance when the consumer fails to meet the repayment terms provided for in the agreement; a creditor may do so, however, only if the consumer actually fails to make payments. For example, a creditor may not terminate and accelerate if the consumer, in error, sends a payment to the wrong location, such as a branch rather than the main office of the creditor. If a consumer files for or is placed in bankruptcy, the creditor may terminate and accelerate under this provision if the consumer fails to meet the repayment terms of the agreement. Section 1026.32(d)(8)(ii) does not override any state or other law that requires a creditor to notify a borrower of a right to cure, or otherwise places a duty on the creditor before it can terminate a loan and accelerate the balance.

Paragraph 32(d)(8)(iii)

1. *Impairment of security.* A creditor may terminate a loan and accelerate the balance if the consumer's action or inaction adversely affects the creditor's security for the loan, or any right of the creditor in that security. Action or inaction by third parties does not, in itself, permit the creditor to terminate and accelerate.

2. *Examples.* i. A creditor may terminate and accelerate, for example, if:

A. The consumer transfers title to the property or sells the property without the permission of the creditor.

B. The consumer fails to maintain required insurance on the dwelling.

C. The consumer fails to pay taxes on the property.

D. The consumer permits the filing of a lien senior to that held by the creditor.

E. The sole consumer obligated on the credit dies.

F. The property is taken through eminent domain.

G. A prior lienholder forecloses.

ii. By contrast, the filing of a judgment against the consumer would permit termination and acceleration only if the amount of the judgment and collateral subject to the judgment is such that the creditor's security is adversely affected. If the consumer commits waste or otherwise destructively uses or fails to maintain the property such that the action adversely affects the security, the loan may be terminated and the balance accelerated. Illegal use of the property by the consumer would permit termination and acceleration if it subjects the property to seizure. If one of two consumers obligated on a loan dies, the creditor may terminate the loan and accelerate the balance if the security is adversely affected. If the consumer moves out of the dwelling that secures the loan and that action adversely affects the security, the creditor may terminate a loan and accelerate the balance.

Section 1026.33—Requirements for Reverse Mortgages

33(a) Definition

1. *Nonrecourse transaction.* A nonrecourse reverse mortgage transaction limits the homeowner's liability to the proceeds of the sale of the home (or any lesser amount specified in the credit obligation). If a transaction structured as a closed-end reverse mortgage transaction allows recourse against the consumer, and the annual percentage rate or the points and fees exceed those specified under § 1026.32(a)(1), the transaction is subject to all the requirements of § 1026.32, including the limitations concerning balloon payments and negative amortization.

Paragraph 33(a)(2)

1. *Default.* Default is not defined by the statute or regulation, but rather by the legal obligation between the parties and state or other law.

2. *Definite term or maturity date.* To meet the definition of a reverse mortgage transaction, a creditor cannot require any principal, interest, or shared appreciation or equity to be due and payable (other than in the case of default) until after the consumer's death, transfer of the dwelling, or the consumer ceases to occupy the dwelling as a principal dwelling. Some state laws require legal obligations secured by a mortgage to specify a definite maturity date or term of repayment in the instrument. An obligation may state a definite maturity date or term of repayment and still meet the definition of a reverse-mortgage transaction if the maturity date or term of repayment used would not operate to cause maturity prior to the occurrence of any of the maturity events recognized in the regulation. For example, some reverse mortgage programs specify that the final maturity date is the borrower's 150th birthday; other programs include a shorter term but provide that the term is automatically extended for consecutive periods if none of the other maturity events has yet occurred. These programs would be permissible.

33(c) Projected Total Cost of Credit

33(c)(1) Costs to Consumer

1. *Costs and charges to consumer—relation to finance charge.* All costs and charges to the consumer that are incurred in a reverse mortgage transaction are included in the projected total cost of credit, and thus in the total annual loan cost rates, whether or not the cost or charge is a finance charge under § 1026.4.

2. *Annuity costs.* As part of the credit transaction, some creditors require or permit a consumer to purchase an annuity that immediately—or at some future time—supplements or replaces the creditor's payments. The amount paid by the consumer for the annuity is a cost to the consumer under this section, regardless of whether the annuity is purchased through the creditor or a third party, or whether the purchase is mandatory or voluntary. For example, this includes the costs of an annuity that a creditor offers, arranges, assists the consumer in purchasing, or that the creditor is aware the consumer is purchasing as a part of the transaction.

3. *Disposition costs excluded.* Disposition costs incurred in connection with the sale or transfer of the property subject to the reverse mortgage are not included in the costs to the consumer under this paragraph. (However, see the definition of Val_n in Appendix K to the regulation to determine the effect certain disposition costs may have on the total annual loan cost rates.)

Paragraph 33(c)(2) Payments to Consumer

1. *Payments upon a specified event.* The projected total cost of credit should not reflect contingent payments in which a credit to the outstanding loan balance or a payment to the consumer's estate is made upon the occurrence of an event (for example, a ''death benefit'' payable if the consumer's death occurs within a certain period of time). Thus, the table of total annual loan cost rates required under § 1026.33(b)(2) would not reflect such payments. At its option, however, a creditor may put an asterisk, footnote, or similar type of notation in the table next to the applicable total annual loan cost rate, and state in the body of the note, apart from the table, the assumption upon which the total annual loan cost is made and any different rate that would apply if the contingent benefit were paid.

33(c)(3) Additional Creditor Compensation

1. *Shared appreciation or equity.* Any shared appreciation or equity that the creditor is entitled to receive pursuant to the legal obligation must be included in the total cost of a reverse mortgage loan. For example, if a creditor agrees to a reduced interest rate on the transaction in exchange for a portion of the appreciation or equity that may be realized when the dwelling is sold, that portion is included in the projected total cost of credit.

33(c)(4) Limitations on Consumer Liability

1. *In general.* Creditors must include any limitation on the consumer's liability (such as a nonrecourse limit or an equity conservation agreement) in the projected total cost of credit. These limits and agreements protect a portion of the equity in the dwelling for the consumer or the consumer's estate. For example, the following are limitations on the consumer's liability that must be included in the projected total cost of credit:

i. A limit on the consumer's liability to a certain percentage of the projected value of the home.

ii. A limit on the consumer's liability to the net proceeds from the sale of the property subject to the reverse mortgage.

2. *Uniform assumption for ''net proceeds'' recourse limitations.* If the legal obligation between the parties does not specify a percentage for the ''net proceeds'' liability of the consumer, for purposes of the disclosures required by § 1026.33, a creditor must assume that the costs associated with selling the property will equal 7 percent of the projected sale price (see the definition of the Val_n symbol under Appendix K(b)(6)).

Section 1026.34—Prohibited Acts or Practices in Connection With High-Cost Mortgages

34(a) Prohibited Acts or Practices for High-Cost Mortgages

34(a)(1) Home-Improvement Contracts

Paragraph 34(a)(1)(i)

1. *Joint payees.* If a creditor pays a contractor with an instrument jointly payable to the contractor and the consumer, the instrument must name as payee each consumer who is primarily obligated on the note.

34(a)(2) Notice to Assignee

1. *Subsequent sellers or assignors.* Any person, whether or not the original creditor, that sells or assigns a mortgage subject to § 1026.32 must furnish the notice of potential liability to the purchaser or assignee.

2. *Format.* While the notice of potential liability need not be in any particular format, the notice must be prominent. Placing it on the face of the note, such as with a stamp, is one means of satisfying the prominence requirement.

3. *Assignee liability.* Pursuant to section 131(d) of the Act, the Act's general holder-in-due course protections do not apply to purchasers and assignees of loans covered by § 1026.32. For such loans, a purchaser's or other assignee's liability for all claims and defenses that the consumer could assert against the creditor is not limited to violations of the Act.

34(a)(3) Refinancings Within One-Year Period

1. *In the borrower's interest.* The determination of whether or not a refinancing covered by § 1026.34(a)(3) is in the borrower's interest is based on the totality of the circumstances, at the time the credit is

extended. A written statement by the borrower that ''this loan is in my interest'' alone does not meet this standard.

i. A refinancing would be in the borrower's interest if needed to meet the borrower's ''bona fide personal financial emergency'' (see generally § 1026.23(e) and § 1026.31(c)(1)(iii)).

ii. In connection with a refinancing that provides additional funds to the borrower, in determining whether a loan is in the borrower's interest consideration should be given to whether the loan fees and charges are commensurate with the amount of new funds advanced, and whether the real estate-related charges are bona fide and reasonable in amount (see generally § 1026.4(c)(7)).

2. *Application of the one-year refinancing prohibition to creditors and assignees.* The prohibition in § 1026.34(a)(3) applies where an extension of credit subject to § 1026.32 is refinanced into another loan subject to § 1026.32. The prohibition is illustrated by the following examples. Assume that Creditor A makes a loan subject to § 1026.32 on January 15, 2003, secured by a first lien; this loan is assigned to Creditor B on February 15, 2003:

i. Creditor A is prohibited from refinancing the January 2003 loan (or any other loan subject to § 1026.32 to the same borrower) into a loan subject to § 1026.32, until January 15, 2004. Creditor B is restricted until January 15, 2004, or such date prior to January 15, 2004 that Creditor B ceases to hold or service the loan. During the prohibition period, Creditors A and B may make a subordinate lien loan that does not refinance a loan subject to § 1026.32. Assume that on April 1, 2003, Creditor A makes but does not assign a second-lien loan subject to § 1026.32. In that case, Creditor A would be prohibited from refinancing either the first-lien or second-lien loans (or any other loans to that borrower subject to § 1026.32) into another loan subject to § 1026.32 until April 1, 2004.

ii. The loan made by Creditor A on January 15, 2003 (and assigned to Creditor B) may be refinanced by Creditor C at any time. If Creditor C refinances this loan on March 1, 2003 into a new loan subject to § 1026.32, Creditor A is prohibited from refinancing the loan made by Creditor C (or any other loan subject to § 1026.32 to the same borrower) into another loan subject to § 1026.32 until January 15, 2004. Creditor C is similarly prohibited from refinancing any loan subject to § 1026.32 to that borrower into another until March 1, 2004. (The limitations of § 1026.34(a)(3) no longer apply to Creditor B after Creditor C refinanced the January 2003 loan and Creditor B ceased to hold or service the loan.)

34(a)(4) Repayment Ability

1. *Application of repayment ability rule.* The § 1026.34(a)(4) prohibition against making loans without regard to consumers' repayment ability applies to mortgage loans described in § 1026.32(a). In addition, the § 1026.34(a)(4) prohibition applies to higher-priced mortgage loans described in § 1026.35(a). *See* § 1026.35(b)(1).

2. *General prohibition.* Section 1026.34(a)(4) prohibits a creditor from extending credit subject to § 1026.32 to a consumer based on the value of the consumer's collateral without regard to the consumer's repayment ability as of consummation, including the consumer's current and reasonably expected income, employment, assets other than the collateral, current obligations, and property tax and insurance obligations. A creditor may base its determination of repayment ability on current or reasonably expected income from employment or other sources, on assets other than the collateral, or both.

3. *Other dwelling-secured obligations.* For purposes of § 1026.34(a)(4), current obligations include another credit obligation of which the creditor has knowledge undertaken prior to or at consummation of the transaction and secured by the same dwelling that secures the transaction subject to § 1026.32 or § 1026.35. For example, where a transaction subject to § 1026.35 is a first-lien transaction for the purchase of a home, a creditor must consider a ''piggyback'' second-lien transaction of which it has knowledge that is used to finance part of the down payment on the house.

4. *Discounted introductory rates and non-amortizing or negatively-amortizing payments.* A credit agreement may determine a consumer's initial payments using a temporarily discounted interest rate or permit the consumer to make initial payments that are non-amortizing or negatively amortizing. (Negative amortization is permissible for loans covered by § 1026.35(a), but not § 1026.32). In such cases the creditor may determine repayment ability using the assumptions provided in § 1026.34(a)(4)(iv).

5. *Repayment ability as of consummation.* Section 1026.34(a)(4) prohibits a creditor from disregarding repayment ability based on the facts and circumstances known to the creditor as of consummation. In general, a creditor does not violate this provision if a consumer defaults because of a significant reduction in income (for example, a job loss) or a significant obligation (for example, an obligation arising from a major medical expense) that occurs after consummation. However, if a creditor has knowledge as of consummation of reductions in income, for example, if a consumer's written application states that the consumer plans to retire within twelve months without obtaining new employment, or states that the consumer will transition from full-time to part-time employment, the creditor must consider that information.

6. *Income, assets, and employment.* Any current or reasonably expected assets or income may be considered by the creditor, except the collateral itself. For example, a creditor may use information about current or expected salary, wages, bonus pay, tips, and commissions. Employment may be full-time, part-time, seasonal, irregular, military, or self-employment. Other sources of income could include interest or dividends; retirement benefits; public assistance; and alimony, child support, or separate maintenance payments. A creditor may also take into account assets such as savings accounts or investments that the consumer can or will be able to use.

7. *Interaction with Regulation B.* Section 1026.34(a)(4) does not require or permit the creditor to make inquiries or verifications that would be prohibited by Regulation B, 12 CFR part 1002.

34(a)(4)(i) Mortgage-Related Obligations

1. *Mortgage-related obligations.* A creditor must include in its repayment ability analysis the expected property taxes and premiums for mortgage-related insurance required by the creditor as set forth in § 1026.35(b)(3)(i), as well as similar mortgage-related expenses. Similar mortgage-related expenses include homeowners' association dues and condominium or cooperative fees.

34(a)(4)(ii) Verification of Repayment Ability

1. *Income and assets relied on.* A creditor must verify the income and assets the creditor relies on to evaluate the consumer's repayment ability. For example, if a consumer earns a salary and also states that he or she is paid an annual bonus, but the creditor only relies on the applicant's salary to evaluate repayment ability, the creditor need only verify the salary.

2. *Income and assets—co-applicant.* If two persons jointly apply for credit and both list income or assets on the application, the creditor must verify repayment ability with respect to both applicants unless the creditor relies only on the income or assets of one of the applicants in determining repayment ability.

3. *Expected income.* If a creditor relies on expected income, the expectation must be reasonable and it must be verified with third-party documents that provide reasonably reliable evidence of the consumer's expected income. For example, if the creditor relies on an expectation that a consumer will receive an annual bonus, the creditor may verify the basis for that expectation with documents that show the consumer's past annual bonuses and the expected bonus must bear a reasonable relationship to past bonuses. Similarly, if the creditor relies on a consumer's expected salary following the consumer's receipt of an educational degree, the creditor may verify that expectation with a written statement from an employer indicating that the consumer will be employed upon graduation at a specified salary.

Paragraph 34(a)(4)(ii)(A)

1. *Internal Revenue Service (IRS) Form W–2.* A creditor may verify a consumer's income using a consumer's IRS Form W–2 (or any subsequent revisions or similar IRS Forms used for reporting wages and tax withholding). The creditor may also use an electronic retrieval service for obtaining the consumer's W–2 information.

2. *Tax returns.* A creditor may verify a consumer's income or assets using the consumer's tax return. A creditor may also use IRS Form 4506 ''Request for Copy of Tax Return,'' Form 4506–T ''Request for Transcript of Tax Return,'' or Form 8821 ''Tax Information Authorization'' (or any subsequent revisions or similar IRS Forms appropriate for obtaining tax return information directly from the IRS) to verify the consumer's income or assets. The creditor may also use an electronic retrieval service for obtaining tax return information.

3. *Other third-party documents that provide reasonably reliable evidence of consumer's income or assets.* Creditors may verify income and assets using documents produced by third parties. Creditors may not rely on information provided orally by third parties, but may rely on correspondence from the third party, such as by letter or email. The creditor may rely on any third-party document that provides reasonably reliable evidence of the consumer's income or assets. For example, creditors may verify the consumer's income using receipts from a check-cashing or remittance service, or by obtaining a written statement from the consumer's employer that states the consumer's income.

4. *Information specific to the consumer.* Creditors must verify a consumer's income or assets using information that is specific to the individual consumer. Creditors may use third-party databases that contain individual-specific data about a consumer's income or assets, such as a third-party database service used by the consumer's employer for the purpose of centralizing income verification requests, so long as the information is reasonably current and accurate. Information about average incomes for the consumer's occupation in the consumer's geographic location or information about average incomes paid by the consumer's employer, however, would not be specific to the individual consumer.

5. *Duplicative collection of documentation.* A creditor that has made a loan to a consumer and is refinancing or extending new credit to the same consumer need not collect from the consumer a document the creditor previously obtained if the creditor has no information that would reasonably lead the creditor to believe that document has changed since it was initially collected. For example, if the creditor has obtained the consumer's 2006 tax return to make a home purchase loan in May 2007, the creditor may rely on the 2006 tax return if the creditor makes a home equity loan to the same consumer in August 2007. Similarly, if the creditor has obtained the consumer's bank statement for May 2007 in making the first loan, the creditor may rely on that bank statement for that month in making the subsequent loan in August 2007.

Paragraph 34(a)(4)(ii)(B)

1. *No violation if income or assets relied on not materially greater than verifiable amounts.* A creditor that does not verify income or assets used to determine repayment ability with reasonably reliable third-party documents does not violate § 1026.34(a)(4)(ii) if the creditor demonstrates that the income or assets it relied upon were not materially greater than the amounts that the creditor would have been able to verify pursuant to § 1026.34(a)(4)(ii). For example, if a creditor determines a consumer's repayment ability by relying on the consumer's annual income of $40,000 but fails to obtain documentation of that amount before extending the credit, the creditor will not have violated this section if the creditor later obtains evidence that would satisfy § 1026.34(a)(4)(ii)(A), such as tax return information, showing that the creditor could have documented, at the time the loan was consummated, that the consumer had an annual income not materially less than $40,000.

2. *Materially greater than.* Amounts of income or assets relied on are not materially greater than amounts that could have been verified at consummation if relying on the verifiable amounts would not have altered a reasonable creditor's decision to extend credit or the terms of the credit.

Paragraph 34(a)(4)(ii)(C)

1. *In general.* A credit report may be used to verify current obligations. A credit report, however, might not reflect an obligation that a consumer has listed on an application. The creditor is responsible for considering such an obligation, but the creditor is not required to independently verify the obligation. Similarly, a creditor is responsible for considering certain obligations undertaken just before or at consummation of the transaction and secured by the same dwelling that secures the transaction (for example, a ''piggy back'' loan), of which the creditor knows, even if not reflected on a credit report. *See* comment 34(a)(4)–3.

34(a)(4)(iii) Presumption of Compliance

1. *In general.* A creditor is presumed to have complied with § 1026.34(a)(4) if the creditor follows the three underwriting procedures specified in paragraph 34(a)(4)(iii) for verifying repayment ability, determining the payment obligation, and measuring the relationship of obligations to income. The procedures for verifying repayment ability are required under paragraph 34(a)(4)(ii); the other procedures are not required but, if followed along with the required procedures, create a presumption that the creditor has complied with § 1026.34(a)(4). The consumer may rebut the presumption with evidence that the creditor nonetheless disregarded repayment ability despite following these procedures. For example, evidence of a very high debt-to-income ratio and a very limited residual income could be sufficient to rebut the presumption, depending on all of the facts and circumstances. If a creditor fails to follow one of the non-required procedures set forth in paragraph 34(a)(4)(iii), then the creditor's compliance is determined based on all of the facts and circumstances without there being a presumption of either compliance or violation.

Paragraph 34(a)(4)(iii)(B)

1. *Determination of payment schedule.* To retain a presumption of compliance under § 1026.34(a)(4)(iii), a creditor must determine the consumer's ability to pay the principal and interest obligation based on the maximum scheduled payment in the first seven years following consummation. In general, a creditor should determine a payment schedule for purposes of § 1026.34(a)(4)(iii)(B) based on the guidance in the commentary to § 1026.17(c)(1). Examples of how to determine the maximum scheduled payment in the first seven years are provided as follows (all payment amounts are rounded):

i. *Balloon-payment loan; fixed interest rate.* A loan in an amount of $100,000 with a fixed interest rate of 8.0 percent (no points) has a 7-year term but is amortized over 30 years. The monthly payment scheduled for 7 years is $733 with a balloon payment of remaining principal due at the end of 7 years. The creditor will retain the presumption of compliance if it assesses repayment ability based on the payment of $733.

ii. *Fixed-rate loan with interest-only payment for five years.* A loan in an amount of $100,000 with a fixed interest rate of 8.0 percent (no points) has a 30-year term. The monthly payment of $667 scheduled for the first 5 years would cover only the interest due. After the fifth year, the scheduled payment would increase to $772, an amount that fully amortizes the principal balance over the remaining 25 years. The creditor will retain the presumption of compliance if it assesses repayment ability based on the payment of $772.

iii. *Fixed-rate loan with interest-only payment for seven years.* A loan in an amount of $100,000 with a fixed interest rate of 8.0 percent (no points) has a 30-year term. The monthly payment of $667 scheduled for the first 7 years would cover only the interest due. After the seventh year, the scheduled payment would increase to $793, an amount that fully amortizes the principal balance over the remaining 23 years. The creditor will retain the presumption of compliance if it assesses repayment ability based on the interest-only payment of $667.

iv. *Variable-rate loan with discount for five years.* A loan in an amount of $100,000 has a 30-year term. The loan agreement provides for a fixed interest rate of 7.0 percent for an initial period of 5 years. Accordingly, the payment scheduled for the first 5 years is $665. The agreement provides that, after 5 years, the interest rate will adjust each year based on a specified index and margin. As of consummation, the sum of the index value and margin (the fully-indexed rate) is 8.0 percent. Accordingly, the payment scheduled for the remaining 25 years is $727. The creditor will retain the presumption of compliance if it assesses repayment ability based on the payment of $727.

v. *Variable-rate loan with discount for seven years.* A loan in an amount of $100,000 has a 30-year term. The loan agreement provides for a fixed interest rate of 7.125 percent for an initial period of 7 years. Accordingly, the payment scheduled for the first 7 years is $674. After 7 years, the agreement provides that the interest rate will adjust each year based on a specified index and margin. As of consummation, the sum of the index value and margin (the fully-indexed rate) is 8.0 percent. Accordingly, the payment scheduled for the remaining years is $725. The creditor will retain the presumption of compliance if it assesses repayment ability based on the payment of $674.

vi. *Step-rate loan.* A loan in an amount of $100,000 has a 30-year term. The agreement provides that the interest rate will be 5 percent for two years, 6 percent for three years, and 7 percent thereafter. Accordingly, the payment amounts are $537 for two years, $597 for three years, and $654 thereafter. To retain the presumption of compliance, the creditor must assess repayment ability based on the payment of $654.

Paragraph 34(a)(4)(iii)(C)

1. *''Income'' and ''debt''.* To determine whether to classify particular inflows or obligations as ''income'' or ''debt,'' creditors may look to widely accepted governmental and non-governmental underwriting standards, including, for example, those set forth in the Federal Housing Administration's handbook on Mortgage Credit Analysis for Mortgage Insurance.

34(a)(4)(iv) Exclusions From Presumption of Compliance

1. *In general.* The exclusions from the presumption of compliance should be interpreted consistent with comments 32(d)(1)(i)–1 and 32(d)(2)–1.

2. *Renewable balloon loan.* If a creditor is unconditionally obligated to renew a balloon-payment loan at the consumer's option (or is obligated to renew subject to conditions within the consumer's control), the full term resulting from such renewal is the relevant term for purposes of the exclusion of certain balloon-payment loans. See comment 17(c)(1)–11 for a discussion of conditions within a consumer's control in connection with renewable balloon-payment loans.

34(b) Prohibited Acts or Practices for Dwelling-Secured Loans; Open-End Credit

1. *Amount of credit extended.* Where a loan is documented as open-end credit but the features and terms or other circumstances demonstrate that it does not meet the definition of open-end credit, the loan is subject to the rules for closed-end credit, including § 1026.32 if the rate or fee trigger is met. In applying the triggers under § 1026.32, the ''amount financed,'' including the ''principal loan amount'' must be determined. In making the determination, the amount of credit that would have been extended if the loan had been documented as a closed-end loan is a factual determination to be made in each case. Factors to be considered include the amount of money the consumer originally requested, the amount of the first advance or the highest outstanding balance, or the amount of the credit line. The full amount of the credit line is considered only to the extent that it is reasonable to expect that the consumer might use the full amount of credit.

Section 1026.35—Prohibited Acts or Practices in Connection With Higher-Priced Mortgage Loans

35(a) *Higher-Priced Mortgage Loans*

Paragraph 35(a)(2)

1. *Average prime offer rate.* Average prime offer rates are annual percentage rates derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. Other pricing terms include commonly used indices, margins, and initial fixed-rate periods for variable-rate transactions. Relevant pricing characteristics include a consumer's credit history and transaction characteristics such as the loan-to-value ratio, owner-occupant status, and purpose of the transaction. To obtain average prime offer rates, the Bureau uses a survey of creditors that both meets the criteria of § 1026.35(a)(2) and provides pricing terms for at least two types of variable-rate transactions and at least two types of non-variable-rate transactions. An example of such a survey is the Freddie Mac Primary Mortgage Market Survey®.

2. *Comparable transaction.* A higher-priced mortgage loan is a consumer credit transaction secured by the consumer's principal dwelling with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by the specified margin. The table of average prime offer rates published by the Bureau indicates how to identify the comparable transaction.

3. *Rate set.* A transaction's annual percentage rate is compared to the average prime offer rate as of the date the transaction's interest rate is set (or ''locked'') before consummation. Sometimes a creditor sets the interest rate initially and then re-sets it at a different level before consummation. The creditor should use the last date the interest rate is set before consummation.

4. *Bureau table.* The Bureau publishes on the Internet, in table form, average prime offer rates for a wide variety of transaction types. The Bureau calculates an annual percentage rate, consistent with Regulation Z (see § 1026.22 and Appendix J), for each transaction type for which pricing terms are available from a survey. The Bureau estimates annual percentage rates for other types of transactions for which direct survey data are not available based on the loan pricing terms available in the survey and other information. The Bureau publishes on the Internet the methodology it uses to arrive at these estimates.

35(b) Rules for Higher-Priced Mortgage Loans

1. *Effective date.* For guidance on the applicability of the rules in § 1026.35(b), see comment 1(d)(5)–1.

Paragraph 35(b)(2)(ii)(C)

1. *Payment change.* Section 1026.35(b)(2) provides that a loan subject to this section may not have a penalty described by § 1026.32(d)(6) unless certain conditions are met. Section 1026.35(b)(2)(ii)(C) lists as a condition that the amount of the periodic payment of principal or interest or both may not change during the four-year period following consummation. For examples showing whether a prepayment penalty is permitted or prohibited in connection with particular payment changes, see comment 32(d)(7)(iv)–1. Those examples, however, include a condition that § 1026.35(b)(2) does not include: the condition that, at consummation, the consumer's total monthly debt payments may not exceed 50 percent of the consumer's monthly gross income. For guidance about circumstances in which payment changes are not considered payment changes for purposes of this section, see comment 32(d)(7)(iv)–2.

2. *Negative amortization.* Section 1026.32(d)(2) provides that a loan described in § 1026.32(a) may not have a payment schedule with regular periodic payments that cause the principal balance to increase. Therefore, the commentary to § 1026.32(d)(7)(iv) does not include examples of payment changes in connection with negative amortization. The following examples show whether, under § 1026.35(b)(2), prepayment penalties are permitted or prohibited in connection with particular payment changes, when a loan agreement permits negative amortization:

i. Initial payments for a variable-rate transaction consummated on January 1, 2010 are $1,000 per month and the loan agreement permits negative amortization to occur. Under the loan agreement, the first date that a scheduled payment in a different amount may be due is January 1, 2014 and the creditor does not have the right to change scheduled payments prior to that date even if negative amortization occurs. A prepayment penalty is permitted with this mortgage transaction provided that the other § 1026.35(b)(2) conditions are met, that is: provided that the prepayment penalty is permitted by other applicable law, the penalty expires on or before December 31, 2011, and the penalty will not apply if the source of the prepayment funds is a refinancing by the creditor or its affiliate.

ii. Initial payments for a variable-rate transaction consummated on January 1, 2010 are $1,000 per month and the loan agreement permits negative amortization to occur. Under the loan agreement, the first date that a scheduled payment in a different amount may be due is January 1, 2014, but the creditor has the right to change scheduled payments prior to that date if negative amortization occurs. A prepayment penalty is prohibited with this mortgage transaction because the payment may change within the four-year period following consummation.

35(b)(3) Escrows

35(b)(3)(i) Failure To Escrow for Property Taxes and Insurance

1. Section 1026.35(b)(3) applies to principal dwellings, including structures that are classified as personal property under state law. For example, an escrow account must be established on a higher-priced mortgage loan secured by a first-lien on a mobile home, boat or a trailer used as the consumer's principal dwelling. *See* the commentary under §§ 1026.2(a)(19), 1026.2(a)(24), 1026.15 and 1026.23. Section 1026.35(b)(3) also applies to higher-priced mortgage loans secured by a first lien on a condominium or a cooperative unit if it is in fact used as principal residence.

2. *Administration of escrow accounts.* Section 1026.35(b)(3) requires creditors to establish before the consummation of a loan secured by a first lien on a principal dwelling an escrow account for payment of property taxes and premiums for mortgage-related insurance required by creditor. Section 6 of RESPA, 12 U.S.C. 2605, and Regulation X address how escrow accounts must be administered.

3. *Optional insurance items.* Section 1026.35(b)(3) does not require that escrow accounts be established for premiums for mortgage-related insurance that the creditor does not require in connection with the credit transaction, such as an earthquake insurance or debt-protection insurance.

Paragraph 35(b)(3)(ii)(B)

1. *Limited exception.* A creditor is required to escrow for payment of property taxes for

all first lien loans secured by condominium units regardless of whether the creditors escrows insurance premiums for condominium unit.

35(b)(3)(v) ''Jumbo'' Loans

1. *Special threshold for ''jumbo'' loans.* For purposes of the escrow requirement in § 1026.35(b)(3) only, the coverage threshold stated in § 1026.35(a)(1) for first-lien loans (1.5 or more percentage points greater than the average prime offer rate) does not apply to a loan with a principal obligation that exceeds the limit in effect as of the date the loan's rate is set for the maximum principal obligation eligible for purchase by Freddie Mac (''jumbo'' loans). The Federal Housing Finance Agency (FHFA) establishes and adjusts the maximum principal obligation pursuant to 12 U.S.C. 1454(a)(2) and other provisions of Federal law. Adjustments to the maximum principal obligation made by FHFA apply in determining whether a mortgage loan is a ''jumbo'' loan to which the separate coverage threshold in § 1026.35(b)(3)(v) applies.

2. *Escrow requirements only.* Under § 1026.35(b)(3)(v), for ''jumbo'' loans, the annual percentage rate threshold is 2.5 or more percentage points greater than the average prime offer rate. This threshold applies solely in determining whether a ''jumbo'' loan is subject to the escrow requirement of § 1026.35(b)(3). The determination of whether ''jumbo'' first-lien loans are subject to the other protections in § 1026.35, such as the ability to repay requirements under § 1026.35(b)(1) and the restrictions on prepayment penalties under § 1026.35(b)(2), is based on the 1.5 percentage point threshold stated in § 1026.35(a)(1).

Section 1026.36—Prohibited Acts or Practices in Connection With Credit Secured by a Dwelling

1. *Scope of coverage.* Sections 1026.36(b) and (c) apply to closed-end consumer credit transactions secured by a consumer's principal dwelling. Sections 1026.36(d) and (e) apply to closed-end consumer credit transactions secured by a dwelling. Sections 1026.36(d) and (e) apply to closed-end loans secured by first or subordinate liens, and reverse mortgages that are not home-equity lines of credit under § 1026.40. *See* § 1026.36(f) for additional restrictions on the scope of this section, and §§ 1026.1(c) and 1026.3(a) and corresponding commentary for further discussion of extensions of credit subject to Regulation Z.

2. *Mandatory compliance date for §§ 1026.36(d) and (e).* The final rules on loan originator compensation in § 1026.36 apply to transactions for which the creditor receives an application on or after the effective date. For example, assume a mortgage broker takes an application on March 10, 2011, which the creditor receives on March 25, 2011. This transaction is not covered. If, however, the creditor does not receive the application until April 8, 2011, the transaction is covered.

36(a) Loan Originator and Mortgage Broker Defined

1. *Meaning of loan originator.* i. *General.* Section 1026.36(a) provides that a loan originator is any person who for compensation or other monetary gain arranges, negotiates, or otherwise obtains an extension of consumer credit for another person. Thus, the term ''loan originator'' includes employees of a creditor as well as employees of a mortgage broker that satisfy this definition. In addition, the definition of loan originator expressly includes any creditor that satisfies the definition of loan originator but makes use of ''table funding'' by a third party. *See* comment 36(a)–1.ii below discussing table funding. Although consumers may sometimes arrange, negotiate, or otherwise obtain extensions of consumer credit on their own behalf, in such cases they do not do so for another person or for compensation or other monetary gain, and therefore are not loan originators under this section. (Under § 1026.2(a)(22), the term ''person'' means a natural person or an organization.)

ii. *Table funding.* Table funding occurs when the creditor does not provide the funds for the transaction at consummation out of the creditor's own resources, including drawing on a *bona fide* warehouse line of credit, or out of deposits held by the creditor. Accordingly, a table-funded transaction is consummated with the debt obligation initially payable by its terms to one person, but another person provides the funds for the transaction at consummation and receives an immediate assignment of the note, loan contract, or other evidence of the debt obligation. Although § 1026.2(a)(17)(i)(B) provides that a person to whom a debt obligation is initially payable on its face generally is a creditor, § 1026.36(a)(1) provides that, solely for the purposes of § 1026.36, such a person is also considered a loan originator. The creditor is not considered a loan originator unless table funding occurs. For example, if a person closes a loan in its own name but does not fund the loan from its own resources or deposits held by it because it assigns the loan at consummation, it is considered a creditor for purposes of Regulation Z and also a loan originator for purposes of § 1026.36. However, if a person closes a loan in its own name and draws on a *bona fide* warehouse line of credit to make the loan at consummation, it is considered a creditor, not a loan originator, for purposes of Regulation Z, including § 1026.36.

iii. *Servicing.* The definition of ''loan originator'' does not apply to a loan servicer when the servicer modifies an existing loan on behalf of the current owner of the loan. The rule only applies to extensions of consumer credit and does not apply if a modification of an existing obligation's terms does not constitute a refinancing under § 1026.20(a).

2. *Meaning of mortgage broker.* For purposes of § 1026.36, with respect to a particular transaction, the term ''mortgage broker'' refers to a loan originator who is not an employee of the creditor. Accordingly, the term ''mortgage broker'' includes companies that engage in the activities described in § 1026.36(a) and also includes employees of such companies that engage in these activities. Section 1026.36(d) prohibits certain payments to a loan originator. These prohibitions apply to payments made to all loan originators, including payments made to mortgage brokers, and payments made by a company acting as a mortgage broker to its employees who are loan originators.

3. *Meaning of creditor.* For purposes of § 1026.36(d) and (e), a creditor means a creditor that is not deemed to be a loan originator on the transaction under this section. Thus, a person that closes a loan in its own name (but another person provides the funds for the transaction at consummation and receives an immediate assignment of the note, loan contract, or other evidence of the debt obligation) is deemed a loan originator, not a creditor, for purposes of § 1026.36. However, that person is still a creditor for all other purposes of Regulation Z.

4. *Managers and administrative staff.* For purposes of § 1026.36, managers, administrative staff, and similar individuals who are employed by a creditor or loan originator but do not arrange, negotiate, or otherwise obtain an extension of credit for a consumer, or whose compensation is not based on whether any particular loan is originated, are not loan originators.

36(c) Servicing Practices

Paragraph 36(c)(1)(i)

1. *Crediting of payments.* Under § 1026.36(c)(1)(i), a mortgage servicer must credit a payment to a consumer's loan account as of the date of receipt. This does not require that a mortgage servicer post the payment to the consumer's loan account on a particular date; the servicer is only required to credit the payment *as of* the date of receipt. Accordingly, a servicer that receives a payment on or before its due date (or within any grace period), and does not enter the payment on its books or in its system until after the payment's due date (or expiration of any grace period), does not violate this rule as long as the entry does not result in the imposition of a late charge, additional interest, or similar penalty to the consumer, or in the reporting of negative information to a consumer reporting agency.

2. *Payments to be credited.* Payments should be credited based on the legal obligation between the creditor and consumer. The legal obligation is determined by applicable state or other law.

3. *Date of receipt.* The ''date of receipt'' is the date that the payment instrument or other means of payment reaches the mortgage servicer. For example, payment by check is received when the mortgage servicer receives it, not when the funds are collected. If the consumer elects to have payment made by a third-party payor such as a financial institution, through a preauthorized payment or telephone bill-payment arrangement, payment is received when the mortgage servicer receives the third-party payor's check or other transfer medium, such as an electronic fund transfer.

Paragraph 36(c)(1)(ii)

1. *Pyramiding of late fees.* The prohibition on pyramiding of late fees in this subsection should be construed consistently with the ''credit practices rule'' of the Federal Trade Commission, 16 CFR 444.4.

Paragraph 36(c)(1)(iii)

1. *Reasonable time.* The payoff statement must be provided to the consumer, or person acting on behalf of the consumer, within a reasonable time after the request. For example, it would be reasonable under most circumstances to provide the statement within five business days of receipt of a consumer's request. This time frame might be longer, for example, when the servicer is experiencing an unusually high volume of refinancing requests.

2. *Person acting on behalf of the consumer.* For purposes of § 1026.36(c)(1)(iii), a person acting on behalf of the consumer may include the consumer's representative, such as an attorney representing the individual, a non-profit consumer counseling or similar organization, or a creditor with which the consumer is refinancing and which requires the payoff statement to complete the refinancing. A servicer may take reasonable measures to verify the identity of any person acting on behalf of the consumer and to obtain the consumer's authorization to release information to any such person before the ''reasonable time'' period begins to run.

3. *Payment requirements.* The servicer may specify reasonable requirements for making payoff requests, such as requiring requests to be in writing and directed to a mailing address, email address or fax number specified by the servicer or orally to a telephone number specified by the servicer, or any other reasonable requirement or method. If the consumer does not follow these requirements, a longer time frame for responding to the request would be reasonable.

4. *Accuracy of payoff statements.* Payoff statements must be accurate when issued.

Paragraph 36(c)(2)

1. *Payment requirements.* The servicer may specify reasonable requirements for making payments in writing, such as requiring that payments be accompanied by the account number or payment coupon; setting a cut-off hour for payment to be received, or setting different hours for payment by mail and payments made in person; specifying that only checks or money orders should be sent by mail; specifying that payment is to be made in U.S. dollars; or specifying one particular address for receiving payments, such as a post office box. The servicer may be prohibited, however, from requiring payment solely by preauthorized electronic fund transfer. (*See* Section 913 of the Electronic Fund Transfer Act, 15 U.S.C. 1693k.)

2. *Payment requirements—limitations.* Requirements for making payments must be reasonable; it should not be difficult for most consumers to make conforming payments. For example, it would be reasonable to require a cut-off time of 5 p.m. for receipt of a mailed check at the location specified by the servicer for receipt of such check.

3. *Implied guidelines for payments.* In the absence of specified requirements for making payments, payments may be made at any location where the servicer conducts business; any time during the servicer's normal business hours; and by cash, money order, draft, or other similar instrument in properly negotiable form, or by electronic fund transfer if the servicer and consumer have so agreed.

36(d) Prohibited Payments to Loan Originators

1. *Persons covered.* Section 1026.36(d) prohibits any person (including the creditor) from paying compensation to a loan originator in connection with a covered credit transaction, if the amount of the payment is based on any of the transaction's terms or conditions. For example, a person that purchases a loan from the creditor may not compensate the loan originator in a manner that violates § 1026.36(d).

2. *Mortgage brokers.* The payments made by a company acting as a mortgage broker to its employees who are loan originators are subject to the section's prohibitions. For example, a mortgage broker may not pay its employee more for a transaction with a 7 percent interest rate than for a transaction with a 6 percent interest rate.

36(d)(1) Payments Based on Transaction Terms and Conditions

1. *Compensation.* i. *General.* For purposes of § 1026.36(d) and (e), the term ''compensation'' includes salaries, commissions, and any financial or similar incentive provided to a loan originator that is based on any of the terms or conditions of the loan originator's transactions. See comment 36(d)(1)–3 for examples of types of compensation that are not covered by § 1026.36(d) and (e). For example, the term ''compensation'' includes:

A. An annual or other periodic bonus; or

B. Awards of merchandise, services, trips, or similar prizes.

ii. *Name of fee.* Compensation includes amounts the loan originator retains and is not dependent on the label or name of any fee imposed in connection with the transaction. For example, if a loan originator imposes a ''processing fee'' in connection with the transaction and retains such fee, it is deemed compensation for purposes of § 1026.36(d) and (e), whether the originator expends the time to process the consumer's application or uses the fee for other expenses, such as overhead.

iii. *Amounts for third-party charges.* Compensation includes amounts the loan originator retains, but does not include amounts the originator receives as payment for *bona fide* and reasonable third-party charges, such as title insurance or appraisals. In some cases, amounts received for payment for third-party charges may exceed the actual charge because, for example, the originator cannot determine with accuracy what the actual charge will be before consummation. In such a case, the difference retained by the originator is not deemed compensation if the third-party charge imposed on the consumer was *bona fide* and reasonable, and also complies with state and other applicable law. On the other hand, if the originator marks up a third-party charge (a practice known as ''upcharging''), and the originator retains the difference between the actual charge and the marked-up charge, the amount retained is compensation for purposes of § 1026.36(d) and (e). For example:

A. Assume a loan originator charges the consumer a $400 application fee that includes $50 for a credit report and $350 for an appraisal. Assume that $50 is the amount the creditor pays for the credit report. At the time the loan originator imposes the application fee on the consumer, the loan originator is uncertain of the cost of the appraisal because the originator may choose from appraisers that charge between $300 to $350 for appraisals. Later, the cost for the appraisal is determined to be $300 for this consumer's transaction. In this case, the $50 difference between the $400 application fee imposed on the consumer and the actual $350 cost for the credit report and appraisal is not deemed compensation for purposes of § 1026.36(d) and (e), even though the $50 is retained by the loan originator.

B. Using the same example in comment 36(d)(1)–1.iii.A above, the $50 difference would be compensation for purposes of § 1026.36(d) and (e) if the appraisers from whom the originator chooses charge fees between $250 and $300.

2. *Examples of compensation that is based on transaction terms or conditions.* Section 1026.36(d)(1) prohibits loan originator compensation that is based on the terms or conditions of the loan originator's transactions. For example, the rule prohibits compensation to a loan originator for a transaction based on that transaction's interest rate, annual percentage rate, loan-to-value ratio, or the existence of a prepayment penalty. The rule also prohibits compensation based on a factor that is a proxy for a transaction's terms or conditions. For example, a consumer's credit score or similar representation of credit risk, such as the consumer's debt-to-income ratio, is not one of the transaction's terms or conditions. However, if a loan originator's compensation varies in whole or in part with a factor that serves as a proxy for loan terms or conditions, then the originator's compensation is based on a transaction's terms or conditions. To illustrate, assume that consumer A and consumer B receive loans from the same loan originator and the same creditor. Consumer A has a credit score of 650, and consumer B has a credit score of 800. Consumer A's loan has a 7 percent interest rate, and consumer B's loan has a 6 ½ percent interest rate because of the consumers' different credit scores. If the creditor pays the loan originator $1,500 in compensation for consumer A's loan and $1,000 in compensation for consumer B's loan because the creditor varies compensation payments in whole or in part with a consumer's credit score, the originator's compensation would be based on the transactions' terms or conditions.

3. *Examples of compensation not based on transaction terms or conditions.* The following are only illustrative examples of compensation methods that are permissible (unless otherwise prohibited by applicable law), and not an exhaustive list. Compensation is not based on the transaction's terms or conditions if it is based on, for example:

i. The loan originator's overall loan volume (*i.e.,* total dollar amount of credit extended or total number of loans originated), delivered to the creditor.

ii. The long-term performance of the originator's loans.

iii. An hourly rate of pay to compensate the originator for the actual number of hours worked.

iv. Whether the consumer is an existing customer of the creditor or a new customer.

v. A payment that is fixed in advance for every loan the originator arranges for the creditor (*e.g.,* $600 for every loan arranged for the creditor, or $1,000 for the first 1,000 loans arranged and $500 for each additional loan arranged).

vi. The percentage of applications submitted by the loan originator to the creditor that result in consummated transactions.

vii. The quality of the loan originator's loan files (*e.g.,* accuracy and completeness of the loan documentation) submitted to the creditor.

viii. A legitimate business expense, such as fixed overhead costs.

ix. Compensation that is based on the amount of credit extended, as permitted by § 1026.36(d)(1)(ii). *See* comment 36(d)(1)–9 discussing compensation based on the amount of credit extended.

4. *Creditor's flexibility in setting loan terms.* Section 1026.36(d)(1) does not limit a creditor's ability to offer a higher interest rate in a transaction as a means for the consumer to finance the payment of the loan originator's compensation or other costs that the consumer would otherwise be required to pay directly (either in cash or out of the loan proceeds). Thus, a creditor may charge a higher interest rate to a consumer who will pay fewer of the costs of the transaction directly, or it may offer the consumer a lower rate if the consumer pays more of the costs directly. For example, if the consumer pays half of the transaction costs directly, a creditor may charge an interest rate of 6 percent but, if the consumer pays none of the transaction costs directly, the creditor may charge an interest rate of 6.5 percent. Section 1026.36(d)(1) also does not limit a creditor from offering or providing different loan terms to the consumer based on the creditor's assessment of the credit and other transactional risks involved. A creditor could also offer different consumers varying interest rates that include a constant interest rate premium to recoup the loan originator's compensation through increased interest paid by the consumer (such as by adding a constant 0.25 percent to the interest rate on each loan).

5. *Effect of modification of loan terms.* Under § 1026.36(d)(1), a loan originator's compensation may not vary based on any of a credit transaction's terms or conditions. Thus, a creditor and originator may not agree to set the originator's compensation at a certain level and then subsequently lower it in selective cases (such as where the consumer is able to obtain a lower rate from another creditor). When the creditor offers to extend a loan with specified terms and conditions (such as the rate and points), the amount of the originator's compensation for that transaction is not subject to change (increase or decrease) based on whether different loan terms are negotiated. For example, if the creditor agrees to lower the rate that was initially offered, the new offer may not be accompanied by a reduction in the loan originator's compensation.

6. *Periodic changes in loan originator compensation and transactions' terms and conditions.* This section does not limit a creditor or other person from periodically revising the compensation it agrees to pay a loan originator. However, the revised compensation arrangement must result in payments to the loan originator that do not vary based on the terms or conditions of a credit transaction. A creditor or other person might periodically review factors such as loan performance, transaction volume, as well as current market conditions for originator compensation, and prospectively revise the compensation it agrees to pay to a loan originator. For example, assume that during the first 6 months of the year, a creditor pays $3,000 to a particular loan originator for each loan delivered, regardless of the loan terms or conditions. After considering the volume of business produced by that originator, the creditor could decide that as of July 1, it will pay $3,250 for each loan delivered by that particular originator, regardless of the loan terms or conditions. No violation occurs even if the loans made by the creditor after July 1 generally carry a higher interest rate than loans made before that date, to reflect the higher compensation.

7. *Compensation received directly from the consumer.* The prohibition in § 1026.36(d)(1) does not apply to transactions in which any loan originator receives compensation directly from the consumer, in which case no other person may provide any compensation to a loan originator, directly or indirectly, in connection with that particular transaction pursuant to § 1026.36(d)(2). Payments to a loan originator made out of loan proceeds are considered compensation received directly from the consumer, while payments derived from an increased interest rate are not considered compensation received directly from the consumer. However, points paid on the loan by the consumer to the creditor are not considered payments received directly from the consumer whether they are paid in cash or out of the loan proceeds. That is, if the consumer pays origination points to the creditor and the creditor compensates the loan originator, the loan originator may not also receive compensation directly from the consumer. Compensation includes amounts retained by the loan originator, but does not include amounts the loan originator receives as payment for *bona fide* and reasonable third-party charges, such as title insurance or appraisals. *See* comment 36(d)(1)–1.

8. *Record retention.* See comment 25(a)–5 for guidance on complying with the record retention requirements of § 1026.25(a) as they apply to § 1026.36(d)(1).

9. *Amount of credit extended.* A loan originator's compensation may be based on the amount of credit extended, subject to certain conditions. Section 1026.36(d)(1) does not prohibit an arrangement under which a loan originator is paid compensation based on a percentage of the amount of credit extended, provided the percentage is fixed and does not vary with the amount of credit extended. However, compensation that is based on a fixed percentage of the amount of credit extended may be subject to a minimum and/or maximum dollar amount, as long as the minimum and maximum dollar amounts do not vary with each credit transaction. For example:

i. A creditor may offer a loan originator 1 percent of the amount of credit extended for all loans the originator arranges for the creditor, but not less than $1,000 or greater than $5,000 for each loan.

ii. A creditor may *not* offer a loan originator 1 percent of the amount of credit extended for loans of $300,000 or more, 2 percent of the amount of credit extended for loans between $200,000 and $300,000, and 3 percent of the amount of credit extended for loans of $200,000 or less.

36(d)(2) Payments by Persons Other Than Consumer

1. *Compensation in connection with a particular transaction.* Under § 1026.36(d)(2), if any loan originator receives compensation directly from a consumer in a transaction, no other person may provide any compensation to a loan originator, directly or indirectly, in connection with that particular credit transaction. *See* comment 36(d)(1)–7 discussing compensation received directly from the consumer. The restrictions imposed under § 1026.36(d)(2) relate only to payments, such as commissions, that are specific to, and paid solely in connection with, the transaction in which the consumer has paid compensation directly to a loan originator. Thus, payments by a mortgage broker company to an employee in the form of a salary or hourly wage, which is not tied to a specific transaction, do not violate § 1026.36(d)(2) even if the consumer directly pays a loan originator a fee in connection with a specific credit transaction. However, if any loan originator receives compensation directly from the consumer in connection with a specific credit transaction, neither the mortgage broker company nor an employee of the mortgage broker company can receive compensation from the creditor in connection with that particular credit transaction.

2. *Compensation received directly from a consumer.* Under Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA), a yield spread premium paid by a creditor to the loan originator may be characterized on the RESPA disclosures as a ''credit'' that will be applied to reduce the consumer's settlement charges, including origination fees. A yield spread premium disclosed in this manner is not considered to be received by the loan originator directly from the consumer for purposes of § 1026.36(d)(2).

36(d)(3) Affiliates

1. For purposes of § 1026.36(d), affiliates are treated as a single ''person.'' The term ''affiliate'' is defined in § 1026.32(b)(2). For example, assume a parent company has two mortgage lending subsidiaries. Under § 1026.36(d)(1), subsidiary ''A'' could not pay a loan originator greater compensation for a loan with an interest rate of 8 percent than it would pay for a loan with an interest rate of 7 percent. If the loan originator may deliver loans to both subsidiaries, they must compensate the loan originator in the same manner. Accordingly, if the loan originator delivers the loan to subsidiary ''B'' and the interest rate is 8 percent, the originator must

receive the same compensation that would have been paid by subsidiary A for a loan with a rate of either 7 or 8 percent.

36(e) Prohibition on Steering

1. *Compensation.* See comment 36(d)(1)–1 for guidance on compensation that is subject to § 1026.36(e).

36(e)(1) General

1. *Steering.* For purposes of § 1026.36(e), directing or ''steering'' a consumer to consummate a particular credit transaction means advising, counseling, or otherwise influencing a consumer to accept that transaction. For such actions to constitute steering, the consumer must actually consummate the transaction in question. Thus, § 1026.36(e)(1) does not address the actions of a loan originator if the consumer does not actually obtain a loan through that loan originator.

2. *Prohibited conduct.* Under § 1026.36(e)(1), a loan originator may not direct or steer a consumer to consummate a transaction based on the fact that the loan originator would increase the amount of compensation that the loan originator would receive for that transaction compared to other transactions, unless the consummated transaction is in the consumer's interest.

i. In determining whether a consummated transaction is in the consumer's interest, that transaction must be compared to other possible loan offers available through the originator, if any, and for which the consumer was likely to qualify, at the time that transaction was offered to the consumer. Possible loan offers are available through the loan originator if they could be obtained from a creditor with which the loan originator regularly does business. Section 1026.36(e)(1) does not require a loan originator to establish a business relationship with any creditor with which the loan originator does not already do business. To be considered a possible loan offer available through the loan originator, an offer need not be extended by the creditor; it need only be an offer that the creditor likely would extend upon receiving an application from the applicant, based on the creditor's current credit standards and its current rate sheets or other similar means of communicating its current credit terms to the loan originator. An originator need not inform the consumer about a potential transaction if the originator makes a good faith determination that the consumer is not likely to qualify for it.

ii. Section 1026.36(e)(1) does not require a loan originator to direct a consumer to the transaction that will result in a creditor paying the least amount of compensation to the originator. However, if the loan originator reviews possible loan offers available from a significant number of the creditors with which the originator regularly does business, and the originator directs the consumer to the transaction that will result in the least amount of creditor-paid compensation for the loan originator, the requirements of § 1026.36(e)(1) are deemed to be satisfied. In the case where a loan originator directs the consumer to the transaction that will result in a greater amount of creditor-paid compensation for the loan originator, § 1026.36(e)(1) is not violated if the terms and conditions on that transaction compared to the other possible loan offers available through the originator, and for which the consumer likely qualifies, are the same. A loan originator who is an employee of the creditor on a transaction may not obtain compensation that is based on the transaction's terms or conditions pursuant to § 1026.36(d)(1), and compliance with that provision by such a loan originator also satisfies the requirements of § 1026.36(e)(1) for that transaction with the creditor. However, if a creditor's employee acts as a broker by forwarding a consumer's application to a creditor *other than* the loan originator's employer, such as when the employer does not offer any loan products for which the consumer would qualify, the loan originator is not an employee of the creditor in that transaction and is subject to § 1026.36(e)(1) if the originator is compensated for arranging the loan with the other creditor.

iii. See the commentary under § 1026.36(e)(3) for additional guidance on what constitutes a ''significant number of creditors with which a loan originator regularly does business'' and guidance on the determination about transactions for which ''the consumer likely qualifies.''

3. *Examples.* Assume a loan originator determines that a consumer likely qualifies for a loan from Creditor A that has a fixed interest rate of 7 percent, but the loan originator directs the consumer to a loan from Creditor B having a rate of 7.5 percent. If the loan originator receives more in compensation from Creditor B than the amount that would have been paid by Creditor A, the prohibition in § 1026.36(e) is violated unless the higher-rate loan is in the consumer's interest. For example, a higher-rate loan might be in the consumer's interest if the lower-rate loan has a prepayment penalty, or if the lower-rate loan requires the consumer to pay more in up-front charges that the consumer is unable or unwilling to pay or finance as part of the loan amount.

36(e)(2) Permissible Transactions

1. *Safe harbors.* A loan originator that satisfies § 1026.36(e)(2) is deemed to comply with § 1026.36(e)(1). A loan originator that does not satisfy § 1026.36(e)(2) is not subject to any presumption regarding the originator's compliance or noncompliance with § 1026.36(e)(1).

2. *Minimum number of loan options.* To obtain the safe harbor, § 1026.36(e)(2) requires that the loan originator present loan options that meet the criteria in § 1026.36(e)(3)(i) for each type of transaction in which the consumer expressed an interest. As required by § 1026.36(e)(3)(ii), the loan originator must have a good faith belief that the options presented are loans for which the consumer likely qualifies. If the loan originator is not able to form such a good faith belief for loan options that meet the criteria in § 1026.36(e)(3)(i) for a given type of transaction, the loan originator may satisfy § 1026.36(e)(2) by presenting all loans for which the consumer likely qualifies and that meet the other requirements in § 1026.36(e)(3) for that given type of transaction. A loan originator may present to the consumer any number of loan options, but presenting a consumer more than four loan options for each type of transaction in which the consumer expressed an interest and for which the consumer likely qualifies would not likely help the consumer make a meaningful choice.

36(e)(3) Loan Options Presented

1. *Significant number of creditors.* A significant number of the creditors with which a loan originator regularly does business is three or more of those creditors. If the loan originator regularly does business with fewer than three creditors, the originator is deemed to comply by obtaining loan options from all the creditors with which it regularly does business. Under § 1026.36(e)(3)(i), the loan originator must obtain loan options from a significant number of creditors with which the loan originator regularly does business, but the loan originator need not present loan options from all such creditors to the consumer. For example, if three loans available from one of the creditors with which the loan originator regularly does business satisfy the criteria in § 1026.36(e)(3)(i), presenting those and no options from any other creditor satisfies that section.

2. *Creditors with which loan originator regularly does business.* To qualify for the safe harbor in § 1026.36(e)(2), the loan originator must obtain and review loan options from a significant number of the creditors with which the loan originator regularly does business. For this purpose, a loan originator regularly does business with a creditor if:

i. There is a written agreement between the originator and the creditor governing the originator's submission of mortgage loan applications to the creditor;

ii. The creditor has extended credit secured by a dwelling to one or more consumers during the current or previous calendar month based on an application submitted by the loan originator; or

iii. The creditor has extended credit secured by a dwelling twenty-five or more times during the previous twelve calendar months based on applications submitted by the loan originator. For this purpose, the previous twelve calendar months begin with the calendar month that precedes the month in which the loan originator accepted the consumer's application.

3. *Lowest interest rate.* To qualify under the safe harbor in § 1026.36(e)(2), for each type of transaction in which the consumer has expressed an interest, the loan originator must present the consumer with loan options that meet the criteria in § 1026.36(e)(3)(i). The criteria are: The loan with the lowest interest rate; the loan with the lowest total dollar amount for discount points and origination points or fees; and a loan with the lowest interest rate without negative amortization, a prepayment penalty, a balloon payment in the first seven years of the loan term, shared equity, or shared appreciation, or, in the case of a reverse mortgage, a loan without a prepayment penalty, shared equity, or shared appreciation. To identify the loan with the lowest interest rate, for any loan that has an initial rate that is fixed for at least five years, the loan originator shall use the initial rate

that would be in effect at consummation. For a loan with an initial rate that is not fixed for at least five years:

i. If the interest rate varies based on changes to an index, the originator shall use the fully-indexed rate that would be in effect at consummation without regard to any initial discount or premium.

ii. For a step-rate loan, the originator shall use the highest rate that would apply during the first five years.

4. *Transactions for which the consumer likely qualifies.* To qualify under the safe harbor in § 1026.36(e)(2), the loan originator must have a good faith belief that the loan options presented to the consumer pursuant to § 1026.36(e)(3) are transactions for which the consumer likely qualifies. The loan originator's belief that the consumer likely qualifies should be based on information reasonably available to the loan originator at the time the loan options are presented. In making this determination, the loan originator may rely on information provided by the consumer, even if it subsequently is determined to be inaccurate. For purposes of § 1026.36(e)(3), a loan originator is not expected to know all aspects of each creditor's underwriting criteria. But pricing or other information that is routinely communicated by creditors to loan originators is considered to be reasonably available to the loan originator, for example, rate sheets showing creditors' current pricing and the required minimum credit score or other eligibility criteria.

Section 1026.39—Mortgage Transfer Disclosures

39(a) Scope

Paragraph 39(a)(1)

1. *Covered persons.* The disclosure requirements of this section apply to any ''covered person'' that becomes the legal owner of an existing mortgage loan, whether through a purchase, or other transfer or assignment, regardless of whether the person also meets the definition of a ''creditor'' in Regulation Z. The fact that a person purchases or acquires mortgage loans and provides the disclosures under this section does not by itself make that person a ''creditor'' as defined in the regulation.

2. *Acquisition of legal title.* To become a ''covered person'' subject to this section, a person must become the owner of an existing mortgage loan by acquiring legal title to the debt obligation.

i. *Partial interest.* A person may become a covered person by acquiring a partial interest in the mortgage loan. If the original creditor transfers a partial interest in the loan to one or more persons, all such transferees are covered persons under this section.

ii. *Joint acquisitions.* All persons that jointly acquire legal title to the loan are covered persons under this section, and under § 1026.39(b)(5), a single disclosure must be provided on behalf of all such covered persons. Multiple persons are deemed to jointly acquire legal title to the loan if each acquires a partial interest in the loan pursuant to the same agreement or by otherwise acting in concert. *See* comments 39(b)(5)–1 and 39(d)(1)(ii)–1 regarding the disclosure requirements for multiple persons that jointly acquire a loan.

iii. *Affiliates.* An acquiring party that is a separate legal entity from the transferor must provide the disclosures required by this section even if the parties are affiliated entities.

3. *Exclusions.* i. *Beneficial interest.* Section 1026.39 does not apply to a party that acquires only a beneficial interest or a security interest in the loan, or to a party that assumes the credit risk without acquiring legal title to the loan. For example, an investor that acquires mortgage-backed securities, pass-through certificates, or participation interests and does not acquire legal title in the underlying mortgage loans is not covered by this section.

ii. *Loan servicers.* Pursuant to TILA Section 131(f)(2), the servicer of a mortgage loan is not the owner of the obligation for purposes of this section if the servicer holds title to the loan as a result of the assignment of the obligation to the servicer solely for the administrative convenience of the servicer in servicing the obligation.

4. *Mergers, corporate acquisitions, or reorganizations.* Disclosures are required under this section when, as a result of a merger, corporate acquisition, or reorganization, the ownership of a mortgage loan is transferred to a different legal entity.

Paragraph 39(a)(2)

1. *Mortgage transactions covered.* Section 1026.39 applies to closed-end or open-end consumer credit transactions secured by the principal dwelling of a consumer.

39(b) Disclosure Required

1. *Generally.* A covered person must mail or deliver the disclosures required by this section on or before the 30th calendar day following the date of transfer, unless an exception in § 1026.39(c) applies. For example, if a covered person acquires a mortgage loan on March 15, the disclosure must be mailed or delivered on or before April 14.

39(b)(1) Form of Disclosures

1. *Combining disclosures.* The disclosures under this section can be combined with other materials or disclosures, including the transfer of servicing notices required by the Real Estate Settlement Procedure Act (12 U.S.C. 2601 *et seq.*) so long as the combined disclosure satisfies the timing and other requirements of this section.

39(b)(4) Multiple Transfers

1. *Single disclosure for multiple transfers.* A mortgage loan might be acquired by a covered person and subsequently transferred to another entity that is also a covered person required to provide the disclosures under this section. In such cases, a single disclosure may be provided on behalf of both covered persons instead of providing two separate disclosures if the disclosure satisfies the timing and content requirements applicable to each covered person. For example, if a covered person acquires a loan on March 15 with the intent to assign the loan to another entity on April 30, the covered person could mail the disclosure on or before April 14 to provide the required information for both entities and indicate when the subsequent transfer is expected to occur.

2. *Estimating the date.* When a covered person provides the disclosure required by this section that also describes a subsequent transfer, the date of the subsequent transfer may be estimated when the exact date is unknown at the time the disclosure is made. Information is unknown if it is not reasonably available to the covered person at the time the disclosure is made. The ''reasonably available'' standard requires that the covered person, acting in good faith, exercise due diligence in obtaining information. The covered person normally may rely on the representations of other parties in obtaining information. The covered person might make the disclosure using an estimated date even though the covered person knows that more precise information will be available in the future. For example, a covered person may provide a disclosure on March 31 stating that it acquired the loan on March 15 and that a transfer to another entity is expected to occur ''on or around'' April 30, even if more precise information will be available by April 14.

3. *Duty to comply.* Even though one covered person provides the disclosures for another covered person, each has a duty to ensure that disclosures related to its acquisition are accurate and provided in a timely manner unless an exception in § 1026.39(c) applies.

39(b)(5) Multiple Covered Person

1. *Single disclosure required.* If multiple covered persons jointly acquire the loan, a single disclosure must be provided on behalf of all covered persons instead of providing separate disclosures. *See* comment 39(a)(1)–2.ii regarding a joint acquisition of legal title, and comment 39(d)(1)(ii)–1 regarding the disclosure requirements for multiple persons that jointly acquire a loan. If multiple covered persons jointly acquire the loan and complete the acquisition on separate dates, a single disclosure must be provided on behalf of all persons on or before the 30th day following the earliest acquisition date. For examples, if covered persons A and B enter into an agreement with the original creditor to jointly acquire the loan, and complete the acquisition on March 15 and March 25, respectively, a single disclosure must be provided on behalf of both persons on or before April 14. If the two acquisition dates are more than 30 days apart, a single disclosure must be provided on behalf of both persons on or before the 30th day following the earlier acquisition date, even though one person has not completed its acquisition. *See* comment 39(b)(4)–2 regarding use of an estimated date of transfer.

2. *Single disclosure not required.* If multiple covered persons each acquire a partial interest in the loan pursuant to separate and unrelated agreements and not jointly, each covered person has a duty to ensure that disclosures related to its acquisition are accurate and provided in a timely manner unless an exception in § 1026.39(c) applies. The parties may, but are not required to, provide a single disclosure that satisfies the timing and content requirements applicable to each covered person.

3. *Timing requirements.* A single disclosure provided on behalf of multiple covered persons must satisfy the timing and content requirements applicable to each covered person unless an exception in § 1026.39(c) applies.

4. *Duty to comply.* Even though one covered person provides the disclosures for another covered person, each has a duty to ensure that disclosures related to its acquisition are accurate and provided in a timely manner unless an exception in § 1026.39(c) applies. *See* comments 39(c)(1)–2, 39(c)(3)–1 and 39(c)(3)–2 regarding transfers of a partial interest in the mortgage loan.

39(c) Exceptions

Paragraph 39(c)(1)

1. *Transfer of all interest.* A covered person is not required to provide the disclosures required by this section if it sells, assigns or otherwise transfers all of its interest in the mortgage loan on or before the 30th calendar day following the date that it acquired the loan. For example, if covered person A acquires the loan on March 15 and subsequently transfers all of its interest in the loan to covered person B on April 1, person A is not required to provide the disclosures required by this section. Person B, however, must provide the disclosures required by this section unless an exception in § 1026.39(c) applies.

2. *Transfer of partial interests.* A covered person that subsequently transfers a partial interest in the loan is required to provide the disclosures required by this section if the covered person retains a partial interest in the loan on the 30th calendar day after it acquired the loan, unless an exception in § 1026.39(c) applies. For example, if covered person A acquires the loan on March 15 and subsequently transfers fifty percent of its interest in the loan to covered person B on April 1, person A is required to provide the disclosures under this section if it retains a partial interest in the loan on April 14. Person B in this example must also provide the disclosures required under this section unless an exception in § 1026.39(c) applies. Either person A or person B could provide the disclosure on behalf of both of them if the disclosure satisfies the timing and content requirements applicable to each of them. In this example, a single disclosure for both covered persons would have to be provided on or before April 14 to satisfy the timing requirements for person A's acquisition of the loan on March 15. *See* comment 39(b)(4)–1 regarding a single disclosure for multiple transfers.

Paragraph 39(c)(2)

1. *Repurchase agreements.* The original creditor or owner of the mortgage loan might sell, assign or otherwise transfer legal title to the loan to secure temporary business financing under an agreement that obligates the original creditor or owner to repurchase the loan. The covered person that acquires the loan in connection with such a repurchase agreement is not required to provide disclosures under this section. However, if the transferor does not repurchase the mortgage loan, the acquiring party must provide the disclosures required by this section within 30 days after the date that the transaction is recognized as an acquisition on its books and records.

2. *Intermediary parties.* The exception in § 1026.39(c)(2) applies regardless of whether the repurchase arrangement involves an intermediary party. For example, legal title to the loan may transfer from the original creditor to party A through party B as an intermediary. If the original creditor is obligated to repurchase the loan, neither party A nor party B is required to provide the disclosures under this section. However, if the original creditor does not repurchase the loan, party A must provide the disclosures required by this section within 30 days after the date that the transaction is recognized as an acquisition on its books and records unless another exception in § 1026.39(c) applies.

Paragraph 39(c)(3)

1. *Acquisition of partial interests.* This exception applies if the covered person acquires only a partial interest in the loan, and there is no change in the agent or person authorized to receive notice of the right to rescind and resolve issues concerning the consumer's payments. If, as a result of the transfer of a partial interest in the loan, a different agent or party is authorized to receive notice of the right to rescind and resolve issues concerning the consumer's payments, the disclosures under this section must be provided.

2. *Examples.* i. A covered person is not required to provide the disclosures under this section if it acquires a partial interest in the loan from the original creditor who remains authorized to receive the notice of the right to rescind and resolve issues concerning the consumer's payments after the transfer.

ii. The original creditor transfers fifty percent of its interest in the loan to covered person A. Person A does not provide the disclosures under this section because the exception in § 1026.39(c)(3) applies. The creditor then transfers the remaining fifty percent of its interest in the loan to covered person B and does not retain any interest in the loan. Person B must provide the disclosures under this section.

iii. The original creditor transfers fifty percent of its interest in the loan to covered person A and also authorizes party X as its agent to receive notice of the right to rescind and resolve issues concerning the consumer's payments on the loan. Since there is a change in an agent or party authorized to receive notice of the right to rescind and resolve issues concerning the consumer's payments, person A is required to provide the disclosures under this section. Person A then transfers all of its interest in the loan to covered person B. Person B is not required to provide the disclosures under this section if the original creditor retains a partial interest in the loan and party X retains the same authority.

iv. The original creditor transfers all of its interest in the loan to covered person A. Person A provides the disclosures under this section and notifies the consumer that party X is authorized to receive notice of the right to rescind and resolve issues concerning the consumer's payments on the loan. Person A then transfers fifty percent of its interest in the loan to covered person B. Person B is not required to provide the disclosures under this section if person A retains a partial interest in the loan and party X retains the same authority.

39(d) Content of Required Disclosures

1. *Identifying the loan.* The disclosures required by this section must identify the loan that was acquired or transferred. The covered person has flexibility in determining what information to provide for this purpose and may use any information that would reasonably inform a consumer which loan was acquired or transferred. For example, the covered person may identify the loan by stating:

i. The address of the mortgaged property along with the account number or loan number previously disclosed to the consumer, which may appear in a truncated format;

ii. The account number alone, or other identifying number, if that number has been previously provided to the consumer, such as on a statement that the consumer receives monthly; or

iii. The date on which the credit was extended and the original amount of the loan or credit line.

Paragraph 39(d)(1)

1. *Identification of covered person.* Section 1026.39(d)(1) requires a covered person to provide its name, address, and telephone number. The party identified must be the covered person who owns the mortgage loan, regardless of whether another party services the loan or is the covered person's agent. In addition to providing its name, address and telephone number, the covered person may, at its option, provide an address for receiving electronic mail or an Internet Web site address, but is not required to do so.

Paragraph 39(d)(1)(i)

1. *Multiple transfers, single disclosure.* If a mortgage loan is acquired by a covered person and subsequently transferred to another covered person, a single disclosure may be provided on behalf of both covered persons instead of providing two separate disclosures as long as the disclosure satisfies the timing and content requirements applicable to each covered person. *See* comment 39(b)(4)–1 regarding multiple transfers. A single disclosure for multiple transfers must state the name, address, and telephone number of each covered person unless § 1026.39(d)(1)(ii) applies.

Paragraph 39(d)(1)(ii)

1. *Multiple covered persons, single disclosure.* If multiple covered persons jointly acquire the loan, a single disclosure must be provided on behalf of all covered persons instead of providing separate disclosures. The single disclosure must provide the name, address, and telephone number of each covered person unless § 1026.39(d)(1)(ii) applies and one of the covered persons has been authorized in accordance with § 1026.39(d)(3) of this section to receive the consumer's notice of the right to rescind and resolve issues concerning the consumer's payments on the

loan. In such cases, the information required by § 1026.39(d)(1) may be provided only for that covered person.

2. *Multiple covered persons, multiple disclosures.* If multiple covered persons each acquire a partial interest in the loan in separate transactions and not jointly, each covered person must comply with the disclosure requirements of this section unless an exception in § 1026.39(c) applies. *See* comment 39(a)(1)–2.ii regarding a joint acquisition of legal title, and comment 39(b)(5)–2 regarding the disclosure requirements for multiple covered persons.

Paragraph 39(d)(3)

1. *Identifying agents.* Under § 1026.39(d)(3), the covered person must provide the name, address and telephone number for the agent or other party having authority to receive the notice of the right to rescind and resolve issues concerning the consumer's payments on the loan. If multiple persons are identified under this paragraph, the disclosure shall provide the name, address and telephone number for each and indicate the extent to which the authority of each person differs. Section 1026.39(d)(3) does not require that a covered person designate an agent or other party, but if the consumer cannot contact the covered person for these purposes, the disclosure must provide the name, address and telephone number for an agent or other party that can address these matters. If an agent or other party is authorized to receive the notice of the right to rescind and resolve issues concerning the consumer's payments on the loan, the disclosure can state that the consumer may contact that agent regarding any questions concerning the consumer's account without specifically mentioning rescission or payment issues. However, if multiple agents are listed on the disclosure, the disclosure shall state the extent to which the authority of each agent differs by indicating if only one of the agents is authorized to receive notice of the right to rescind, or only one of the agents is authorized to resolve issues concerning payments.

2. *Other contact information.* The covered person may also provide an agent's electronic mail address or Internet Web site address, but is not required to do so.

Paragraph 39(d)(4)

1. *Where recorded.* Section 1026.39(d)(4) requires the covered person to disclose where transfer of ownership of the debt to the covered person is recorded if it has been recorded in public records. Alternatively, the disclosure can state that the transfer of ownership of the debt has not been recorded in public records at the time the disclosure is provided, if that is the case, or the disclosure can state where the transfer may later be recorded. An exact address is not required and it would be sufficient, for example, to state that the transfer of ownership is recorded in the office of public land records or the recorder of deeds office for the county or local jurisdiction where the property is located.

39(e) Optional Disclosures

1. *Generally.* Section 1026.39(e) provides that covered persons may, at their option, include additional information about the mortgage transaction that they consider relevant or helpful to consumers. For example, the covered person may choose to inform consumers that the location where they should send mortgage payments has not changed. *See* comment 39(b)(1)–1 regarding combined disclosures.

Section 1026.40—Requirements for Home-Equity Plans

1. *Coverage.* This section applies to all open-end credit plans secured by the consumer's *dwelling,* as defined in § 1026.2(a)(19), and is not limited to plans secured by the consumer's principal dwelling. (See the commentary to § 1026.3(a), which discusses whether transactions are consumer or business-purpose credit, for guidance on whether a home equity plan is subject to Regulation Z.)

2. *Changes to home equity plans entered into on or after November 7, 1989.* Section 1026.9(c) applies if, by written agreement under § 1026.40(f)(3)(iii), a creditor changes the terms of a home equity plan—entered into on or after November 7, 1989—at or before its scheduled expiration, for example, by renewing a plan on different terms. A new plan results, however, if the plan is renewed (with or without changes to the terms) after the scheduled expiration. The new plan is subject to all open-end credit rules, including §§ 1026.6, 1026.15, and 1026.40.

3. *Transition rules and renewals of preexisting plans.* The requirements of this section do not apply to home equity plans entered into before November 7, 1989. The requirements of this section also do not apply if the original consumer, on or after November 7, 1989, renews a plan entered into prior to that date (with or without changes to the terms). If, on or after November 7, 1989, a security interest in the consumer's dwelling is added to a line of credit entered into before that date, the substantive restrictions of this section apply for the remainder of the plan, but no new disclosures are required under this section.

4. *Disclosure of repayment phase—applicability of requirements.* Some plans provide in the initial agreement for a period during which no further draws may be taken and repayment of the amount borrowed is made. All of the applicable disclosures in this section must be given for the repayment phase. Thus, for example, a creditor must provide payment information about the repayment phase as well as about the draw period, as required by § 1026.40(d)(5). If the rate that will apply during the repayment phase is fixed at a known amount, the creditor must provide an annual percentage rate under § 1026.40(d)(6) for that phase. If, however, a creditor uses an index to determine the rate that will apply at the time of conversion to the repayment phase—even if the rate will thereafter be fixed—the creditor must provide the information in § 1026.40(d)(12), as applicable.

5. *Payment terms—applicability of closed-end provisions and substantive rules.* All payment terms that are provided for in the initial agreement are subject to the requirements of subpart B and not subpart C of the regulation. Payment terms that are subsequently added to the agreement may be subject to subpart B or to subpart C, depending on the circumstances. The following examples apply these general rules to different situations:

i. If the initial agreement provides for a repayment phase or for other payment terms such as options permitting conversion of part or all of the balance to a fixed rate during the draw period, these terms must be disclosed pursuant to §§ 1026.6 and 1026.40, and not under subpart C. Furthermore, the creditor must continue to provide periodic statements under § 1026.7 and comply with other provisions of subpart B (such as the substantive requirements of § 1026.40(f)) throughout the plan, including the repayment phase.

ii. If the consumer and the creditor enter into an agreement during the draw period to repay all or part of the principal balance on different terms (for example, with a fixed rate of interest) and the amount of available credit will be replenished as the principal balance is repaid, the creditor must continue to comply with subpart B. For example, the creditor must continue to provide periodic statements and comply with the substantive requirements of § 1026.40(f) throughout the plan.

iii. If the consumer and creditor enter into an agreement during the draw period to repay all or part of the principal balance and the amount of available credit will not be replenished as the principal balance is repaid, the creditor must give closed-end credit disclosures pursuant to subpart C for that new agreement. In such cases, subpart B, including the substantive rules, does not apply to the closed-end credit transaction, although it will continue to apply to any remaining open-end credit available under the plan.

6. *Spreader clause.* When a creditor holds a mortgage or deed of trust on the consumer's dwelling and that mortgage or deed of trust contains a *spreader clause* (also known as a *dragnet* or cross-collateralization clause), subsequent occurrences such as the opening of an open-end plan are subject to the rules applicable to home equity plans to the same degree as if a security interest were taken directly to secure the plan, unless the creditor effectively waives its security interest under the spreader clause with respect to the subsequent open-end credit extensions.

7. *Appraisals and other valuations.* For consumer credit transactions subject to § 1026.40 and secured by the consumer's principal dwelling, creditors and other persons must comply with the requirements for appraisals and other valuations under § 1026.42.

40(a) Form of Disclosures

40(a)(1) General

1. *Written disclosures.* The disclosures required under this section must be clear and conspicuous and in writing, but need not be in a form the consumer can keep. (*See* the commentary to § 1026.6(a)(3) for special rules when disclosures required under § 1026.40(d) are given in a retainable form.)

2. *Disclosure of annual percentage rate—more conspicuous requirement.* As provided

in § 1026.5(a)(2), when the term *annual percentage rate* is required to be disclosed with a number, it must be more conspicuous than other required disclosures.

3. *Segregation of disclosures.* i. While most of the disclosures must be grouped together and segregated from all unrelated information, the creditor is permitted to include information that explains or expands on the required disclosures, including, for example:

A. Any prepayment penalty.

B. How a substitute index may be chosen.

C. Actions the creditor may take short of terminating and accelerating an outstanding balance.

D. Renewal terms.

E. Rebate of fees.

ii. An example of information that does not explain or expand on the required disclosures and thus cannot be included is the creditor's underwriting criteria, although the creditor could provide such information separately from the required disclosures.

4. *Method of providing disclosures.* A creditor may provide a single disclosure form for all of its home equity plans, as long as the disclosure describes all aspects of the plans. For example, if the creditor offers several payment options, all such options must be disclosed. (See, however, the commentary to § 1026.40(d)(5)(iii) and (d)(12) (x) and (xi) for disclosure requirements relating to these provisions.) If any aspects of a plan are linked together, the creditor must disclose clearly the relationship of the terms to each other. For example, if the consumer can only obtain a particular payment option in conjunction with a certain variable-rate feature, this fact must be disclosed. A creditor has the option of providing separate disclosure forms for multiple options or variations in features. For example, a creditor that offers different payment options for the draw period may prepare separate disclosure forms for the two payment options. A creditor using this alternative, however, must include a statement on each disclosure form that the consumer should ask about the creditor's other home equity programs. (This disclosure is required only for those programs available generally to the public. Thus, if the only other programs available are employee preferred-rate plans, for example, the creditor would not have to provide this statement.) A creditor that receives a request for information about other available programs must provide the additional disclosures as soon as reasonably possible.

5. *Form of electronic disclosures provided on or with electronic applications.* Creditors must provide the disclosures required by this section (including the brochure) on or with a blank application that is made available to the consumer in electronic form, such as on a creditor's Internet Web site. Creditors have flexibility in satisfying this requirement. Methods creditors could use to satisfy the requirement include, but are not limited to, the following examples (whatever method is used, a creditor need not confirm that the consumer has read the disclosures):

i. The disclosures could automatically appear on the screen when the application appears;

ii. The disclosures could be located on the same Web page as the application (whether or not they appear on the initial screen), if the application contains a clear and conspicuous reference to the location of the disclosures and indicates that the disclosures contain rate, fee, and other cost information, as applicable;

iii. Creditors could provide a link to the electronic disclosures on or with the application as long as consumers cannot bypass the disclosures before submitting the application. The link would take the consumer to the disclosures, but the consumer need not be required to scroll completely through the disclosures; or

iv. The disclosures could be located on the same Web page as the application without necessarily appearing on the initial screen, immediately preceding the button that the consumer will click to submit the application.

40(a)(2) Precedence of Certain Disclosures

1. *Precedence rule.* The list of conditions provided at the creditor's option under § 1026.40(d)(4)(iii) need not precede the other disclosures.

Paragraph 40(a)(3)

1. *Form of disclosures.* Whether disclosures must be in electronic form depends upon the following:

i. If a consumer accesses a home equity credit line application electronically (other than as described under ii. below), such as online at a home computer, the creditor must provide the disclosures in electronic form (such as with the application form on its Web site) in order to meet the requirement to provide disclosures in a timely manner on or with the application. If the creditor instead mailed paper disclosures to the consumer, this requirement would not be met.

ii. In contrast, if a consumer is physically present in the creditor's office, and accesses a home equity credit line application electronically, such as via a terminal or kiosk (or if the consumer uses a terminal or kiosk located on the premises of an affiliate or third party that has arranged with the creditor to provide applications to consumers), the creditor may provide disclosures in either electronic or paper form, provided the creditor complies with the timing, delivery, and retainability requirements of the regulation.

40(b) Time of Disclosures

1. *Mail and telephone applications.* If the creditor sends applications through the mail, the disclosures and a brochure must accompany the application. If an application is taken over the telephone, the disclosures and brochure may be delivered or mailed within three business days of taking the application. If an application is mailed to the consumer following a telephone request, however, the creditor also must send the disclosures and a brochure along with the application.

2. *General purpose applications.* The disclosures and a brochure need not be provided when a general purpose application is given to a consumer unless (1) the application or materials accompanying it indicate that it can be used to apply for a home equity plan or (2) the application is provided in response to a consumer's specific inquiry about a home equity plan. On the other hand, if a general purpose application is provided in response to a consumer's specific inquiry only about credit other than a home equity plan, the disclosures and brochure need not be provided even if the application indicates it can be used for a home equity plan, unless it is accompanied by promotional information about home equity plans.

3. *Publicly-available applications.* Some creditors make applications for home equity plans, such as *take-ones,* available without the need for a consumer to request them. These applications must be accompanied by the disclosures and a brochure, such as by attaching the disclosures and brochure to the application form.

4. *Response cards.* A creditor may solicit consumers for its home equity plan by mailing a *response card* which the consumer returns to the creditor to indicate interest in the plan. If the only action taken by the creditor upon receipt of the response card is to send the consumer an application form or to telephone the consumer to discuss the plan, the creditor need not send the disclosures and brochure with the response card.

5. *Denial or withdrawal of application.* In situations where § 1026.40(b) permits the creditor a three-day delay in providing disclosures and the brochure, if the creditor determines within that period that an application will not be approved, the creditor need not provide the consumer with the disclosures or brochure. Similarly, if the consumer withdraws the application within this three-day period, the creditor need not provide the disclosures or brochure.

6. *Intermediary agent or broker.* In determining whether or not an application involves an *intermediary agent or broker* as discussed in § 1026.40(b), creditors should consult the provisions in comment 19(b)–3.

40(c) Duties of Third Parties

1. *Disclosure requirements.* Although third parties who give applications to consumers for home equity plans must provide the brochure required under § 1026.40(e) in all cases, such persons need provide the disclosures required under § 1026.40(d) only in certain instances. A third party has no duty to obtain disclosures about a creditor's home equity plan or to create a set of disclosures based on what it knows about a creditor's plan. If, however, a creditor provides the third party with disclosures along with its application form, the third party must give the disclosures to the consumer with the application form. The duties under this section are those of the third party; the creditor is not responsible for ensuring that a third party complies with those obligations. If an intermediary agent or broker takes an application over the telephone or receives an application contained in a magazine or other publication, § 1026.40(c) permits that person to mail the disclosures and brochure within three business days of receipt of the application. (See the commentary to § 1026.40(h) about imposition of nonrefundable fees.)

40(d) Content of Disclosures

1. *Disclosures given as applicable.* The disclosures required under this section need

be made only as applicable. Thus, for example, if negative amortization cannot occur in a home equity plan, a reference to it need not be made.

2. *Duty to respond to requests for information.* If the consumer, prior to the opening of a plan, requests information as suggested in the disclosures (such as the current index value or margin), the creditor must provide this information as soon as reasonably possible after the request.

40(d)(1) Retention of Information

1. *When disclosure not required.* The creditor need not disclose that the consumer should make or otherwise retain a copy of the disclosures if they are retainable—for example, if the disclosures are not part of an application that must be returned to the creditor to apply for the plan.

40(d)(2) Conditions for Disclosed Terms

Paragraph 40(d)(2)(i)

1. *Guaranteed terms.* The requirement that the creditor disclose the time by which an application must be submitted to obtain the disclosed terms does not require the creditor to guarantee any terms. If a creditor chooses not to guarantee any terms, it must disclose that all of the terms are subject to change prior to opening the plan. The creditor also is permitted to guarantee some terms and not others, but must indicate which terms are subject to change.

2. *Date for obtaining disclosed terms.* The creditor may disclose either a specific date or a time period for obtaining the disclosed terms. If the creditor discloses a time period, the consumer must be able to determine from the disclosure the specific date by which an application must be submitted to obtain any guaranteed terms. For example, the disclosure might read, ''To obtain the following terms, you must submit your application within 60 days after the date appearing on this disclosure,'' provided the disclosure form also shows the date.

Paragraph 40(d)(2)(ii)

1. *Relation to other provisions.* Creditors should consult the rules in § 1026.40(g) regarding refund of fees.

40(d)(4) Possible Actions by Creditor

Paragraph 40(d)(4)(i)

1. *Fees imposed upon termination.* This disclosure applies only to fees (such as penalty or prepayment fees) that the creditor imposes if it terminates the plan prior to normal expiration. The disclosure does not apply to fees that are imposed either when the plan expires in accordance with the agreement or if the consumer terminates the plan prior to its scheduled maturity. In addition, the disclosure does not apply to fees associated with collection of the debt, such as attorneys fees and court costs, or to increases in the annual percentage rate linked to the consumer's failure to make payments. The actual amount of the fee need not be disclosed.

2. *Changes specified in the initial agreement.* If changes may occur pursuant to § 1026.40(f)(3)(i), a creditor must state that certain changes will be implemented as specified in the initial agreement.

Paragraph 40(d)(4)(iii)

1. *Disclosure of conditions.* In making this disclosure, the creditor may provide a highlighted copy of the document that contains such information, such as the contract or security agreement. The relevant items must be distinguished from the other information contained in the document. For example, the creditor may provide a cover sheet that specifically points out which contract provisions contain the information, or may mark the relevant items on the document itself. As an alternative to disclosing the conditions in this manner, the creditor may simply describe the conditions using the language in §§ 1026.40(f)(2)(i)–(iii), 1026.40(f)(3)(i) (regarding freezing the line when the maximum annual percentage rate is reached), and 1026.40(f)(3)(vi) or language that is substantially similar. The condition contained in § 1026.40(f)(2)(iv) need not be stated. In describing specified changes that may be implemented during the plan, the creditor may provide a disclosure such as ''Our agreement permits us to make certain changes to the terms of the line at specified times or upon the occurrence of specified events.''

2. *Form of disclosure.* The list of conditions under § 1026.40(d)(4)(iii) may appear with the segregated disclosures or apart from them. If the creditor elects to provide the list of conditions with the segregated disclosures, the list need not comply with the precedence rule in § 1026.40(a)(2).

40(d)(5) Payment Terms

Paragraph 40(d)(5)(i)

1. *Length of the plan.* The combined length of the draw period and any repayment period need not be stated. If the length of the repayment phase cannot be determined because, for example, it depends on the balance outstanding at the beginning of the repayment period, the creditor must state that the length is determined by the size of the balance. If the length of the plan is indefinite (for example, because there is no time limit on the period during which the consumer can take advances), the creditor must state that fact.

2. *Renewal provisions.* If, under the credit agreement, a creditor retains the right to review a line at the end of the specified draw period and determine whether to renew or extend the draw period of the plan, the possibility of renewal or extension—regardless of its likelihood—should be ignored for purposes of the disclosures. For example, if an agreement provides that the draw period is five years and that the creditor may renew the draw period for an additional five years, the possibility of renewal should be ignored and the draw period should be considered five years. (See the commentary accompanying § 1026.9(c)(1) dealing with change in terms requirements.)

Paragraph 40(d)(5)(ii)

1. *Determination of the minimum periodic payment.* This disclosure must reflect how the minimum periodic payment is determined, but need only describe the principal and interest components of the payment. Other charges that may be part of the payment (as well as the balance computation method) may, but need not, be described under this provision.

2. *Fixed rate and term payment options during draw period.* If the home equity plan permits the consumer to repay all or part of the balance during the draw period at a fixed rate (rather than a variable rate) and over a specified time period, this feature must be disclosed. To illustrate, a variable-rate plan may permit a consumer to elect during a ten-year draw period to repay all or a portion of the balance over a three-year period at a fixed rate. The creditor must disclose the rules relating to this feature including the period during which the option can be selected, the length of time over which repayment can occur, any fees imposed for such a feature, and the specific rate or a description of the index and margin that will apply upon exercise of this choice. For example, the index and margin disclosure might state: ''If you choose to convert any portion of your balance to a fixed rate, the rate will be the highest prime rate published in the 'Wall Street Journal' that is in effect at the date of conversion plus a margin.'' If the fixed rate is to be determined according to an index, it must be one that is outside the creditor's control and is publicly available in accordance with § 1026.40(f)(1). The effect of exercising the option should not be reflected elsewhere in the disclosures, such as in the historical example required in § 1026.40(d)(12)(xi).

3. *Balloon payments.* In programs where the occurrence of a balloon payment is possible, the creditor must disclose the possibility of a balloon payment even if such a payment is uncertain or unlikely. In such cases, the disclosure might read, ''Your minimum payments may not be sufficient to fully repay the principal that is outstanding on your line. If they are not, you will be required to pay the entire outstanding balance in a single payment.'' In programs where a balloon payment will occur, such as programs with interest-only payments during the draw period and no repayment period, the disclosures must state that fact. For example, the disclosure might read, ''Your minimum payments will not repay the principal that is outstanding on your line. You will be required to pay the entire outstanding balance in a single payment.'' In making this disclosure, the creditor is not required to use the term ''balloon payment.'' The creditor also is not required to disclose the amount of the balloon payment. (See, however, the requirement under § 1026.40(d)(5)(iii).) The balloon payment disclosure does not apply in cases where repayment of the entire outstanding balance would occur only as a result of termination and acceleration. The creditor also need not make a disclosure about balloon payments if the final payment could not be more than twice the amount of other minimum payments under the plan.

Paragraph 40(d)(5)(iii)

1. *Minimum periodic payment example.* In disclosing the payment example, the creditor may assume that the credit limit as well as the outstanding balance is $10,000 if such an assumption is relevant to calculating payments. (If the creditor only offers lines of

credit for less than $10,000, the creditor may assume an outstanding balance of $5,000 instead of $10,000 in making this disclosure.) The example should reflect the payment comprised only of principal and interest. Creditors may provide an additional example reflecting other charges that may be included in the payment, such as credit insurance premiums. Creditors may assume that all months have an equal number of days, that payments are collected in whole cents, and that payments will fall on a business day even though they may be due on a non-business day. For variable-rate plans, the example must be based on the last rate in the historical example required in § 1026.40(d)(12)(xi), or a more recent rate. In cases where the last rate shown in the historical example is different from the index value and margin (for example, due to a rate cap), creditors should calculate the rate by using the index value and margin. A discounted rate may not be considered a more recent rate in calculating this payment example for either variable- or fixed-rate plans.

2. *Representative examples.* i. In plans with multiple payment options within the draw period or within any repayment period, the creditor may provide representative examples as an alternative to providing examples for each payment option. The creditor may elect to provide representative payment examples based on three categories of payment options. The first category consists of plans that permit minimum payment of only accrued finance charges (*interest only* plans). The second category includes plans in which a fixed percentage or a fixed fraction of the outstanding balance or credit limit (for example, 2% of the balance or 1/180th of the balance) is used to determine the minimum payment. The third category includes all other types of minimum payment options, such as a specified dollar amount plus any accrued finance charges. Creditors may classify their minimum payment arrangements within one of these three categories even if other features exist, such as varying lengths of a draw or repayment period, required payment of past due amounts, late charges, and minimum dollar amounts. The creditor may use a single example within each category to represent the payment options in that category. For example, if a creditor permits minimum payments of 1%, 2%, 3% or 4% of the outstanding balance, it may pick one of these four options and provide the example required under § 1026.40(d)(5)(iii) for that option alone.

ii. The example used to represent a category must be an option commonly chosen by consumers, or a typical or representative example. (See the commentary to § 1026.40(d)(12)(x) and (xi) for a discussion of the use of representative examples for making those disclosures. Creditors using a representative example within each category must use the same example for purposes of the disclosures under § 1026.40(d)(5)(iii) and (d)(12)(x) and (xi).) Creditors may use representative examples under § 1026.40(d)(5) only with respect to the payment example required under paragraph (d)(5)(iii). Creditors must provide a full narrative description of all payment options under § 1026.40(d)(5)(i) and (ii).

3. *Examples for draw and repayment periods.* Separate examples must be given for the draw and repayment periods unless the payments are determined the same way during both periods. In setting forth payment examples for any repayment period under this section (and the historical example under § 1026.40(d)(12)(xi)), creditors should assume a $10,000 advance is taken at the beginning of the draw period and is reduced according to the terms of the plan. Creditors should not assume an additional advance is taken at any time, including at the beginning of any repayment period.

4. *Reverse mortgages.* Reverse mortgages, also known as reverse annuity or home equity conversion mortgages, in addition to permitting the consumer to obtain advances, may involve the disbursement of monthly advances to the consumer for a fixed period or until the occurrence of an event such as the consumer's death. Repayment of the reverse mortgage (generally a single payment of principal and accrued interest) may be required to be made at the end of the disbursements or, for example, upon the death of the consumer. In disclosing these plans, creditors must apply the following rules, as applicable:

i. If the reverse mortgage has a specified period for advances and disbursements but repayment is due only upon occurrence of a future event such as the death of the consumer, the creditor must assume that disbursements will be made until they are scheduled to end. The creditor must assume repayment will occur when disbursements end (or within a period following the final disbursement which is not longer than the regular interval between disbursements). This assumption should be used even though repayment may occur before or after the disbursements are scheduled to end. In such cases, the creditor may include a statement such as ''The disclosures assume that you will repay the line at the time the draw period and our payments to you end. As provided in your agreement, your repayment may be required at a different time.'' The single payment should be considered the ''minimum periodic payment'' and consequently would not be treated as a balloon payment. The example of the minimum payment under § 1026.40(d)(5)(iii) should assume a single $10,000 draw.

ii. If the reverse mortgage has neither a specified period for advances or disbursements nor a specified repayment date and these terms will be determined solely by reference to future events, including the consumer's death, the creditor may assume that the draws and disbursements will end upon the consumer's death (estimated by using actuarial tables, for example) and that repayment will be required at the same time (or within a period following the date of the final disbursement which is not longer than the regular interval for disbursements). Alternatively, the creditor may base the disclosures upon another future event it estimates will be most likely to occur first. (If terms will be determined by reference to future events which do not include the consumer's death, the creditor must base the disclosures upon the occurrence of the event estimated to be most likely to occur first.)

iii. In making the disclosures, the creditor must assume that all draws and disbursements and accrued interest will be paid by the consumer. For example, if the note has a non-recourse provision providing that the consumer is not obligated for an amount greater than the value of the house, the creditor must nonetheless assume that the full amount to be drawn or disbursed will be repaid. In this case, however, the creditor may include a statement such as ''The disclosures assume full repayment of the amount advanced plus accrued interest, although the amount you may be required to pay is limited by your agreement.''

iv. Some reverse mortgages provide that some or all of the appreciation in the value of the property will be shared between the consumer and the creditor. The creditor must disclose the appreciation feature, including describing how the creditor's share will be determined, any limitations, and when the feature may be exercised.

40(d)(6) Annual Percentage Rate

1. *Preferred-rate plans.* If a creditor offers a preferential fixed-rate plan in which the rate will increase a specified amount upon the occurrence of a specified event, the creditor must disclose the specific amount the rate will increase.

40(d)(7) Fees Imposed by Creditor

1. *Applicability.* The fees referred to in § 1026.40(d)(7) include items such as application fees, points, annual fees, transaction fees, fees to obtain checks to access the plan, and fees imposed for converting to a repayment phase that is provided for in the original agreement. This disclosure includes any fees that are imposed by the creditor to use or maintain the plan, whether the fees are kept by the creditor or a third party. For example, if a creditor requires an annual credit report on the consumer and requires the consumer to pay this fee to the creditor or directly to the third party, the fee must be specifically stated. Third party fees to open the plan that are initially paid by the consumer to the creditor may be included in this disclosure or in the disclosure under § 1026.40(d)(8).

2. *Manner of describing fees.* Charges may be stated as an estimated dollar amount for each fee, or as a percentage of a typical or representative amount of credit. The creditor may provide a stepped fee schedule in which a fee will increase a specified amount at a specified date. (See the discussion contained in the commentary to § 1026.40(f)(3)(i).)

3. *Fees not required to be disclosed.* Fees that are not imposed to open, use, or maintain a plan, such as fees for researching an account, photocopying, paying late, stopping payment, having a check returned, exceeding the credit limit, or closing out an account do not have to be disclosed under this section. Credit report and appraisal fees imposed to investigate whether a condition permitting a freeze continues to exist—as discussed in the commentary to § 1026.40(f)(3)(vi)—are not required to be disclosed under this section or § 1026.40(d)(8).

4. *Rebates of closing costs.* If closing costs are imposed they must be disclosed, regardless of whether such costs may be rebated later (for example, rebated to the extent of any interest paid during the first year of the plan).

5. *Terms used in disclosure.* Creditors need not use the terms *finance charge* or *other charge* in describing the fees imposed by the creditor under this section or those imposed by third parties under § 1026.40(d)(8).

40(d)(8) Fees Imposed by Third Parties to Open a Plan

1. *Applicability.* Section 1026.40(d)(8) applies only to fees imposed by third parties to open the plan. Thus, for example, this section does not require disclosure of a fee imposed by a government agency at the end of a plan to release a security interest. Fees to be disclosed include appraisal, credit report, government agency, and attorneys fees. In cases where property insurance is required by the creditor, the creditor either may disclose the amount of the premium or may state that property insurance is required. For example, the disclosure might state, ''You must carry insurance on the property that secures this plan.''

2. *Itemization of third-party fees.* In all cases creditors must state the total of third-party fees as a single dollar amount or a range except that the total need not include costs for property insurance if the creditor discloses that such insurance is required. A creditor has two options with regard to providing the more detailed information about third party fees. Creditors may provide a statement that the consumer may request more specific cost information about third party fees from the creditor. As an alternative to including this statement, creditors may provide an itemization of such fees (by type and amount) with the early disclosures. Any itemization provided upon the consumer's request need not include a disclosure about property insurance.

3. *Manner of describing fees.* A good faith estimate of the amount of fees must be provided. Creditors may provide, based on a typical or representative amount of credit, a range for such fees or state the dollar amount of such fees. Fees may be expressed on a unit cost basis, for example, $5 per $1,000 of credit.

4. *Rebates of third party fees.* Even if fees imposed by third parties may be rebated, they must be disclosed. (See the commentary to § 1026.40(d)(7).)

40(d)(9) Negative Amortization

1. *Disclosure required.* In transactions where the minimum payment will not or may not be sufficient to cover the interest that accrues on the outstanding balance, the creditor must disclose that negative amortization will or may occur. This disclosure is required whether or not the unpaid interest is added to the outstanding balance upon which interest is computed. A disclosure is not required merely because a loan calls for non-amortizing or partially amortizing payments.

40(d)(10) Transaction Requirements

1. *Applicability.* A limitation on automated teller machine usage need not be disclosed under this paragraph unless that is the only means by which the consumer can obtain funds.

40(d)(12) Disclosures for Variable-Rate Plans

1. *Variable-rate provisions.* Sample forms in Appendix G–14 provide illustrative guidance on the variable-rate rules.

Paragraph 40(d)(12)(iv)

1. *Determination of annual percentage rate.* If the creditor adjusts its index through the addition of a margin, the disclosure might read, ''Your annual percentage rate is based on the index plus a margin.'' The creditor is not required to disclose a specific value for the margin.

Paragraph 40(d)(12)(viii)

1. *Preferred-rate provisions.* This paragraph requires disclosure of preferred-rate provisions, where the rate will increase upon the occurrence of some event, such as the borrower-employee leaving the creditor's employ or the consumer closing an existing deposit account with the creditor.

2. *Provisions on conversion to fixed rates.* The commentary to § 1026.40(d)(5)(ii) discusses the disclosure requirements for options permitting the consumer to convert from a variable rate to a fixed rate.

Paragraph 40(d)(12)(ix)

1. *Periodic limitations on increases in rates.* The creditor must disclose any annual limitations on increases in the annual percentage rate. If the creditor bases its rate limitation on 12 monthly billing cycles, such a limitation should be treated as an annual cap. Rate limitations imposed on less than an annual basis must be stated in terms of a specific amount of time. For example, if the creditor imposes rate limitations on only a semiannual basis, this must be expressed as a rate limitation for a six-month time period. If the creditor does not impose periodic limitations (annual or shorter) on rate increases, the fact that there are no annual rate limitations must be stated.

2. *Maximum limitations on increases in rates.* The maximum annual percentage rate that may be imposed under each payment option over the term of the plan (including the draw period and any repayment period provided for in the initial agreement) must be provided. The creditor may disclose this rate as a specific number (for example, 18%) or as a specific amount above the initial rate. For example, this disclosure might read, ''The maximum annual percentage rate that can apply to your line will be 5 percentage points above your initial rate.'' If the creditor states the maximum rate as a specific amount above the initial rate, the creditor must include a statement that the consumer should inquire about the rate limitations that are currently available. If an initial discount is not taken into account in applying maximum rate limitations, that fact must be disclosed. If separate overall limitations apply to rate increases resulting from events such as the exercise of a fixed-rate conversion option or leaving the creditor's employ, those limitations also must be stated. Limitations do not include legal limits in the nature of usury or rate ceilings under state or Federal statutes or regulations.

3. *Form of disclosures.* The creditor need not disclose each periodic or maximum rate limitation that is currently available. Instead, the creditor may disclose the range of the lowest and highest periodic and maximum rate limitations that may be applicable to the creditor's home equity plans. Creditors using this alternative must include a statement that the consumer should inquire about the rate limitations that are currently available.

Paragraph 40(d)(12)(x)

1. *Maximum rate payment example.* In calculating the payment creditors should assume the maximum rate is in effect. Any discounted or premium initial rates or periodic rate limitations should be ignored for purposes of this disclosure. If a range is used to disclose the maximum cap under § 1026.40(d)(12)(ix), the highest rate in the range must be used for the disclosure under this paragraph. As an alternative to making disclosures based on each payment option, the creditor may choose a representative example within the three categories of payment options upon which to base this disclosure. (See the commentary to § 1026.40(d)(5).) However, separate examples must be provided for the draw period and for any repayment period unless the payment is determined the same way in both periods. Creditors should calculate the example for the repayment period based on an assumed $10,000 balance. (See the commentary to § 1026.40(d)(5) for a discussion of the circumstances in which a creditor may use a lower outstanding balance.)

2. *Time the maximum rate could be reached.* In stating the date or time when the maximum rate could be reached, creditors should assume the rate increases as rapidly as possible under the plan. In calculating the date or time, creditors should factor in any discounted or premium initial rates and periodic rate limitations. This disclosure must be provided for the draw phase and any repayment phase. Creditors should assume the index and margin shown in the last year of the historical example (or a more recent rate) is in effect at the beginning of each phase.

Paragraph 40(d)(12)(xi)

1. *Index movement.* Index values and annual percentage rates must be shown for the entire 15 years of the historical example and must be based on the most recent 15 years. The example must be updated annually to reflect the most recent 15 years of index values as soon as reasonably possible after the new index value becomes available. If the values for an index have not been available for 15 years, a creditor need only go back as far as the values have been available and may start the historical example at the year for which values are first available.

2. *Selection of index values.* The historical example must reflect the method of choosing index values for the plan. For example, if an average of index values is used in the plan, averages must be used in the example, but if an index value as of a particular date is used, a single index value must be shown. The creditor is required to assume one date (or one period, if an average is used) within a year on which to base the history of index

values. The creditor may choose to use index values as of any date or period as long as the index value as of this date or period is used for each year in the example. Only one index value per year need be shown, even if the plan provides for adjustments to the annual percentage rate or payment more than once in a year. In such cases, the creditor can assume that the index rate remained constant for the full year for the purpose of calculating the annual percentage rate and payment.

3. *Selection of margin.* A value for the margin must be assumed in order to prepare the example. A creditor may select a representative margin that it has used with the index during the six months preceding preparation of the disclosures and state that the margin is one that it has used recently. The margin selected may be used until the creditor annually updates the disclosure form to reflect the most recent 15 years of index values.

4. *Amount of discount or premium.* In reflecting any discounted or premium initial rate, the creditor may select a discount or premium that it has used during the six months preceding preparation of the disclosures, and should disclose that the discount or premium is one that the creditor has used recently. The discount or premium should be reflected in the example for as long as it is in effect. The creditor may assume that a discount or premium that would have been in effect for any part of a year was in effect for the full year for purposes of reflecting it in the historical example.

5. *Rate limitations.* Limitations on both periodic and maximum rates must be reflected in the historical example. If ranges of rate limitations are provided under § 1026.40(d)(12)(ix), the highest rates provided in those ranges must be used in the example. Rate limitations that may apply more often than annually should be treated as if they were annual limitations. For example, if a creditor imposes a 1% cap every six months, this should be reflected in the example as if it were a 2% annual cap.

6. *Assumed advances.* The creditor should assume that the $10,000 balance is an advance taken at the beginning of the first billing cycle and is reduced according to the terms of the plan, and that the consumer takes no subsequent draws. As discussed in the commentary to § 1026.40(d)(5), creditors should not assume an additional advance is taken at the beginning of any repayment period. If applicable, the creditor may assume the $10,000 is both the advance and the credit limit. (See the commentary to § 1026.40(d)(5) for a discussion of the circumstances in which a creditor may use a lower outstanding balance.)

7. *Representative payment options.* The creditor need not provide an historical example for all of its various payment options, but may select a representative payment option within each of the three categories of payments upon which to base its disclosure. (See the commentary to § 1026.40(d)(5).)

8. *Payment information.* i. The payment figures in the historical example must reflect all significant program terms. For example, features such as rate and payment caps, a discounted initial rate, negative amortization, and rate carryover must be taken into account in calculating the payment figures if these would have applied to the plan. The historical example should include payments for as much of the length of the plan as would occur during a 15-year period. For example:

A. If the draw period is 10 years and the repayment period is 15 years, the example should illustrate the entire 10-year draw period and the first 5 years of the repayment period.

B. If the length of the draw period is 15 years and there is a 15-year repayment phase, the historical example must reflect the payments for the 15-year draw period and would not show any of the repayment period. No additional historical example would be required to reflect payments for the repayment period.

C. If the length of the plan is less than 15 years, payments in the historical example need only be shown for the number of years in the term. In such cases, however, the creditor must show the index values, margin and annual percentage rates and continue to reflect all significant plan terms such as rate limitations for the entire 15 years.

ii. A creditor need show only a single payment per year in the example, even though payments may vary during a year. The calculations should be based on the actual payment computation formula, although the creditor may assume that all months have an equal number of days. The creditor may assume that payments are made on the last day of the billing cycle, the billing date or the payment due date, but must be consistent in the manner in which the period used to illustrate payment information is selected. Information about balloon payments and remaining balance may, but need not, be reflected in the example.

9. *Disclosures for repayment period.* The historical example must reflect all features of the repayment period, including the appropriate index values, margin, rate limitations, length of the repayment period, and payments. For example, if different indices are used during the draw and repayment periods, the index values for that portion of the 15 years that reflect the repayment period must be the values for the appropriate index.

10. *Reverse mortgages.* The historical example for reverse mortgages should reflect 15 years of index values and annual percentage rates, but the payment column should be blank until the year that the single payment will be made, assuming that payment is estimated to occur within 15 years. (See the commentary to § 1026.40(d)(5) for a discussion of reverse mortgages.)

40(e) Brochure

1. *Substitutes.* A brochure is a suitable substitute for the home equity brochure, ''What You Should Know About Home Equity Lines of Credit,'' (available on the Bureau's Web site) if it is, at a minimum, comparable to that brochure in substance and comprehensiveness. Creditors are permitted to provide more detailed information than is contained in that brochure.

2. *Effect of third party delivery of brochure.* If a creditor determines that a third party has provided a consumer with the required brochure pursuant to § 1026.40(c), the creditor need not give the consumer a second brochure.

40(f) Limitations on Home Equity Plans

1. *Coverage.* Section 1026.40(f) limits both actions that may be taken and language that may be included in contracts, and applies to any assignee or holder as well as to the original creditor. The limitations apply to the draw period and any repayment period, and to any renewal or modification of the original agreement.

Paragraph 40(f)(1)

1. *External index.* A creditor may change the annual percentage rate for a plan only if the change is based on an index outside the creditor's control. Thus, a creditor may not make rate changes based on its own prime rate or cost of funds and may not reserve a contractual right to change rates at its discretion. A creditor is permitted, however, to use a published prime rate, such as that in the Wall Street Journal, even if the bank's own prime rate is one of several rates used to establish the published rate.

2. *Publicly available.* The index must be available to the public. A publicly available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify rates imposed under the plan.

3. *Provisions not prohibited.* This paragraph does not prohibit rate changes that are specifically set forth in the agreement. For example, stepped-rate plans, in which specified rates are imposed for specified periods, are permissible. In addition, preferred-rate provisions, in which the rate increases by a specified amount upon the occurrence of a specified event, also are permissible.

Paragraph 40(f)(2)

1. *Limitations on termination and acceleration.* In general, creditors are prohibited from terminating and accelerating payment of the outstanding balance before the scheduled expiration of a plan. However, creditors may take these actions in the four circumstances specified in § 1026.40(f)(2). Creditors are not permitted to specify in their contracts any other events that allow termination and acceleration beyond those permitted by the regulation. Thus, for example, an agreement may not provide that the balance is payable on demand nor may it provide that the account will be terminated and the balance accelerated if the rate cap is reached.

2. *Other actions permitted.* If an event permitting termination and acceleration occurs, a creditor may instead take actions short of terminating and accelerating. For example, a creditor could temporarily or permanently suspend further advances, reduce the credit limit, change the payment terms, or require the consumer to pay a fee. A creditor also may provide in its agreement that a higher rate or higher fees will apply in circumstances under which it would otherwise be permitted to terminate the plan and accelerate the balance. A creditor that does not immediately terminate an account and accelerate payment or take another

permitted action may take such action at a later time, provided one of the conditions permitting termination and acceleration exists at that time.

Paragraph 40(f)(2)(i)

1. *Fraud or material misrepresentation.* A creditor may terminate a plan and accelerate the balance if there has been fraud or material misrepresentation by the consumer in connection with the plan. This exception includes fraud or misrepresentation at any time, either during the application process or during the draw period and any repayment period. What constitutes fraud or misrepresentation is determined by applicable state law and may include acts of omission as well as overt acts, as long as any necessary intent on the part of the consumer exists.

Paragraph 40(f)(2)(ii)

1. *Failure to meet repayment terms.* A creditor may terminate a plan and accelerate the balance when the consumer fails to meet the repayment terms provided for in the agreement. However, a creditor may terminate and accelerate under this provision only if the consumer actually fails to make payments. For example, a creditor may not terminate and accelerate if the consumer, in error, sends a payment to the wrong location, such as a branch rather than the main office of the creditor. If a consumer files for or is placed in bankruptcy, the creditor may terminate and accelerate under this provision if the consumer fails to meet the repayment terms of the agreement. This section does not override any state or other law that requires a right-to-cure notice, or otherwise places a duty on the creditor before it can terminate a plan and accelerate the balance.

Paragraph 40(f)(2)(iii)

1. *Impairment of security.* A creditor may terminate a plan and accelerate the balance if the consumer's action or inaction adversely affects the creditor's security for the plan, or any right of the creditor in that security. Action or inaction by third parties does not, in itself, permit the creditor to terminate and accelerate.

2. *Examples.* i. A creditor may terminate and accelerate, for example, if:

A. The consumer transfers title to the property or sells the property without the permission of the creditor.

B. The consumer fails to maintain required insurance on the dwelling.

C. The consumer fails to pay taxes on the property.

D. The consumer permits the filing of a lien senior to that held by the creditor.

E. The sole consumer obligated on the plan dies.

F. The property is taken through eminent domain.

G. A prior lienholder forecloses.

ii. By contrast, the filing of a judgment against the consumer would permit termination and acceleration only if the amount of the judgment and collateral subject to the judgment is such that the creditor's security is adversely affected. If the consumer commits waste or otherwise destructively uses or fails to maintain the property such that the action adversely affects the security, the plan may be terminated and the balance accelerated. Illegal use of the property by the consumer would permit termination and acceleration if it subjects the property to seizure. If one of two consumers obligated on a plan dies the creditor may terminate the plan and accelerate the balance if the security is adversely affected. If the consumer moves out of the dwelling that secures the plan and that action adversely affects the security, the creditor may terminate a plan and accelerate the balance.

Paragraph 40(f)(3)

1. *Scope of provision.* In general, a creditor may not change the terms of a plan after it is opened. For example, a creditor may not increase any fee or impose a new fee once the plan has been opened, even if the fee is charged by a third party, such as a credit reporting agency, for a service. The change of terms prohibition applies to all features of a plan, not only those required to be disclosed under this section. For example, this provision applies to charges imposed for late payment, although this fee is not required to be disclosed under § 1026.40(d)(7).

2. *Charges not covered.* There are three charges not covered by this provision. A creditor may pass on increases in taxes since such charges are imposed by a governmental body and are beyond the control of the creditor. In addition, a creditor may pass on increases in premiums for property insurance that are excluded from the finance charge under § 1026.4(d)(2), since such insurance provides a benefit to the consumer independent of the use of the line and is often maintained notwithstanding the line. A creditor also may pass on increases in premiums for credit insurance that are excluded from the finance charge under § 1026.4(d)(1), since the insurance is voluntary and provides a benefit to the consumer.

Paragraph 40(f)(3)(i)

1. *Changes provided for in agreement.* A creditor may provide in the initial agreement that further advances will be prohibited or the credit line reduced during any period in which the maximum annual percentage rate is reached. A creditor also may provide for other specific changes to take place upon the occurrence of specific events. Both the triggering event and the resulting modification must be stated with specificity. For example, in home equity plans for employees, the agreement could provide that a specified higher rate or margin will apply if the borrower's employment with the creditor ends. A contract could contain a stepped-rate or stepped-fee schedule providing for specified changes in the rate or the fees on certain dates or after a specified period of time. A creditor also may provide in the initial agreement that it will be entitled to a share of the appreciation in the value of the property as long as the specific appreciation share and the specific circumstances which require the payment of it are set forth. A contract may permit a consumer to switch among minimum payment options during the plan.

2. *Prohibited provisions.* A creditor may not include a general provision in its agreement permitting changes to any or all of the terms of the plan. For example, creditors may not include ''boilerplate'' language in the agreement stating that they reserve the right to change the fees imposed under the plan. In addition, a creditor may not include any ''triggering events'' or responses that the regulation expressly addresses in a manner different from that provided in the regulation. For example, an agreement may not provide that the margin in a variable-rate plan will increase if there is a material change in the consumer's financial circumstances, because the regulation specifies that temporarily freezing the line or lowering the credit limit is the permissible response to a material change in the consumer's financial circumstances. Similarly a contract cannot contain a provision allowing the creditor to freeze a line due to an insignificant decline in property value since the regulation allows that response only for a significant decline.

Paragraph 40(f)(3)(ii)

1. *Substitution of index.* A creditor may change the index and margin used under the plan if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable.

Paragraph 40(f)(3)(iii)

1. *Changes by written agreement.* A creditor may change the terms of a plan if the consumer expressly agrees in writing to the change at the time it is made. For example, a consumer and a creditor could agree in writing to change the repayment terms from interest-only payments to payments that reduce the principal balance. The provisions of any such agreement are governed by the limitations in § 1026.40(f). For example, a mutual agreement could not provide for future annual percentage rate changes based on the movement of an index controlled by the creditor or for termination and acceleration under circumstances other than those specified in the regulation. By contrast, a consumer could agree to a new credit limit for the plan, although the agreement could not permit the creditor to later change the credit limit except by a subsequent written agreement or in the circumstances described in § 1026.40(f)(3)(vi).

2. *Written agreement.* The change must be agreed to in writing by the consumer. Creditors are not permitted to assume consent because the consumer uses an account, even if use of an account would otherwise constitute acceptance of a proposed change under state law.

Paragraph 40(f)(3)(iv)

1. *Beneficial changes.* After a plan is opened, a creditor may make changes that unequivocally benefit the consumer. Under this provision, a creditor may offer more

options to consumers, as long as existing options remain. For example, a creditor may offer the consumer the option of making lower monthly payments or could increase the credit limit. Similarly, a creditor wishing to extend the length of the plan on the same terms may do so. Creditors are permitted to temporarily reduce the rate or fees charged during the plan (though a change in terms notice may be required under § 1026.9(c) when the rate or fees are returned to their original level). Creditors also may offer an additional means of access to the line, even if fees are associated with using the device, provided the consumer retains the ability to use prior access devices on the original terms.

Paragraph 40(f)(3)(v)

1. *Insignificant changes.* A creditor is permitted to make insignificant changes after a plan is opened. This rule accommodates operational and similar problems, such as changing the address of the creditor for purposes of sending payments. It does not permit a creditor to change a term such as a fee charged for late payments.

2. *Examples of insignificant changes.* Creditors may make minor changes to features such as the billing cycle date, the payment due date (as long as the consumer does not have a diminished grace period if one is provided), and the day of the month on which index values are measured to determine changes to the rate for variable-rate plans. A creditor also may change its rounding practice in accordance with the tolerance rules set forth in § 1026.14 (for example, stating an exact APR of 14.3333 percent as 14.3 percent, even if it had previously been stated as 14.33 percent). A creditor may change the balance computation method it uses only if the change produces an insignificant difference in the finance charge paid by the consumer. For example, a creditor may switch from using the average daily balance method (including new transactions) to the daily balance method (including new transactions).

Paragraph 40(f)(3)(vi)

1. *Suspension of credit privileges or reduction of credit limit.* A creditor may prohibit additional extensions of credit or reduce the credit limit in the circumstances specified in this section of the regulation. In addition, as discussed under § 1026.40(f)(3)(i), a creditor may contractually reserve the right to take such actions when the maximum annual percentage rate is reached. A creditor may not take these actions under other circumstances, unless the creditor would be permitted to terminate the line and accelerate the balance as described in § 1026.40(f)(2). The creditor's right to reduce the credit limit does not permit reducing the limit below the amount of the outstanding balance if this would require the consumer to make a higher payment.

2. *Temporary nature of suspension or reduction.* Creditors are permitted to prohibit additional extensions of credit or reduce the credit limit only while one of the designated circumstances exists. When the circumstance justifying the creditor's action ceases to exist, credit privileges must be reinstated, assuming that no other circumstance permitting such action exists at that time.

3. *Imposition of fees.* If not prohibited by state law, a creditor may collect only bona fide and reasonable appraisal and credit report fees if such fees are actually incurred in investigating whether the condition permitting the freeze continues to exist. A creditor may not, in any circumstances, impose a fee to reinstate a credit line once the condition has been determined not to exist.

4. *Reinstatement of credit privileges.* Creditors are responsible for ensuring that credit privileges are restored as soon as reasonably possible after the condition that permitted the creditor's action ceases to exist. One way a creditor can meet this responsibility is to monitor the line on an ongoing basis to determine when the condition ceases to exist. The creditor must investigate the condition frequently enough to assure itself that the condition permitting the freeze continues to exist. The frequency with which the creditor must investigate to determine whether a condition continues to exist depends upon the specific condition permitting the freeze. As an alternative to such monitoring, the creditor may shift the duty to the consumer to request reinstatement of credit privileges by providing a notice in accordance with § 1026.9(c)(1)(iii). A creditor may require a reinstatement request to be in writing if it notifies the consumer of this requirement on the notice provided under § 1026.9(c)(1)(iii). Once the consumer requests reinstatement, the creditor must promptly investigate to determine whether the condition allowing the freeze continues to exist. Under this alternative, the creditor has a duty to investigate only upon the consumer's request.

5. *Suspension of credit privileges following request by consumer.* A creditor may honor a specific request by a consumer to suspend credit privileges. If the consumer later requests that the creditor reinstate credit privileges, the creditor must do so provided no other circumstance justifying a suspension exists at that time. If two or more consumers are obligated under a plan and each has the ability to take advances, the agreement may permit any of the consumers to direct the creditor not to make further advances. A creditor may require that all persons obligated under a plan request reinstatement.

6. *Significant decline defined.* What constitutes a significant decline for purposes of § 1026.40(f)(3)(vi)(A) will vary according to individual circumstances. In any event, if the value of the dwelling declines such that the initial difference between the credit limit and the available equity (based on the property's appraised value for purposes of the plan) is reduced by fifty percent, this constitutes a significant decline in the value of the dwelling for purposes of § 1026.40(f)(3)(vi)(A). For example, assume that a house with a first mortgage of $50,000 is appraised at $100,000 and the credit limit is $30,000. The difference between the credit limit and the available equity is $20,000, half of which is $10,000. The creditor could prohibit further advances or reduce the credit limit if the value of the property declines from $100,000 to $90,000. This provision does not require a creditor to obtain an appraisal before suspending credit privileges although a significant decline must occur before suspension can occur.

7. *Material change in financial circumstances.* Two conditions must be met for § 1026.40(f)(3)(vi)(B) to apply. First, there must be a ''material change'' in the consumer's financial circumstances, such as a significant decrease in the consumer's income. Second, as a result of this change, the creditor must have a reasonable belief that the consumer will be unable to fulfill the payment obligations of the plan. A creditor may, but does not have to, rely on specific evidence (such as the failure to pay other debts) in concluding that the second part of the test has been met. A creditor may prohibit further advances or reduce the credit limit under this section if a consumer files for or is placed in bankruptcy.

8. *Default of a material obligation.* Creditors may specify events that would qualify as a default of a material obligation under § 1026.40(f)(3)(vi)(C). For example, a creditor may provide that default of a material obligation will exist if the consumer moves out of the dwelling or permits an intervening lien to be filed that would take priority over future advances made by the creditor.

9. *Government limits on the annual percentage rate.* Under § 1026.40(f)(3)(vi)(D), a creditor may prohibit further advances or reduce the credit limit if, for example, a state usury law is enacted which prohibits a creditor from imposing the agreed-upon annual percentage rate.

40(g) Refund of Fees

1. *Refund of fees required.* If any disclosed term, including any term provided upon request pursuant to § 1026.40(d), changes between the time the early disclosures are provided to the consumer and the time the plan is opened, and the consumer as a result decides to not enter into the plan, a creditor must refund all fees paid by the consumer in connection with the application. All fees, including credit report fees and appraisal fees, must be refunded whether such fees are paid to the creditor or directly to third parties. A consumer is entitled to a refund of fees under these circumstances whether or not terms are guaranteed by the creditor under § 1026.40(d)(2)(i).

2. *Variable-rate plans.* The right to a refund of fees does not apply to changes in the annual percentage rate resulting from fluctuations in the index value in a variable-rate plan. Also, if the maximum annual percentage rate is expressed as an amount over the initial rate, the right to refund of fees would not apply to changes in the cap resulting from fluctuations in the index value.

3. *Changes in terms.* If a term, such as the maximum rate, is stated as a range in the early disclosures, and the term ultimately applicable to the plan falls within that range, a change does not occur for purposes of this section. If, however, no range is used and the term is changed (for example, a rate cap of 6 rather than 5 percentage points over the initial rate), the change would permit the

consumer to obtain a refund of fees. If a fee imposed by the creditor is stated in the early disclosures as an estimate and the fee changes, the consumer could elect to not enter into the agreement and would be entitled to a refund of fees. On the other hand, if fees imposed by third parties are disclosed as estimates and those fees change, the consumer is not entitled to a refund of fees paid in connection with the application. Creditors must, however, use the best information reasonably available in providing disclosures about such fees.

4. *Timing of refunds and relation to other provisions.* The refund of fees must be made as soon as reasonably possible after the creditor is notified that the consumer is not entering into the plan because of the changed term, or that the consumer wants a refund of fees. The fact that an application fee may be refunded to some applicants under this provision does not render such fees finance charges under § 1026.4(c)(1) of the regulation.

40(h) Imposition of Nonrefundable Fees

1. *Collection of fees after consumer receives disclosures.* A fee may be collected after the consumer receives the disclosures and brochure and before the expiration of three days, although the fee must be refunded if, within three days of receiving the required information, the consumer decides to not enter into the agreement. In such a case, the consumer must be notified that the fee is refundable for three days. The notice must be clear and conspicuous and in writing, and may be included with the disclosures required under § 1026.40(d) or as an attachment to them. If disclosures and brochure are mailed to the consumer, § 1026.40(h) provides that a nonrefundable fee may not be imposed until six business days after the mailing.

2. *Collection of fees before consumer receives disclosures.* An application fee may be collected before the consumer receives the disclosures and brochure (for example, when an application contained in a magazine is mailed in with an application fee) provided that it remains refundable until three business days after the consumer receives the § 1026.40 disclosures. No other fees except a refundable membership fee may be collected until after the consumer receives the disclosures required under § 1026.40.

3. *Relation to other provisions.* A fee collected before disclosures are provided may become nonrefundable except that, under § 1026.40(g), it must be refunded if the consumer elects to not enter into the plan because of a change in terms. (Of course, all fees must be refunded if the consumer later rescinds under § 1026.15.)

Section 1026.42—Valuation Independence

42(a) Scope

1. *Open- and closed-end credit.* Section 1026.42 applies to both open-end and closed-end transactions secured by the consumer's principal dwelling.

2. *Consumer's principal dwelling.* Section 1026.42 applies only if the dwelling that will secure a consumer credit transaction is the principal dwelling of the consumer who obtains credit.

42(b) Definitions

Paragraph 42(b)(1)

1. *Examples of covered persons.* ''Covered persons'' include creditors, mortgage brokers, appraisers, appraisal management companies, real estate agents, and other persons that provide ''settlement services'' as defined under the Real Estate Settlement Procedures Act and implementing regulations. *See* 12 U.S.C. 2602(3).

2. *Examples of persons not covered.* The following persons are not ''covered persons'' (unless, of course, they are creditors with respect to a covered transaction or perform ''settlement services'' in connection with a covered transaction):

i. The consumer who obtains credit through a covered transaction.

ii. A person secondarily liable for a covered transaction, such as a guarantor.

iii. A person that resides in or will reside in the consumer's principal dwelling but will not be liable on the covered transaction, such as a non-obligor spouse.

Paragraph 42(b)(2)

1. *Principal dwelling.* The term ''principal dwelling'' has the same meaning under § 1026.42(b) as under §§ 1026.2(a)(24), 1026.15(a), and 1026.23(a). *See* comments 2(a)(24)–3, 15(a)–5, and 23(a)–3.

Paragraph 42(b)(3)

1. *Valuation.* A ''valuation'' is an estimate of value prepared by a natural person, such as an appraisal report prepared by an appraiser or an estimate of market value prepared by a real estate agent. The term includes photographic or other information included with a written estimate of value. A ''valuation'' includes an estimate provided or viewed electronically, such as an estimate transmitted via electronic mail or viewed using a computer.

2. *Automated model or system.* A ''valuation'' does not include an estimate of value produced exclusively using an automated model or system. However, a ''valuation'' includes an estimate of value developed by a natural person based in part on an estimate of value produced using an automated model or system.

3. *Estimate.* An estimate of the value of the consumer's principal dwelling includes an estimate of a range of values for the consumer's principal dwelling.

42(c) Valuation for consumer's principal dwelling

42(c)(1) Coercion

1. *State law.* The terms ''coercion,'' ''extortion,'' ''inducement,'' ''bribery,'' ''intimidation,'' ''compensation,'' ''instruction,'' and ''collusion'' have the meanings given to them by applicable state law or contract. *See* § 1026.2(b)(3).

2. *Purpose.* A covered person does not violate § 1026.42(c)(1) if the person does not engage in an act or practice set forth in § 1026.42(c)(1) for the purpose of causing the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of a person that prepares valuations. For example, requesting that a person that prepares a valuation take certain actions, such as consider additional, appropriate property information, does not violate § 1026.42(c), because such request does not supplant the independent judgment of the person that prepares a valuation. *See* § 1026.42(c)(3)(i). A covered person also may provide incentives, such as additional compensation, to a person that prepares valuations or performs valuation management functions under § 1026.42(c)(1), as long as the covered person does not cause or attempt to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of the person that prepares valuations.

3. *Person that prepares valuations.* For purposes of § 1026.42, the term ''valuation'' includes an estimate of value regardless of whether it is an appraisal prepared by a state-certified or -licensed appraiser. See comment 42(b)(3)–1. A person that prepares valuations may or may not be a state-licensed or state-certified appraiser. Thus a person violates § 1026.42(c)(1) by engaging in prohibited acts or practices directed towards any person that prepares or may prepare a valuation of the consumer's principal dwelling for a covered transaction. For example, a person violates § 1026.42(c)(1) by seeking to coerce a real estate agent to assign a value to the consumer's principal dwelling based on a factor other than the independent judgment of the real estate agent, in connection with a covered transaction.

4. *Indirect acts or practices.* Section 1026.42(c)(1) prohibits both direct and indirect attempts to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of the person that prepares the valuation, through coercion and certain other acts and practices. For example, a creditor violates § 1026.42(c)(1) if the creditor attempts to cause the value an appraiser engaged by an appraisal management company assigns to the consumer's principal dwelling to be based on a factor other than the appraiser's independent judgment, by threatening to withhold future business from a title company affiliated with the appraisal management company unless the appraiser assigns a value to the dwelling that meets or exceeds a minimum threshold.

Paragraph 42(c)(1)(i)

1. *Applicability of examples.* Section 1026.42(c)(1)(i) provides examples of coercion of a person that prepares valuations. However, § 1026.42(c)(1)(i) also applies to coercion of a person that performs valuation management functions or its affiliate. *See* § 1026.42(c)(1); comment 42(c)(1) 4.

2. *Specific value or predetermined threshold.* As used in the examples of actions prohibited under § 1026.42(c)(1), a ''specific value'' and a ''predetermined threshold'' include a predetermined minimum, maximum, or range of values. Further, although the examples assume a covered person's prohibited actions are designed to cause the value assigned to the consumer's principal dwelling to equal or exceed a certain amount, the rule applies equally to cases where a covered person's prohibited actions are designed to cause the value assigned to the dwelling to be below a certain amount.

42(c)(2) Mischaracterization of Value

42(c)(2)(i) Misrepresentation

1. *Opinion of value.* Section 1026.42(c)(2)(i) prohibits a person that performs valuations from misrepresenting the value of the consumer's principal dwelling in a valuation. Such person misrepresents the value of the consumer's principal dwelling by assigning a value to such dwelling that does not reflect the person's opinion of the value of such dwelling. For example, an appraiser misrepresents the value of the consumer's principal dwelling if the appraiser estimates that the value of such dwelling is $250,000 applying the standards required by the Uniform Standards of Professional Appraisal Standards but assigns a value of $300,000 to such dwelling in a Uniform Residential Appraisal Report.

42(c)(2)(iii) Inducement of Mischaracterization

1. *Inducement.* A covered person may not induce a person to materially misrepresent the value of the consumer's principal dwelling in a valuation or to falsify or alter a valuation. For example, a loan originator may not coerce a loan underwriter to alter an appraisal report to increase the value assigned to the consumer's principal dwelling.

42(d) Prohibition on Conflicts of Interest

42(d)(1)(i) In General

1. *Prohibited interest in the property.* A person preparing a valuation or performing valuation management functions for a covered transaction has a prohibited interest in the property under paragraph (d)(1)(i) if the person has any ownership or reasonably foreseeable ownership interest in the property. For example, a person who seeks a mortgage to purchase a home has a reasonably foreseeable ownership interest in the property securing the mortgage, and therefore is not permitted to prepare the valuation or perform valuation management functions for that mortgage transaction under paragraph (d)(1)(i).

2. *Prohibited interest in the transaction.* A person preparing a valuation or performing valuation management functions has a prohibited interest in the transaction under paragraph (d)(1)(i) if that person or an affiliate of that person also serves as a loan officer of the creditor, mortgage broker, real estate broker, or other settlement service provider for the transaction and the conditions under paragraph (d)(4) are not satisfied. A person also has a prohibited interest in the transaction if the person is compensated or otherwise receives financial or other benefits based on whether the transaction is consummated. Under these circumstances, the person is not permitted to prepare the valuation or perform valuation management functions for that transaction under paragraph (d)(1)(i).

42(d)(1)(ii) Employees and Affiliates of Creditors; Providers of Multiple Settlement Services

1. *Employees and affiliates of creditors.* In general, a creditor may use employees or affiliates to prepare a valuation or perform valuation management functions without violating paragraph (d)(1)(i). However, whether an employee or affiliate has a direct or indirect interest in the property or transaction that creates a prohibited conflict of interest under paragraph (d)(1)(i) depends on the facts and circumstances of a particular case, including the structure of the employment or affiliate relationship.

2. *Providers of multiple settlement services.* In general, a person who prepares a valuation or perform valuation management functions for a covered transaction may perform another settlement service for the same transaction, or the person's affiliate may perform another settlement service, without violating paragraph (d)(1)(i). However, whether the person has a direct or indirect interest in the property or transaction that creates a prohibited conflict of interest under paragraph (d)(1)(i) depends on the facts and circumstances of a particular case.

42(d)(2) Employees and Affiliates of Creditors with Assets of More than $250 Million for Both of the Past two Calendar Years

1. *Safe harbor.* A person who a prepares valuation or performs valuation management functions for a covered transaction and is an employee or affiliate of the creditor will not be deemed to have an interest prohibited under paragraph (d)(1)(i) on the basis of the employment or affiliate relationship with the creditor if the conditions in paragraph (d)(2) are satisfied. Even if the conditions in paragraph (d)(2) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, in general, in any covered transaction in which the creditor had assets of more than $250 million for both of the past two years, the creditor may use its own employee or affiliate to prepare a valuation or perform valuation management functions for a particular transaction, as long as the conditions described in paragraph (d)(2) are satisfied. If the conditions in paragraph (d)(2) are not satisfied, whether a person preparing a valuation or performing valuation management functions has violated paragraph (d)(1)(i) depends on all of the facts and circumstances.

Paragraph 42(d)(2)(ii)

1. *Prohibition on reporting to a person who is part of the creditor's loan production function.* To qualify for the safe harbor under paragraph (d)(2), the person preparing a valuation or performing valuation management functions may not report to a person who is part of the creditor's loan production function (as defined in paragraph (d)(5)(i) and comment 42(d)(5)(i)–1). For example, if a person preparing a valuation is directly supervised or managed by a loan officer or other person in the creditor's loan production function, or by a person who is directly supervised or managed by a loan officer, the condition under paragraph (d)(2)(ii) is not met.

2. *Prohibition on reporting to a person whose compensation is based on the transaction closing.* To qualify for the safe harbor under paragraph (d)(2), the person preparing a valuation or performing valuation management functions may not report to a person whose compensation is based on the closing of the transaction to which the valuation relates. For example, assume an appraisal management company performs valuation management functions for a transaction in which the creditor is an affiliate of the appraisal management company. If the employee of the appraisal management company who is in charge of valuation management functions for that transaction is supervised by a person who earns a commission or bonus based on the percentage of closed transactions for which the appraisal management company provides valuation management functions, the condition under paragraph (d)(2)(ii) is not met.

Paragraph 42(d)(2)(iii)

1. *Direct or indirect involvement in selection of person who prepares a valuation.* In any covered transaction, the safe harbor under paragraph (d)(2) is available if, among other things, no employee, officer or director in the creditor's loan production function (as defined in paragraph (d)(4)(ii) and comment 42(d)(4)(ii)–1) is directly or indirectly involved in selecting, retaining, recommending or influencing the selection of the person to prepare a valuation or perform valuation management functions, or to be included in or excluded from a list or panel of approved persons who prepare valuations or perform valuation management functions. For example, if the person who selects the person to prepare the valuation for a covered transaction is supervised by an employee of the creditor who also supervises loan officers, the condition in paragraph (d)(2)(iii) is not met.

42(d)(3) Employees and Affiliates of Creditors With Assets of $250 Million or Less for Either of the Past Two Calendar Years

1. *Safe harbor.* A person who prepares a valuation or performs valuation management functions for a covered transaction and is an employee or affiliate of the creditor will not be deemed to have interest prohibited under paragraph (d)(1)(i) on the basis of the employment or affiliate relationship with the creditor if the conditions in paragraph (d)(3) are satisfied. Even if the conditions in paragraph (d)(3) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, in general, in any covered transaction in which the creditor had assets of $250 million or less for either of the past two calendar years, the creditor may use its own employee or affiliate to prepare a valuation or perform valuation management functions for a particular transaction, as long as the conditions described in paragraph (d)(3) are satisfied. If the conditions in paragraph (d)(3) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated paragraph (d)(1)(i) depends on all of the facts and circumstances.

42(d)(4) Providers of Multiple Settlement Services

Paragraph 42(d)(4)(i)

1. *Safe harbor in transactions in which the creditor had assets of more than $250 million for both of the past two calendar years.* A person preparing a valuation or performing valuation management functions in addition to performing another settlement service for the same transaction, or whose affiliate performs another settlement service for the transaction, will not be deemed to have interest prohibited under paragraph (d)(1)(i) as a result of the person or the person's affiliate performing another settlement service if the conditions in paragraph (d)(4)(i) are satisfied. Even if the conditions in paragraph (d)(4)(i) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, in general, in any covered transaction with a creditor that had assets of more than $250 million for the past two years, a person preparing a valuation or performing valuation management functions, or its affiliate, may provide another settlement service for the same transaction, as long as the conditions described in paragraph (d)(4)(i) are satisfied. If the conditions in paragraph (d)(4)(i) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated paragraph (d)(1)(i) depends on all of the facts and circumstances.

2. *Reporting.* The safe harbor under paragraph (d)(4)(i) is available if the condition specified in paragraph (d)(2)(ii), among others, is met. Paragraph (d)(2)(ii) prohibits a person preparing a valuation or performing valuation management functions from reporting to a person whose compensation is based on the closing of the transaction to which the valuation relates. For example, assume an appraisal management company performs both valuation management functions and title services, including providing title insurance, for the same covered transaction. If the appraisal management company employee in charge of valuation management functions for the transaction is supervised by the title insurance agent in the transaction, whose compensation depends in whole or in part on whether title insurance is sold at the loan closing, the condition in paragraph (d)(2)(ii) is not met.

Paragraph 42(d)(4)(ii)

1. *Safe harbor in transactions in which the creditor had assets of $250 million or less for either of the past two calendar years.* A person preparing a valuation or performing valuation management functions in addition to performing another settlement service for the same transaction, or whose affiliate performs another settlement service for the transaction, will not be deemed to have an interest prohibited under paragraph (d)(1)(i) as a result of the person or the person's affiliate performing another settlement service if the conditions in paragraph (d)(4)(ii) are satisfied. Even if the conditions in paragraph (d)(4)(ii) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, in general, in any covered transaction in which the creditor had assets of $250 million or less for either of the past two years, a person preparing a valuation or performing valuation management functions, or its affiliate, may provide other settlement services for the same transaction, as long as the conditions described in paragraph (d)(4)(ii) are satisfied. If the conditions in paragraph (d)(4)(ii) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated paragraph (d)(1)(i) depends on all of the facts and circumstances.

42(d)(5) Definitions

42(d)(5)(i) Loan Production Function

1. *Loan production function.* One condition of the safe harbors under paragraphs (d)(2) and (d)(4)(i), involving transactions in which the creditor had assets of more than $250 million for both of the past two calendar years, is that the person who prepares a valuation or performs valuation management functions must report to a person who is not part of the creditor's ''loan production function.'' A creditor's ''loan production function'' includes retail sales staff, loan officers, and any other employee of the creditor with responsibility for taking a loan application, offering or negotiating loan terms or whose compensation is based on loan processing volume. A person is not considered part of a creditor's loan production function solely because part of the person's compensation includes a general bonus not tied to specific transactions or a specific percentage of transactions closing, or a profit sharing plan that benefits all employees. A person solely responsible for credit administration or risk management is also not considered part of a creditor's loan production function. Credit administration and risk management includes, for example, loan underwriting, loan closing functions (*e.g.,* loan documentation), disbursing funds, collecting mortgage payments and otherwise servicing the loan (*e.g.,* escrow management and payment of taxes), monitoring loan performance, and foreclosure processing.

42(e) When Extension of Credit Prohibited

1. *Reasonable diligence.* A creditor will be deemed to have acted with reasonable diligence under § 1026.42(e) if the creditor extends credit based on a valuation other than the valuation subject to the restriction in § 1026.42(e). A creditor need not obtain a second valuation to document that the creditor has acted with reasonable diligence to determine that the valuation does not materially misstate or misrepresent the value of the consumer's principal dwelling, however. For example, assume an appraiser notifies a creditor before consummation that a loan originator attempted to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the appraiser's independent judgment, through coercion. If the creditor reasonably determines and documents that the appraisal does not materially misstate or misrepresent the value of the consumer's principal dwelling, for purposes of § 1026.42(e), the creditor may extend credit based on the appraisal.

42(f) Customary and Reasonable Compensation

42(f)(1) Requirement to Provide Customary and Reasonable Compensation to Fee Appraisers

1. *Agents of the creditor.* Whether a person is an agent of the creditor is determined by applicable law; however, a ''fee appraiser'' as defined in paragraph (f)(4)(i) is not an agent of the creditor for purposes of paragraph (f), and therefore is not required to pay other fee appraisers customary and reasonable compensation under paragraph (f).

2. *Geographic market.* For purposes of paragraph (f), the ''geographic market of the property being appraised'' means the geographic market relevant to compensation levels for appraisal services. Depending on the facts and circumstances, the relevant geographic market may be a state, metropolitan statistical area (MSA), metropolitan division, area outside of an MSA, county, or other geographic area. For example, assume that fee appraisers who normally work only in County A generally accept $400 to appraise an attached single-family property in County A. Assume also that *very few or no* fee appraisers who work only in contiguous County B will accept a rate comparable to $400 to appraise an attached single-family property in County A. The relevant geographic market for an attached single-family property in County A may reasonably be defined as County A. On the other hand, assume that fee appraisers who normally work only in County A generally accept $400 to appraise an attached single-family property in County A. Assume also that *many* fee appraisers who normally work only in contiguous County B will accept a rate comparable to $400 to appraise an attached single-family property in County A. The relevant geographic market for an attached single-family property in County A may reasonably be defined to include both County A and County B.

3. *Failure to perform contractual obligations.* Paragraph (f)(1) does not prohibit a creditor or its agent from withholding compensation from a fee appraiser for failing to meet contractual obligations, such as failing to provide the appraisal report or violating state or Federal appraisal laws in performing the appraisal.

4. *Agreement that fee is ''customary and reasonable.''* A document signed by a fee appraiser indicating that the appraiser agrees that the fee paid to the appraiser is ''customary and reasonable'' does not by itself create a presumption of compliance with § 1026.42(f) or otherwise satisfy the requirement to pay a fee appraiser at a customary and reasonable rate.

5. *Volume-based discounts.* Section 1026.42(f)(1) does not prohibit a fee appraiser and a creditor (or its agent) from agreeing to compensation based on transaction volume, so long as the compensation is customary and reasonable. For example, assume that a

fee appraiser typically receives $300 for appraisals from creditors with whom it does business; the fee appraiser, however, agrees to reduce the fee to $280 for a particular creditor, in exchange for a minimum number of assignments from the creditor.

42(f)(2) Presumption of Compliance

1. *In general.* A creditor and its agent are presumed to comply with paragraph (f)(1) if the creditor or its agent meets the conditions specified in paragraph (f)(2) in determining the compensation paid to a fee appraiser. These conditions are not requirements for compliance but, if met, create a presumption that the creditor or its agent has complied with § 1026.42(f)(1). A person may rebut this presumption with evidence that the amount of compensation paid to a fee appraiser was not customary and reasonable for reasons unrelated to the conditions in paragraph (f)(2)(i) or (f)(2)(ii). If a creditor or its agent does not meet one of the non-required conditions set forth in paragraph (f)(2), the creditor's and its agent's compliance with paragraph (f)(1) is determined based on all of the facts and circumstances without a presumption of either compliance or violation.

Paragraph 42(f)(2)(i)

1. *Two-step process for determining customary and reasonable rates.* Paragraph (f)(2)(i) sets forth a two-step process for a creditor or its agent to determine the amount of compensation that is customary and reasonable in a given transaction. First, the creditor or its agent must identify recent rates paid for comparable appraisal services in the relevant geographic market. Second, once recent rates have been identified, the creditor or its agent must review the factors listed in paragraph (f)(2)(i)(A)-(F) and make any appropriate adjustments to the rates to ensure that the amount of compensation is reasonable.

2. *Identifying recent rates.* Whether rates may reasonably be considered ''recent'' depends on the facts and circumstances. Generally, ''recent'' rates would include rates charged within one year of the creditor's or its agent's reliance on this information to qualify for the presumption of compliance under paragraph (f)(2). For purposes of the presumption of compliance under paragraph (f)(2), a creditor or its agent may gather information about recent rates by using a reasonable method that provides information about rates for appraisal services in the geographic market of the relevant property; a creditor or its agent may, but is not required to, use or perform a fee survey.

3. *Accounting for factors.* Once recent rates in the relevant geographic market have been identified, the creditor or its agent must review the factors listed in paragraph (f)(2)(i)(A)-(F) to determine the appropriate rate for the current transaction. For example, if the recent rates identified by the creditor or its agent were solely for appraisal assignments in which the scope of work required consideration of two comparable properties, but the current transaction required an appraisal that considered three comparable properties, the creditor or its agent might reasonably adjust the rate by an amount that accounts for the increased scope of work, in addition to making any other appropriate adjustments based on the remaining factors.

Paragraph 42(f)(2)(i)(A)

1. *Type of property.* The type of property may include, for example, detached or attached single-family property, condominium or cooperative unit, or manufactured home.

Paragraph 42(f)(2)(i)(B)

1. *Scope of work.* The scope of work may include, for example, the type of inspection (such as exterior only or both interior and exterior) or number of comparables required for the appraisal.

Paragraph 42(f)(2)(i)(D)

1. *Fee appraiser qualifications.* The fee appraiser qualifications may include, for example, a state license or certification in accordance with the minimum criteria issued by the Appraisal Qualifications Board of the Appraisal Foundation, or completion of continuing education courses on effective appraisal methods and related topics.

2. *Membership in professional appraisal organization.* Paragraph 42(f)(2)(i)(D) does not override state or Federal laws prohibiting the exclusion of an appraiser from consideration for an assignment solely by virtue of membership or lack of membership in any particular appraisal organization. *See, e.g.,* 12 CFR 225.66(a).

Paragraph 42(f)(2)(i)(E)

1. *Fee appraiser experience and professional record.* The fee appraiser's level of experience may include, for example, the fee appraiser's years of service as a state-licensed or state-certified appraiser, or years of service appraising properties in a particular geographical area or of a particular type. The fee appraiser's professional record may include, for example, whether the fee appraiser has a past record of suspensions, disqualifications, debarments, or judgments for waste, fraud, abuse or breach of legal or professional standards.

Paragraph 42(f)(2)(i)(F)

1. *Fee appraiser work quality.* The fee appraiser's work quality may include, for example, the past quality of appraisals performed by the appraiser based on the written performance and review criteria of the creditor or agent of the creditor.

Paragraph 42(f)(2)(ii)

1. *Restraining trade.* Under § 1026.42(f)(2)(ii)(A), creditor or its agent would not qualify for the presumption of compliance under paragraph (f)(2) if it engaged in any acts to restrain trade such as entering into a price fixing or market allocation agreement that affect the compensation of fee appraisers. For example, if appraisal management company A and appraisal management company B agreed to compensate fee appraisers at no more than a specific rate or range of rates, neither appraisal management company would qualify for the presumption of compliance. Likewise, if appraisal management company A and appraisal management company B agreed that appraisal management company A would limit its business to a certain portion of the relevant geographic market and appraisal management company B would limit its business to a different portion of the relevant geographic market, and as a result each appraisal management company unilaterally set the fees paid to fee appraisers in their respective portions of the market, neither appraisal management company would qualify for the presumption of compliance under paragraph (f)(2).

2. *Acts of monopolization.* Under § 1026.42(f)(2)(ii)(B), a creditor or its agent would not qualify for the presumption of compliance under paragraph (f)(2) if it engaged in any act of monopolization such as restricting entry into the relevant geographic market or causing any person to leave the relevant geographic market, resulting in anticompetitive effects that affect the compensation paid to fee appraisers. For example, if only one appraisal management company exists or is predominant in a particular market area, that appraisal management company might not qualify for the presumption of compliance if it entered into exclusivity agreements with all creditors in the market or all fee appraisers in the market, such that other appraisal management companies had to leave or could not enter the market. Whether this behavior would be considered an anticompetitive act that affects the compensation paid to fee appraisers depends on all of the facts and circumstances, including applicable law.

42(f)(3) Alternative Presumption of Compliance

1. *In general.* A creditor and its agent are presumed to comply with paragraph (f)(1) if the creditor or its agent determine the compensation paid to a fee appraiser based on information about customary and reasonable rates that satisfies the conditions in paragraph (f)(3) for that information. Reliance on information satisfying the conditions in paragraph (f)(3) is not a requirement for compliance with paragraph (f)(1), but creates a presumption that the creditor or its agent has complied. A person may rebut this presumption with evidence that the rate of compensation paid to a fee appraiser by the creditor or its agent is not customary and reasonable based on facts or information other than third-party information satisfying the conditions of this paragraph (f)(3). If a creditor or its agent does not rely on information that meets the conditions in paragraph (f)(3), the creditor's and its agent's compliance with paragraph (f)(1) is determined based on all of the facts and circumstances without a presumption of either compliance or violation.

2. *Geographic market.* The meaning of ''geographic market'' for purposes of paragraph (f) is explained in comment (f)(1)–1.

3. *Recent rates.* Whether rates may reasonably be considered ''recent'' depends on the facts and circumstances. Generally, ''recent'' rates would include rates charged within one year of the creditor's or its agent's reliance on this information to qualify for the presumption of compliance under paragraph (f)(3).

42(f)(4) Definitions

42(f)(4)(i) Fee Appraiser

1. *Organization.* The term ''organization'' in paragraph 42(f)(4)(i)(B) includes a corporation, partnership, proprietorship, association, cooperative, or other business entity and does not include a natural person.

42(g) Mandatory Reporting

42(g)(1) Reporting Required

1. *Reasonable basis.* A person reasonably believes that an appraiser has materially failed to comply with the Uniform Standards of Professional Appraisal Practice (USPAP) established by the Appraisal Standards Board of the Appraisal Foundation (as defined in 12 U.S.C. 3350(9)) or ethical or professional requirements for appraisers under applicable state or Federal statutes or regulations if the person possesses knowledge or information that would lead a reasonable person in the same circumstances to conclude that the appraiser has materially failed to comply with USPAP or such statutory or regulatory requirements.

2. *Material failure to comply.* For purposes of § 1026.42(g)(1), a material failure to comply is one that is likely to affect the value assigned to the consumer's principal dwelling. The following are examples of a material failure to comply with USPAP or ethical or professional requirements:

i. Mischaracterizing the value of the consumer's principal dwelling in violation of § 1026.42(c)(2)(i).

ii. Performing an assignment in a grossly negligent manner, in violation of a rule under USPAP.

iii. Accepting an appraisal assignment on the condition that the appraiser will report a value equal to or greater than the purchase price for the consumer's principal dwelling, in violation of a rule under USPAP.

3. *Other matters.* Section 1026.42(g)(1) does not require reporting of a matter that is not material under § 1026.42(g)(1), for example:

i. An appraiser's disclosure of confidential information in violation of applicable state law.

ii. An appraiser's failure to maintain errors and omissions insurance in violation of applicable state law.

4. *Examples of covered persons.* ''Covered persons'' include creditors, mortgage brokers, appraisers, appraisal management companies, real estate agents, and other persons that provide ''settlement services'' as defined in section 3(3) of the Real Estate Settlement Procedures Act (12 U.S.C. 2602(3)) and the implementing regulation at 12 CFR 1024.2. *See* § 1026.42(b)(1).

5. *Examples of persons not covered.* The following persons are not ''covered persons'' (unless, of course, they are creditors with respect to a covered transaction or perform ''settlement services'' in connection with a covered transaction):

i. The consumer who obtains credit through a covered transaction.

ii. A person secondarily liable for a covered transaction, such as a guarantor.

iii. A person that resides in or will reside in the consumer's principal dwelling but will not be liable on the covered transaction, such as a non-obligor spouse.

6. *Appraiser.* For purposes of § 1026.42(g)(1), an ''appraiser'' is a natural person who provides opinions of the value of dwellings and is required to be licensed or certified under the laws of the state in which the consumer's principal dwelling is located or otherwise is subject to the jurisdiction of the appraiser certifying and licensing agency for that state. *See* 12 U.S.C. 3350(1).

Subpart F—Special Rules for Private Education Loans

Section 1026.46—Special Disclosure Requirements for Private Education Loans

46(a) Coverage

1. *Coverage.* This subpart applies to all private education loans as defined in § 1026.46(b)(5). Coverage under this subpart is optional for certain extensions of credit that do not meet the definition of ''private education loan'' because the credit is not extended, in whole or in part, for ''postsecondary educational expenses'' defined in § 1026.46(b)(3). If a transaction is not covered and a creditor opts to comply with any section of this subpart, the creditor must comply with all applicable sections of this subpart. If a transaction is not covered and a creditor opts not to comply with this subpart, the creditor must comply with all applicable requirements under §§ 1026.17 and 1026.18. Compliance with this subpart is optional for an extension of credit for expenses incurred after graduation from a law, medical, dental, veterinary, or other graduate school and related to relocation, study for a bar or other examination, participation in an internship or residency program, or similar purposes. However, if any part of such loan is used for postsecondary educational expenses as defined in § 1026.46(b)(3), then compliance with Subpart F is mandatory not optional.

46(b) Definitions

46(b)(1) Covered Educational Institution

1. *General.* A covered educational institution includes any educational institution that meets the definition of an institution of higher education in § 1026.46(b)(2). An institution is also a covered educational institution if it otherwise meets the definition of an institution of higher education, except for its lack of accreditation. Such an institution may include, for example, a university or community college. It may also include an institution, whether accredited or unaccredited, offering instruction to prepare students for gainful employment in a recognized profession, such as flying, culinary arts, or dental assistance. A covered educational institution does not include elementary or secondary schools.

2. *Agent.* For purposes of § 1026.46(b)(1), the term agent means an institution-affiliated organization as defined by Section 151 of the Higher Education Act of 1965 (20 U.S.C 1019) or an officer or employee of an institution-affiliated organization. Under Section 151 of the Higher Education Act, an institution-affiliated organization means any organization that is directly or indirectly related to a covered institution and is engaged in the practice of recommending, promoting, or endorsing education loans for students attending the covered institution or the families of such students. An institution-affiliated organization may include an alumni organization, athletic organization, foundation, or social, academic, or professional organization, of a covered institution, but does not include any creditor with respect to any private education loan made by that creditor.

46(b)(2) Institution of Higher Education

1. *General.* An institution of higher education includes any institution that meets the definitions contained in sections 101 and 102 of the Higher Education Act of 1965 (20 U.S.C. 1001–1002) and implementing Department of Education regulations (34 CFR 600). Such an institution may include, for example, a university or community college. It may also include an institution offering instruction to prepare students for gainful employment in a recognized profession, such as flying, culinary arts, or dental assistance. An institution of higher education does not include elementary or secondary schools.

46(b)(3) Postsecondary Educational Expenses

1. *General.* The examples listed in § 1026.46(b)(3) are illustrative only. The full list of postsecondary educational expenses is contained in section 472 of the Higher Education Act of 1965 (20 U.S.C. 1087ll).

46(b)(4) Preferred Lender Arrangement

1. *General.* The term ''preferred lender arrangement'' is defined in section 151 of the Higher Education Act of 1965 (20 U.S.C. 1019). The term refers to an arrangement or agreement between a creditor and a covered educational institution (or an institution-affiliated organization as defined by section 151 of the Higher Education Act of 1965 (20 U.S.C 1019)) under which a creditor provides private education loans to consumers for students attending the covered educational institution and the covered educational institution recommends, promotes, or endorses the private education loan products of the creditor. It does not include arrangements or agreements with respect to Federal Direct Stafford/Ford loans, or Federal PLUS loans made under the Federal PLUS auction pilot program.

46(b)(5) Private Education Loan

1. *Extended expressly for postsecondary educational expenses.* A private education loan is one that is extended expressly for postsecondary educational expenses. The term includes loans extended for postsecondary educational expenses incurred while a student is enrolled in a covered educational institution as well as loans extended to consolidate a consumer's pre-existing private education loans.

2. *Multiple-purpose loans.* i. *Definition.* A private education loan may include an extension of credit not excluded under § 1026.46(b)(5) that the consumer may use for multiple purposes including, but not limited to, postsecondary educational expenses. If the consumer expressly indicates that the proceeds of the loan will be used to pay for postsecondary educational expenses by indicating the loan's purpose on an application, the loan is a private education loan.

ii. *Coverage.* A creditor generally will not know before an application is received whether the consumer intends to use the loan for postsecondary educational expenses. For this reason, the creditor need not provide the disclosures required by § 1026.47(a) on or with the application or solicitation for a loan that may be used for multiple purposes. *See* § 1026.47(d)(1)(i). However, if the consumer expressly indicates that the proceeds of the loan will be used to pay for postsecondary educational expenses, the creditor must comply with §§ 1026.47(b) and (c) and § 1026.48. For purposes of the required disclosures, the creditor must calculate the disclosures based on the entire amount of the loan, even if only a part of the proceeds is intended for postsecondary educational expenses. The creditor may rely solely on a check-box, or a purpose line, on a loan application to determine whether or not the applicant intends to use loan proceeds for postsecondary educational expenses.

iii. *Examples.* The creditor must comply only if the extension of credit also meets the other parts of the definition of private education loan. For example, if the creditor uses a single application form for both open-end and closed-end credit, and the consumer applies for open-end credit to be used for postsecondary educational expenses, the extension of credit is not covered. Similarly, if the consumer indicates the extension of credit will be used for educational expenses that are not postsecondary educational expenses, such as elementary or secondary educational expenses, the extension of credit is not covered. These examples are only illustrative, not exhaustive.

3. *Short-term loans.* Some covered educational institutions offer loans to students with terms of 90 days or less to assist the student in paying for educational expenses, usually while the student waits for other funds to be disbursed. Under § 1026.46(b)(5)(iv)(A) such loans are not considered private education loans, even if interest is charged on the credit balance. (Because these loans charge interest, they are not covered by the exception under § 1026.46(b)(5)(iv)(B).) However, these loans are extensions of credit subject to the requirements of §§ 1026.17 and 18. The legal agreement may provide that repayment is required when the consumer or the educational institution receives certain funds. If, under the terms of the legal obligation, repayment of the loan is required when the certain funds are received by the consumer or the educational institution (such as by deposit into the consumer's or educational institution's account), the disclosures should be based on the creditor's estimate of the time the funds will be delivered.

4. *Billing plans.* Some covered educational institutions offer billing plans that permit a consumer to make payments in installments. Such plans are not considered private education loans, if an interest rate will not be applied to the credit balance and the term of the extension of credit is one year or less, even if the plan is payable in more than four installments. However, such plans may be extensions of credit subject to the requirements of §§ 1026.17 and 1026.18.

46(c) Form of Disclosures

1. *Form of disclosures—relation to other sections.* Creditors must make the disclosures required under this subpart in accordance with § 1026.46(c). Section 1026.46(c)(2) requires that the disclosures be grouped together and segregated from everything else. In complying with this requirement, creditors may follow the rules in § 1026.17, except where specifically provided otherwise. For example, although § 1026.17(b) requires creditors to provide only one set of disclosures before consummation of the transaction, §§ 1026.47(b) and (c) require that the creditor provide the disclosures under § 1026.18 both upon approval and after the consumer accepts the loan.

46(c)(3) Electronic Disclosures

1. *Application and solicitation disclosures—electronic disclosures.* If the disclosures required under § 1026.47(a) are provided electronically, they must be provided on or with the application or solicitation reply form. Electronic disclosures are deemed to be on or with an application or solicitation if they meet one of the following conditions:

i. They automatically appear on the screen when the application or solicitation reply form appears;

ii. They are located on the same Web ''page'' as the application or solicitation reply form without necessarily appearing on the initial screen, if the application or reply form contains a clear and conspicuous reference to the location of the disclosures and indicates that the disclosures contain rate, fee, and other cost information, as applicable; or

iii. They are posted on a Web site and the application or solicitation reply form is linked to the disclosures in a manner that prevents the consumer from by passing the disclosures before submitting the application or reply form.

46(d) Timing of Disclosures

1. *Receipt of disclosures.* Under § 1026.46(d)(4), if the creditor places the disclosures in the mail, the consumer is considered to have received them three business days after they are mailed. For purposes of § 1026.46(d)(4), ''business day'' means all calendar days except Sundays and the legal public holidays referred to in § 1026.2(a)(6). *See* comment 2(a)(6)–2. For example, if the creditor places the disclosures in the mail on Thursday, June 4, the disclosures are considered received on Monday, June 8.

46(d)(1) Application or Solicitation Disclosures

1. *Invitations to apply.* A creditor may contact a consumer who has not been pre-selected for a private education loan about taking out a loan (whether by direct mail, telephone, or other means) and invite the consumer to complete an application. Such a contact does not meet the definition of solicitation, nor is it covered by this subpart, unless the contact itself includes the following:

i. An application form in a direct mailing, electronic communication or a single application form as a ''take-one'' (in racks in public locations, for example);

ii. An oral application in a telephone contact; or

iii. An application in an in-person contact.

46(d)(2) Approval Disclosures

1. *Timing.* The creditor must provide the disclosures required by § 1026.47(b) at the time the creditor provides to the consumer any notice that the loan has been approved. However, nothing in this section prevents the creditor from communicating to the consumer that additional information is required from the consumer before approval may be granted. In such a case, a creditor is not required to provide the disclosures at that time. If the creditor communicates notice of approval to the consumer by mail, the disclosures must be mailed at the same time as the notice of approval. If the creditor communicates notice of approval by telephone, the creditor must place the disclosures in the mail within three business days of the telephone call. If the creditor communicates notice of approval in electronic form, the creditor may provide the disclosures in electronic form. If the creditor has complied with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*) the creditor may provide the disclosures solely in electronic form; otherwise, the creditor must place the disclosures in the mail within three business days of the communication.

46(g) Effect of Subsequent Events

1. *Approval disclosures.* Inaccuracies in the disclosures required under § 1026.47(b) are not violations if attributable to events occurring after disclosures are made, although creditors are restricted under § 1026.48(c)(2) from making certain changes to the loan's rate or terms after the creditor provides an approval disclosure to a consumer. Since creditors are required provide the final disclosures under § 1026.47(c), they need not make new approval disclosures in response to an event that occurs after the creditor delivers the required approval disclosures, except as specified under § 1026.48(c)(4). For example, at the time the approval disclosures are provided, the creditor may not know the precise disbursement date of the loan funds and must provide estimated disclosures based on the best information reasonably available and labeled as an estimate. If, after the approval disclosures are provided, the creditor learns from the educational institution the precise disbursement date, new approval disclosures would not be required, unless specifically required under § 1026.48(c)(4) if other changes are made. Similarly, the creditor may not know the precise amounts of each loan to be consolidated in a consolidation loan transaction and information about the precise amounts would not require new approval disclosures, unless specifically required under § 1026.48(c)(4) if other changes are made.

2. *Final disclosures.* Inaccuracies in the disclosures required under § 1026.47(c) are not violations if attributable to events occurring after disclosures are made. For example, if the consumer initially chooses to defer payment of principal and interest while

enrolled in a covered educational institution, but later chooses to make payments while enrolled, such a change does not make the original disclosures inaccurate.

Section 1026.47—Content of Disclosures

1. *As applicable.* The disclosures required by this subpart need be made only as applicable, unless specifically required otherwise. The creditor need not provide any disclosure that is not applicable to a particular transaction. For example, in a transaction consolidating private education loans, or in transactions under § 1026.46(a) for which compliance with this subpart is optional, the creditor need not disclose the information under §§ 1026.47(a)(6), and (b)(4), and any other information otherwise required to be disclosed under this subpart that is not applicable to the transaction. Similarly, creditors making loans to consumers where the student is not attending an institution of higher education, as defined in § 1026.46(b)(2), need not provide the disclosures regarding the self-certification form in § 1026.47(a)(8).

47(a) Application or Solicitation Disclosures

Paragraph 47(a)(1)(i)

1. *Rates actually offered.* The disclosure may state only those rates that the creditor is actually prepared to offer. For example, a creditor may not disclose a very low interest rate that will not in fact be offered at any time. For a loan with variable interest rates, the ranges of rates will be considered actually offered if:

i. For disclosures in applications or solicitations sent by direct mail, the rates were in effect within 60 days before mailing;

ii. For disclosures in applications or solicitations in electronic form, the rates were in effect within 30 days before the disclosures are sent to a consumer, or for disclosures made on an Internet Web site, within 30 days before being viewed by the public;

iii. For disclosures in printed applications or solicitations made available to the general public, the rates were in effect within 30 days before printing; or

iv. For disclosures provided orally in telephone applications or solicitations, the rates are currently available at the time the disclosures are provided.

2. *Creditworthiness and other factors.* If the rate will depend, at least in part, on a later determination of the consumer's creditworthiness or other factors, the disclosure must include a statement that the rate for which the consumer may qualify at approval will depend on the consumer's creditworthiness and other factors. The creditor may, but is not required to, specify any additional factors that it will use to determine the interest rate. For example, if the creditor will determine the interest rate based on information in the consumer's or cosigner's credit report and the type of school the consumer attends, the creditor may state, ''Your interest rate will be based on your credit history and other factors (cosigner credit and school type).''

3. *Rates applicable to the loan.* For a variable-rate private education loan, the disclosure of the interest rate or range of rates must reflect the rate or rates calculated based on the index and margin that will be used to make interest rate adjustments for the loan. The creditor may provide a description of the index and margin or range of margins used to make interest rate adjustments, including a reference to a source, such as a newspaper, where the consumer may look up the index.

Paragraph 47(a)(1)(iii)

1. *Coverage.* The interest rate is considered variable if the terms of the legal obligation allow the creditor to increase the interest rate originally disclosed to the consumer and the requirements of § 1026.47(a)(1)(iii) apply to all such transactions. The provisions do not apply to increases resulting from delinquency (including late payment), default, assumption, or acceleration.

2. *Limitations.* The creditor must disclose how often the rate may change and any limit on the amount that the rate may increase at any one time. The creditor must also disclose any maximum rate over the life of the transaction. If the legal obligation between the parties does specify a maximum rate, the creditor must disclose any legal limits in the nature of usury or rate ceilings under state or Federal statutes or regulations. However, if the applicable maximum rate is in the form of a legal limit, such as a state's usury cap (rather than a maximum rate specified in the legal obligation between the parties), the creditor must disclose that the maximum rate is determined by applicable law. The creditor must also disclose that the consumer's actual rate may be higher or lower than the initial rates disclosed under § 1026.47(a)(1)(i), if applicable.

Paragraph 47(a)(1)(iv)

1. *Cosigner or guarantor—changes in applicable interest rate.* The creditor must state whether the interest rate typically will be higher if the loan is not co-signed or guaranteed by a third party. The creditor is required to provide a statement of the effect on the interest rate and is not required to provide a numerical estimate of the effect on the interest rate. For example, a creditor may state: ''Rates are typically higher without a cosigner.''

47(a)(2) Fees and Default or Late Payment Costs

1. *Fees or range of fees.* The creditor must itemize fees required to obtain the private education loan. The creditor must give a single dollar amount for each fee, unless the fee is based on a percentage, in which case a percentage must be stated. If the exact amount of the fee is not known at the time of disclosure, the creditor may disclose the dollar amount or percentage for each fee as an estimated range.

2. *Fees required to obtain the private education loan.* The creditor must itemize the fees that the consumer must pay to obtain the private education loan. Fees disclosed include all finance charges under § 1026.4, such as loan origination fees, credit report fees, and fees charged upon entering repayment, as well as fees not considered finance charges but required to obtain credit, such as application fees that are charged whether or not credit is extended. Fees disclosed include those paid by the consumer directly to the creditor and fees paid to third parties by the creditor on the consumer's behalf. Creditors are not required to disclose fees that apply if the consumer exercises an option under the loan agreement after consummation, such as fees for deferment, forbearance, or loan modification.

47(a)(3) Repayment Terms

1. *Loan term.* The term of the loan is the maximum period of time during which regularly scheduled payments of principal and interest will be due on the loan.

2. *Payment deferral options—general.* The creditor must describe the options that the consumer has under the loan agreement to defer payment on the loan. When there is no deferment option provided for the loan, the creditor must disclose that fact. Payment deferral options required to be disclosed include options for immediate deferral of payments, such as when the student is currently enrolled at a covered educational institution. The description may include of the length of the maximum initial in-school deferment period, the types of payments that may be deferred, and a description of any payments that are required during the deferment period. The creditor may, but need not, disclose any conditions applicable to the deferment option, such as that deferment is permitted only while the student is continuously enrolled in school. If payment deferral is not an option while the student is enrolled in school, the creditor may disclose that the consumer must begin repayment upon disbursement of the loan and that the consumer may not defer repayment while enrolled in school. If the creditor offers payment deferral options that may apply during the repayment period, such as an option to defer payments if the student returns to school to pursue an additional degree, the creditor must include a statement referring the consumer to the contract document or promissory note for more information.

3. *Payment deferral options—in school deferment.* For each payment deferral option applicable while the student is enrolled at a covered educational institution the creditor must disclose whether interest will accrue while the student is enrolled at a covered educational institution and, if interest does accrue, whether payment of interest may be deferred and added to the principal balance.

4. *Combination with cost estimate disclosure.* The disclosures of the loan term under § 1026.47(a)(3)(i) and of the payment deferral options applicable while the student is enrolled at a covered educational institution under §§ 1026.47(a)(3)(ii) and (iii) may be combined with the disclosure of cost estimates required in § 1026.47(a)(4). For example, the creditor may describe each payment deferral option in the same chart or table that provides the cost estimates for each payment deferral option. *See* Appendix H–21.

5. *Bankruptcy limitations.* The creditor may comply with § 1026.47(a)(3)(iv) by disclosing the following statement: ''If you file for bankruptcy you may still be required to pay back this loan.''

47(a)(4) Cost Estimates

1. *Total cost of the loan.* For purposes of § 1026.47(a)(4), the creditor must calculate

the example of the total cost of the loan in accordance with the rules in § 1026.18(h) for calculating the loan's total of payments.

2. *Basis for estimates.* i. The creditor must calculate the total cost estimate by determining all finance charges that would be applicable to loans with the highest rate of interest required to be disclosed under § 1026.47(a)(1)(i). For example, if a creditor charges a range of origination fees from 0% to 3%, but the 3% origination fee would apply to loans with the highest initial rate, the lender must assume the 3% origination fee is charged. The creditor must base the total cost estimate on a total loan amount that includes all prepaid finance charges and results in a $10,000 amount financed. For example, if the prepaid finance charges are $600, the creditor must base the estimate on a $10,600 total loan amount and an amount financed of $10,000. The example must reflect an amount provided of $10,000. If the creditor only offers a particular private education loan for less than $10,000, the creditor may assume a loan amount that results in a $5,000 amount financed for that loan.

ii. If a prepaid finance charge is determined as a percentage of the amount financed, for purposes of the example, the creditor should assume that the fee is determined as a percentage of the total loan amount, even if this is not the creditor's usual practice. For example, suppose the consumer requires a disbursement of $10,000 and the creditor charges a 3% origination fee. In order to calculate the total cost example, the creditor must determine the loan amount that will result in a $10,000 amount financed after the 3% fee is assessed. In this example, the resulting loan amount would be $10,309.28. Assessing the 3% origination fee on the loan amount of $10,309.28 results in an origination fee of $309.28, which is withheld from the loan funds disbursed to the consumer. The principal loan amount of $10,309.28 minus the prepaid finance charge of $309.28 results in an amount financed of $10,000.

3. *Calculated for each option to defer interest payments.* The example must include an estimate of the total cost of the loan for each in-school deferral option disclosed in § 1026.47(a)(3)(iii). For example, if the creditor provides the consumer with the option to begin making principal and interest payments immediately, to defer principal payments but begin making interest-only payments immediately, or to defer all principal and interest payments while in school, the creditor is required to disclose three estimates of the total cost of the loan, one for each deferral option. If the creditor adds accrued interest to the loan balance (*i.e.,* interest is capitalized), the estimate of the total loan cost should be based on the capitalization method that the creditor actually uses for the loan. For instance, for each deferred payment option where the creditor would capitalize interest on a quarterly basis, the total loan cost must be calculated assuming interest capitalizes on a quarterly basis.

4. *Deferment period assumptions.* Creditors may use either of the following two methods for estimating the duration of in-school deferment periods:

i. For loan programs intended for educational expenses of undergraduate students, the creditor may assume that the consumer defers payments for a four-year matriculation period, plus the loan's maximum applicable grace period, if any. For all other loans, the creditor may assume that the consumer defers for a two-year matriculation period, plus the maximum applicable grace period, if any, or the maximum time the consumer may defer payments under the loan program, whichever is shorter.

ii. Alternatively, if the creditor knows that the student will be enrolled in a program with a standard duration, the creditor may assume that the consumer defers payments for the full duration of the program (plus any grace period). For example, if a creditor makes loans intended for students enrolled in a four-year medical school degree program, the creditor may assume that the consumer defers payments for four years plus the loan's maximum applicable grace period, if any. However, the creditor may not modify the disclosure to correspond to a particular student's situation. For example, even if the creditor knows that a student will be a second-year medical school student, the creditor must assume a four-year deferral period.

Paragraph 47(a)(6)(ii)

1. *Terms of Federal student loans.* The creditor must disclose the interest rates available under each program under Title IV of the Higher Education Act of 1965 and whether the rates are fixed or variable, as prescribed in the Higher Education Act of 1965 (20 U.S.C. 1077a). Where the fixed interest rate for a loan varies by statute depending on the date of disbursement or receipt of application, the creditor must disclose only the interest rate as of the time the disclosure is provided.

Paragraph 47(a)(6)(iii)

1. *Web site address.* The creditor must include with this disclosure an appropriate U.S. Department of Education Web site address such as ''federalstudentaid.ed.gov.''

47(b) Approval Disclosures

47(b)(1) Interest Rate

1. *Variable rate disclosures.* The interest rate is considered variable if the terms of the legal obligation allow the creditor to increase the interest rate originally disclosed to the consumer. The provisions do not apply to increases resulting from delinquency (including late payment), default, assumption, or acceleration. In addition to disclosing the information required under §§ 1026.47(b)(ii) and (iii), the creditor must disclose the information required under §§ 1026.18(f)(1)(i) and (iii)—the circumstances under which the rate may increase and the effect of an increase, respectively. The creditor is required to disclose the maximum monthly payment based on the maximum possible rate in § 1026.47(b)(3)(viii), and the creditor need not disclose a separate example of the payment terms that would result from an increase under § 1026.18(f)(1)(iv).

2. *Limitations on rate adjustments.* The creditor must disclose how often the rate may change and any limit on the amount that the rate may increase at any one time. The creditor must also disclose any maximum rate over the life of the transaction. If the legal obligation between the parties does provide a maximum rate, the creditor must disclose any legal limits in the nature of usury or rate ceilings under state or Federal statutes or regulations. However, if the applicable maximum rate is in the form of a legal limit, such as a state's usury cap (rather than a maximum rate specified in the legal obligation between the parties), the creditor must disclose that the maximum rate is determined by applicable law. Compliance with § 1026.18(f)(1)(ii) (requiring disclosure of any limitations on the increase of the interest rate) does not necessarily constitute compliance with this section. Specifically, this section requires that if there are no limitations on interest rate increases, the creditor must disclose that fact. By contrast, comment 18(f)(1)(ii)–1 states that if there are no limitations the creditor need not disclose that fact. In addition, under this section, limitations on rate increases include, rather than exclude, legal limits in the nature of usury or rate ceilings under state or Federal statutes or regulations.

3. *Rates applicable to the loan.* For a variable-rate loan, the disclosure of the interest rate must reflect the index and margin that will be used to make interest rate adjustments for the loan. The creditor may provide a description of the index and margin or range of margins used to make interest rate adjustments, including a reference to a source, such as a newspaper, where the consumer may look up the index.

47(b)(2) Fees and Default or Late Payment Costs

1. *Fees and default or late payment costs.* Creditors may follow the commentary for § 1026.47(a)(2) in complying with § 1026.47(b)(2). Creditors must disclose the late payment fees required to be disclosed under § 1026.18(l) as part of the disclosure required under § 1026.47(b)(2)(ii). If the creditor includes the itemization of the amount financed under § 1026.18(c)(1), any fees disclosed as part of the itemization need not be separately disclosed elsewhere.

47(b)(3) Repayment Terms

1. *Principal amount.* The principal amount must equal what the face amount of the note would be as of the time of approval, and it must be labeled ''Total Loan Amount.'' *See* Appendix H–18. This amount may be different from the ''principal loan amount'' used to calculate the amount financed under comment 18(b)(3)–1, because the creditor has the option under that comment of using a ''principal loan amount'' that is different from the face amount of the note. If the creditor elects to provide an itemization of the amount financed under § 1026.18(c)(1) the creditor need not disclose the amount financed elsewhere.

2. *Loan term.* The term of the loan is the maximum period of time during which regularly scheduled payments of principal and interest are due on the loan.

3. *Payment deferral options applicable to the consumer.* Creditors may follow the commentary for § 1026.47(a)(3)(ii) in complying with § 1026.47(b)(3)(iii).

4. *Payments required during enrollment.* Required payments that must be disclosed include payments of interest and principal, interest only, or other payments that the consumer must make during the time that the student is enrolled. Compliance with § 1026.18(g) constitutes compliance with § 1026.47(b)(3)(iv).

5. *Bankruptcy limitations.* The creditor may comply with § 1026.47(b)(3)(vi) by disclosing the following statement: ''If you file for bankruptcy you may still be required to pay back this loan.''

6. *An estimate of the total amount for repayment.* The creditor must disclose an estimate of the total amount for repayment at two interest rates:

i. The interest rate in effect on the date of approval. Compliance with the total of payments disclosure requirement of § 1026.18(h) constitutes compliance with this requirement.

ii. The maximum possible rate of interest applicable to the loan or, if the maximum rate cannot be determined, a rate of 25%. If the legal obligation between the parties specifies a maximum rate of interest, the creditor must calculate the total amount for repayment based on that rate. If the legal obligation does not specify a maximum rate but a usury or rate ceiling under state or Federal statutes or regulations applies, the creditor must use that rate. If a there is no maximum rate in the legal obligation or under a usury or rate ceiling, the creditor must base the disclosure on a rate of 25% and must disclose that there is no maximum rate and that the total amount for repayment disclosed under § 1026.47(b)(3)(vii)(B) is an estimate and will be higher if the applicable interest rate increases.

iii. If terms of the legal obligation provide a limitation on the amount that the interest rate may increase at any one time, the creditor may reflect the effect of the interest rate limitation in calculating the total cost example. For example, if the legal obligation provides that the interest rate may not increase by more than three percentage points each year, the creditor may assume that the rate increases by three percentage points each year until it reaches that maximum possible rate, or if a maximum rate cannot be determined, an interest rate of 25%.

7. *The maximum monthly payment.* The creditor must disclose the maximum payment that the consumer could be required to make under the loan agreement, calculated using the maximum rate of interest applicable to the loan, or if the maximum rate cannot be determined, a rate of 25%. The creditor must determine and disclose the maximum rate of interest in accordance with comments 47(b)(3)–6.ii and 47(b)(3)–6.iii. In addition, if a maximum rate cannot be determined, the creditor must state that there is no maximum rate and that the monthly payment amounts disclosed under § 1026.47(b)(3)(viii) are estimates and will be higher if the applicable interest rate increases.

47(b)(4) Alternatives to Private Education Loans

1. *General.* Creditors may use the guidance provided in the commentary for § 1026.47(a)(6) in complying with § 1026.47(b)(4).

47(b)(5) Rights of the Consumer

1. *Notice of acceptance period.* The disclosure that the consumer may accept the terms of the loan until the acceptance period under § 1026.48(c)(1) has expired must include the specific date on which the acceptance period expires and state that the consumer may accept the terms of the loan until that date. Under § 1026.48(c)(1), the date on which the acceptance period expires is based on when the consumer receives the disclosures. If the creditor mails the disclosures, the consumer is considered to have received them three business days after the creditor places the disclosures in the mail *See* § 1026.46(d)(4). If the creditor provides an acceptance period longer than the minimum 30 calendar days, the disclosure must reflect the later date. The disclosure must also specify the method or methods by which the consumer may communicate acceptance.

47(c) Final Disclosures

1. *Notice of right to cancel.* The disclosure of the right to cancel must include the specific date on which the three-day cancellation period expires and state that the consumer has a right to cancel by that date. *See* comments 48(d)–1 and –2. For example, if the disclosures were mailed to the consumer on Friday, June 1, and the consumer is deemed to receive them on Tuesday, June 5, the creditor could state: ''You have a right to cancel this transaction, without penalty, by midnight on June 8, 2009. No funds will be disbursed to you or to your school until after this time. You may cancel by calling us at 800–XXX–XXXX.'' If the creditor permits cancellation by mail, the statement must specify that the consumer's mailed request will be deemed timely if placed in the mail not later than the cancellation date specified on the disclosure. The disclosure must also specify the method or methods by which the consumer may cancel.

2. *More conspicuous.* The statement of the right to cancel must be more conspicuous than any other disclosure required under this section except for the finance charge, the interest rate, and the creditor's identity. *See* § 1026.46(c)(2)(iii). The statement will be deemed to be made more conspicuous if it is segregated from other disclosures, placed near or at the top of the disclosure document, and highlighted in relation to other required disclosures. For example, the statement may be outlined with a prominent, noticeable box; printed in contrasting color; printed in larger type, bold print, or different type face; underlined; or set off with asterisks.

Section 1026.48—Limitations on Private Education Loans

1. *Co-branding—definition of marketing.* The prohibition on co-branding in §§ 1026.48(a) and (b) applies to the marketing of private education loans. The term marketing includes any advertisement under § 1026.2(a)(2). In addition, the term marketing includes any document provided by the creditor to the consumer related to a specific transaction, such as an application or solicitation, a promissory note or a contract provided to the consumer. For example, prominently displaying the name of the educational institution at the top of the application form or promissory note without mentioning the name of the creditor, such as by naming the loan product the ''University of ABC Loan,'' would be prohibited.

2. *Implied endorsement.* A suggestion that a private education loan is offered or made by the covered educational institution instead of by the creditor is included in the prohibition on implying that the covered educational institution endorses the private education loan under § 1026.48(a)(1). For example, naming the loan the ''University of ABC Loan,'' suggests that the loan is offered by the educational institution. However, the use of a creditor's full name, even if that name includes the name of a covered educational institution, does not imply endorsement. For example, a credit union whose name includes the name of a covered educational institution is not prohibited from using its own name. In addition, the authorized use of a state seal by a state or an institution of higher education in the marketing of state education loan products does not imply endorsement.

3. *Disclosure.* i. A creditor is considered to have complied with § 1026.48(a)(2) if the creditor's marketing contains a clear and conspicuous statement, equally prominent and closely proximate to the reference to the covered educational institution, using the name of the creditor and the name of the covered educational institution that the covered educational institution does not endorse the creditor's loans and that the creditor is not affiliated with the covered educational institution. For example, ''[Name of creditor]'s loans are not endorsed by [name of school] and [name of creditor] is not affiliated with [name of school].'' The statement is considered to be equally prominent and closely proximate if it is the same type size and is located immediately next to or directly above or below the reference to the educational institution, without any intervening text or graphical displays.

ii. A creditor is considered to have complied with § 1026.48(b) if the creditor's marketing contains a clear and conspicuous statement, equally prominent and closely proximate to the reference to the covered educational institution, using the name of the creditor's loan or loan program, the name of the covered educational institution, and the name of the creditor, that the creditor's loans are not offered or made by the covered educational institution, but are made by the creditor. For example, ''[Name of loan or loan program] is not being offered or made by [name of school], but by [name of creditor].'' The statement is considered to be equally prominent and closely proximate if it is the same type size and is located immediately next to or directly above or below the reference to the educational institution, without any intervening text or graphical displays.

48(c) Consumer's Right to Accept

1. *30 day acceptance period.* The creditor must provide the consumer with at least 30 calendar days from the date the consumer

receives the disclosures required under § 1026.47(b) to accept the terms of the loan. The creditor may provide the consumer with a longer period of time. If the creditor places the disclosures in the mail, the consumer is considered to have received them three business days after they are mailed under § 1026.46(d)(4). For purposes of determining when a consumer receives mailed disclosures, ''business day'' means all calendar days except Sundays and the legal public holidays referred to in § 1026.2(a)(6). *See* comment 46(d)–1. The consumer may accept the loan at any time before the end of the 30-day period.

2. *Method of acceptance.* The creditor must specify a method or methods by which the consumer can accept the loan at any time within the 30-day acceptance period. The creditor may require the consumer to communicate acceptance orally or in writing. Acceptance may also be communicated electronically, but electronic communication must not be the only means provided for the consumer to communicate acceptance unless the creditor has provided the approval disclosure electronically in compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). If acceptance by mail is allowed, the consumer's communication of acceptance is considered timely if placed in the mail within the 30-day period.

3. *Prohibition on changes to rates and terms.* The prohibition on changes to the rates and terms of the loan applies to changes that affect those terms that are required to be disclosed under §§ 1026.47(b) and (c). The creditor is permitted to make changes that do not affect any of the terms disclosed to the consumer under those sections.

4. *Permissible changes to rates and terms—re-disclosure not required.* Creditors are not required to consummate a loan where the extension of credit would be prohibited by law or where the creditor has reason to believe that the consumer has committed fraud. A creditor may make changes to the rate based on adjustments to the index used for the loan and changes that will unequivocally benefit the consumer. For example, a creditor is permitted to reduce the interest rate or lower the amount of a fee. A creditor may also reduce the loan amount based on a certification or other information received from a covered educational institution or from the consumer indicating that the student's cost of attendance has decreased or the amount of other financial aid has increased. A creditor may also withdraw the loan approval based on a certification or other information received from a covered educational institution or from the consumer indicating that the student is not enrolled in the institution. For these changes permitted by § 1026.48(c)(3), the creditor is not required to provide a new set of approval disclosures required under § 1026.47(b) or provide the consumer with a new 30-day acceptance period under § 1026.48(c)(1). The creditor must provide the final disclosures under § 1026.47(c).

5. *Permissible changes to rates and terms—school certification.* If the creditor reduces the loan amount based on information that the student's cost of attendance has decreased or the amount of other financial aid has increased, the creditor may make certain corresponding changes to the rate and terms. The creditor may change the rate or terms to those that the consumer would have received if the consumer had applied for the reduced loan amount. For example, assume a consumer applies for, and is approved for, a $10,000 loan at a 7% interest rate. However, after the consumer receives the approval disclosures, the consumer's school certifies that the consumer's financial need is only $8,000. The creditor may reduce the loan amount for which the consumer is approved to $8,000. The creditor may also, for example, increase the interest rate on the loan to 7.125%, but only if the consumer would have received a rate of 7.125% if the consumer had originally applied for an $8,000 loan.

6. *Permissible changes to rates and terms—re-disclosure required.* A creditor may make changes to the interest rate or terms to accommodate a request from a consumer. For example, assume a consumer applies for a $10,000 loan and is approved for the $10,000 amount at an interest rate of 6%. After the creditor has provided the approval disclosures, the consumer's financial need increases, and the consumer requests to a loan amount of $15,000. In this situation, the creditor is permitted to offer a $15,000 loan, and to make any other changes such as raising the interest rate to 7%, in response to the consumer's request. The creditor must provide a new set of disclosures under § 1026.47(b) and provide the consumer with 30 days to accept the offer under § 1026.48(c) for the $15,000 loan offered in response to the consumer's request. However, because the consumer may choose not to accept the offer for the $15,000 loan at the higher interest rate, the creditor may not withdraw or change the rate or terms of the offer for the $10,000 loan, except as permitted under § 1026.48(c)(3), unless the consumer accepts the $15,000 loan.

48(d) Consumer's Right to Cancel

1. *Right to cancel.* If the creditor mails the disclosures, the disclosures are considered received by the consumer three business days after the disclosures were mailed. For purposes of determining when the consumer receives the disclosures, the term ''business day'' is defined as all calendar days except Sunday and the legal public holidays referred to in § 1026.2(a)(6). *See* § 1026.46(d)(4). The consumer has three business days from the date on which the disclosures are deemed received to cancel the loan. For example, if the creditor places the disclosures in the mail on Thursday, June 4, the disclosures are considered received on Monday, June 8. The consumer may cancel any time before midnight Thursday, June 11. The creditor may provide the consumer with more time to cancel the loan than the minimum three business days required under this section. If the creditor provides the consumer with a longer period of time in which to cancel the loan, the creditor may disburse the funds three business days after the consumer has received the disclosures required under this section, but the creditor must honor the consumer's later timely cancellation request.

2. *Method of cancellation.* The creditor must specify a method or methods by which the consumer may cancel. For example, the creditor may require the consumer to communicate cancellation orally or in writing. Cancellation may also be communicated electronically, but electronic communication must not be the only means by which the consumer may cancel unless the creditor provided the final disclosure electronically in compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). If the creditor allows cancellation by mail, the creditor must specify an address or the name and address of an agent of the creditor to receive notice of cancellation. The creditor must wait to disburse funds until it is reasonably satisfied that the consumer has not canceled. For example, the creditor may satisfy itself by waiting a reasonable time after expiration of the cancellation period to allow for delivery of a mailed notice. The creditor may also satisfy itself by obtaining a written statement from the consumer, which must be provided to and signed by the consumer only at the end of the three-day period, that the right has not been exercised.

3. *Cancellation without penalty.* The creditor may not charge the consumer a fee for exercising the right to cancel under § 1026.48(d). The prohibition extends only to fees charged specifically for canceling the loan. The creditor is not required to refund fees, such as an application fee, that are charged to all consumers whether or not the consumer cancels the loan.

48(e) Self-Certification Form

1. *General.* Section 1026.48(e) requires that the creditor obtain the self-certification form, signed by the consumer, before consummating the private education loan. The rule applies only to private education loans that will be used for the postsecondary educational expenses of a student while that student is attending an institution of higher education as defined in § 1026.46(b)(2). It does not apply to all covered educational institutions. The requirement applies even if the student is not currently attending an institution of higher education, but will use the loan proceeds for postsecondary educational expenses while attending such institution. For example, a creditor is required to obtain the form before consummating a private education loan provided to a high school senior for expenses to be incurred during the consumer's first year of college. This provision does not require that the creditor obtain the self-certification form in instances where the loan is not intended for a student attending an institution of higher education, such as when the consumer is consolidating loans after graduation. Section 155(a)(2) of the Higher Education Act of 1965 provides that the form shall be made available to the consumer by the relevant institution of higher education. However, § 1026.48(e) provides flexibility to institutions of higher education and creditors as to how the completed self-certification form is provided to the lender. The creditor

may receive the form directly from the consumer, or the creditor may receive the form from the consumer through the institution of higher education. In addition, the creditor may provide the form, and the information the consumer will require to complete the form, directly to the consumer.

2. *Electronic signature.* Under section 155(a)(2) of the Higher Education Act of 1965, the institution of higher education may provide the self-certification form to the consumer in written or electronic form. Under section 155(a)(5) of the Higher Education Act of 1965, the form may be signed electronically by the consumer. A creditor may accept the self-certification form from the consumer in electronic form. A consumer's electronic signature is considered valid if it meets the requirements issued by the Department of Education under section 155(a)(5) of the Higher Education Act of 1965.

48(f) Provision of Information by Preferred Lenders

1. *General.* Section 1026.48(f) does not specify the format in which creditors must provide the required information to the covered educational institution. Creditors may choose to provide only the required information or may provide copies of the form or forms the lender uses to comply with § 1026.47(a). A creditor is only required to provide the required information if the creditor is aware that it is a party to a preferred lender arrangement. For example, if a creditor is placed on a covered educational institution's preferred lender list without the creditor's knowledge, the creditor is not required to comply with § 1026.48(f).

Subpart G—Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

Section 1026.51 Ability To Pay

51(a) General Rule

51(a)(1)(i) Consideration of Ability to Pay

1. *Consideration of additional factors.* Section 1026.51(a) requires a card issuer to consider a consumer's independent ability to make the required minimum periodic payments under the terms of an account based on the consumer's independent income or assets and current obligations. The card issuer may also consider consumer reports, credit scores, and other factors, consistent with Regulation B (12 CFR part 1002).

2. *Ability to pay as of application or consideration of increase.* A card issuer complies with § 1026.51(a) if it bases its determination regarding a consumer's independent ability to make the required minimum periodic payments on the facts and circumstances known to the card issuer at the time the consumer applies to open the credit card account or when the card issuer considers increasing the credit line on an existing account.

3. *Credit line increase.* When a card issuer considers increasing the credit line on an existing account, § 1026.51(a) applies whether the consideration is based upon a request of the consumer or is initiated by the card issuer.

4. *Income and assets.* i. *Sources of information.* For purposes of § 1026.51(a), a card issuer may consider the consumer's income and assets based on:

A. Information provided by the consumer in connection with the credit card account under an open-end (not home-secured) consumer credit plan;

B. Information provided by the consumer in connection with any other financial relationship the card issuer or its affiliates have with the consumer (subject to any applicable information-sharing rules);

C. Information obtained through third parties (subject to any applicable information-sharing rules); and

D. Information obtained through any empirically derived, demonstrably and statistically sound model that reasonably estimates a consumer's income and assets.

ii. *Income and assets of persons liable for debts incurred on account.* For purposes of § 1026.51(a), a card issuer may consider any current or reasonably expected income and assets of the consumer or consumers who are applying for a new account and will be liable for debts incurred on that account. Similarly, when a card issuer is considering whether to increase the credit limit on an existing account, the card issuer may consider any current or reasonably expected income and assets of the consumer or consumers who are accountholders and are liable for debts incurred on that account. A card issuer may also consider any current or reasonably expected income and assets of a cosigner or guarantor who is or will be liable for debts incurred on the account. However, a card issuer may not use the income and assets of an authorized user or other person who is not liable for debts incurred on the account to satisfy the requirements of § 1026.51, unless a Federal or state statute or regulation grants a consumer who is liable for debts incurred on the account an ownership interest in such income and assets. Information about current or reasonably expected income and assets includes, for example, information about current or expected salary, wages, bonus pay, tips, and commissions. Employment may be full-time, part-time, seasonal, irregular, military, or self-employment. Other sources of income could include interest or dividends, retirement benefits, public assistance, alimony, child support, or separate maintenance payments. A card issuer may also take into account assets such as savings accounts or investments.

iii. *Household income and assets.* Consideration of information regarding a consumer's household income does not by itself satisfy the requirement in § 1026.51(a) to consider the consumer's independent ability to pay. For example, if a card issuer requests on its application forms that applicants provide their ''household income,'' the card issuer may not rely solely on the information provided by applicants to satisfy the requirements of § 1026.51(a). Instead, the card issuer would need to obtain additional information about an applicant's independent income (such as by contacting the applicant). However, if a card issuer requests on its application forms that applicants provide their income without reference to household income (such as by requesting ''income'' or ''salary''), the card issuer may rely on the information provided by applicants to satisfy the requirements of § 1026.51(a).

5. *Current obligations.* A card issuer may consider the consumer's current obligations based on information provided by the consumer or in a consumer report. In evaluating a consumer's current obligations, a card issuer need not assume that credit lines for other obligations are fully utilized.

6. *Joint applicants and joint accountholders.* With respect to the opening of a joint account for two or more consumers or a credit line increase on such an account, the card issuer may consider the collective ability of all persons who are or will be liable for debts incurred on the account to make the required payments.

51(a)(2) Minimum Periodic Payments

1. *Applicable minimum payment formula.* For purposes of estimating required minimum periodic payments under the safe harbor set forth in § 1026.51(a)(2)(ii), if the account has or may have a promotional program, such as a deferred payment or similar program, where there is no applicable minimum payment formula during the promotional period, the issuer must estimate the required minimum periodic payment based on the minimum payment formula that will apply when the promotion ends.

2. *Interest rate for purchases.* For purposes of estimating required minimum periodic payments under the safe harbor set forth in § 1026.51(a)(2)(ii), if the interest rate for purchases is or may be a promotional rate, the issuer must use the post-promotional rate to estimate interest charges.

3. *Mandatory fees.* For purposes of estimating required minimum periodic payments under the safe harbor set forth in § 1026.51(a)(2)(ii), mandatory fees that must be assumed to be charged include those fees the card issuer knows the consumer will be required to pay under the terms of the account if the account is opened, such as an annual fee. If a mandatory fee is a promotional fee (as defined in § 1026.16(g)), the issuer must use the post-promotional fee amount for purposes of § 1026.51(a)(2)(ii).

51(b) Rules Affecting Young Consumers

1. *Age as of date of application or consideration of credit line increase.* Sections 1026.51(b)(1) and (b)(2) apply only to a consumer who has not attained the age of 21 as of the date of submission of the application under § 1026.51(b)(1) or the date the credit line increase is requested by the consumer (or if no request has been made, the date the credit line increase is considered by the card issuer) under § 1026.51(b)(2).

2. *Liability of cosigner, guarantor, or joint accountholder.* Sections 1026.51(b)(1)(ii) and (b)(2) require the signature or written consent of a cosigner, guarantor, or joint accountholder agreeing either to be secondarily liable for any debt on the account incurred by the consumer before the consumer has attained the age of 21 or to be jointly liable with the consumer for any debt on the account. Sections 1026.51(b)(1)(ii) and (b)(2) do not prohibit a card issuer from also requiring the cosigner, guarantor, or joint accountholder to assume liability for debts

incurred after the consumer has attained the age of 21, consistent with any agreement made between the parties.

3. *Authorized users exempt.* If a consumer who has not attained the age of 21 is being added to another person's account as an authorized user and has no liability for debts incurred on the account, § 1026.51(b)(1) and (b)(2) do not apply.

4. *Electronic application.* Consistent with § 1026.5(a)(1)(iii), an application may be provided to the consumer in electronic form without regard to the consumer consent or other provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*) in the circumstances set forth in § 1026.60. The electronic submission of an application from a consumer or a consent to a credit line increase from a cosigner, guarantor, or joint accountholder to a card issuer would constitute a written application or consent for purposes of § 1026.51(b) and would not be considered a consumer disclosure for purposes of the E-Sign Act.

51(b)(1) Applications from young consumers

1. *Relation to Regulation B.* In considering an application or credit line increase on the credit card account of a consumer who is less than 21 years old, creditors must comply with the applicable rules in Regulation B (12 CFR part 1002).

2. *Financial information.* Information regarding income and assets that satisfies the requirements of § 1026.51(a) also satisfies the requirements of § 1026.51(b)(1). *See* comment 51(a)(1)–4.

51(b)(2) Credit line increases for young consumers

1. *Credit line request by joint accountholder aged 21 or older.* The requirement under § 1026.51(b)(2) that a cosigner, guarantor, or joint accountholder for a credit card account opened pursuant to § 1026.51(b)(1)(ii) must agree in writing to assume liability for the increase before a credit line is increased, does not apply if the cosigner, guarantor or joint accountholder who is at least 21 years old initiates the request for the increase.

Section 1026.52—Limitations on Fees

52(a) Limitations prior to account opening and during first year after account opening

52(a)(1) General rule

1. *Application.* The 25 percent limit in § 1026.52(a)(1) applies to fees that the card issuer charges to the account as well as to fees that the card issuer requires the consumer to pay with respect to the account through other means (such as through a payment from the consumer's asset account to the card issuer or from another credit account provided by the card issuer). For example:

i. Assume that, under the terms of a credit card account, a consumer is required to pay $120 in fees for the issuance or availability of credit at account opening. The consumer is also required to pay a cash advance fee that is equal to five percent of the cash advance and a late payment fee of $15 if the required minimum periodic payment is not received by the payment due date (which is the twenty-fifth of the month). At account opening on January 1 of year one, the credit limit for the account is $500. Section 1026.52(a)(1) permits the card issuer to charge to the account the $120 in fees for the issuance or availability of credit at account opening. On February 1 of year one, the consumer uses the account for a $100 cash advance. Section 1026.52(a)(1) permits the card issuer to charge a $5 cash-advance fee to the account. On March 26 of year one, the card issuer has not received the consumer's required minimum periodic payment. Section 1026.52(a)(2) permits the card issuer to charge a $15 late payment fee to the account. On July 15 of year one, the consumer uses the account for a $50 cash advance. Section 1026.52(a)(1) does not permit the card issuer to charge a $2.50 cash advance fee to the account. Furthermore, § 1026.52(a)(1) prohibits the card issuer from collecting the $2.50 cash advance fee from the consumer by other means.

ii. Assume that, under the terms of a credit card account, a consumer is required to pay $125 in fees for the issuance or availability of credit during the first year after account opening. At account opening on January 1 of year one, the credit limit for the account is $500. Section 1026.52(a)(1) permits the card issuer to charge the $125 in fees to the account. However, § 1026.52(a)(1) prohibits the card issuer from requiring the consumer to make payments to the card issuer for additional non-exempt fees with respect to the account prior to account opening or during the first year after account opening. Section 1026.52(a)(1) also prohibits the card issuer from requiring the consumer to open a separate credit account with the card issuer to fund the payment of additional non-exempt fees prior to the opening of the credit card account or during the first year after the credit card account is opened.

iii. Assume that, on January 1 of year one, a consumer is required to pay a $100 fee in order to apply for a credit card account. On January 5, the card issuer approves the consumer's application, assigns the account a credit limit of $1,000, and provides the consumer with account-opening disclosures consistent with § 1026.6. The date on which the account may first be used by the consumer to engage in transactions is January 5. The consumer is required to pay $150 in fees for the issuance or availability of credit, which § 1026.52(a)(1) permits the card issuer to charge to the account on January 5. However, because the $100 application fee is subject to the 25 percent limit in § 1026.52(a)(1), the card issuer is prohibited from requiring the consumer to pay any additional non-exempt fees with respect to the account until January 5 of year two.

2. *Fees that exceed 25 percent limit.* A card issuer that charges a fee to a credit card account that exceeds the 25 percent limit complies with § 1026.52(a)(1) if the card issuer waives or removes the fee and any associated interest charges or credits the account for an amount equal to the fee and any associated interest charges within a reasonable amount of time but no later than the end of the billing cycle following the billing cycle during which the fee was charged. For example, assuming the facts in the example in comment 52(a)(1)–1.i above, the card issuer complies with § 1026.52(a)(1) if the card issuer charged the $2.50 cash advance fee to the account on July 15 of year one but waived or removed the fee or credited the account for $2.50 (plus any interest charges on that $2.50) at the end of the billing cycle.

3. *Changes in credit limit during first year.* i. *Increases in credit limit.* If a card issuer increases the credit limit during the first year after the account is opened, § 1026.52(a)(1) does not permit the card issuer to require the consumer to pay additional fees that would otherwise be prohibited (such as a fee for increasing the credit limit). For example, assume that, at account opening on January 1, the credit limit for a credit card account is $400 and the consumer is required to pay $100 in fees for the issuance or availability of credit. On July 1, the card issuer increases the credit limit for the account to $600. Section 1026.52(a)(1) does not permit the card issuer to require the consumer to pay additional fees based on the increased credit limit.

ii. *Decreases in credit limit.* If a card issuer decreases the credit limit during the first year after the account is opened, § 1026.52(a)(1) requires the card issuer to waive or remove any fees charged to the account that exceed 25 percent of the reduced credit limit or to credit the account for an amount equal to any fees the consumer was required to pay with respect to the account that exceed 25 percent of the reduced credit limit within a reasonable amount of time but no later than the end of the billing cycle following the billing cycle during which the credit limit was reduced. For example:

A. Assume that, at account opening on January 1, the credit limit for a credit card account is $1,000 and the consumer is required to pay $250 in fees for the issuance or availability of credit. The billing cycles for the account begin on the first day of the month and end on the last day of the month. On July 30, the card issuer decreases the credit limit for the account to $500. Section 1026.52(a)(1) requires the card issuer to waive or remove $175 in fees from the account or to credit the account for an amount equal to $175 within a reasonable amount of time but no later than August 31.

B. Assume that, on June 25 of year one, a consumer is required to pay a $75 fee in order to apply for a credit card account. At account opening on July 1 of year one, the credit limit for the account is $500 and the consumer is required to pay $50 in fees for the issuance or availability of credit. The billing cycles for the account begin on the first day of the month and end on the last day of the month. On February 15 of year two, the card issuer decreases the credit limit for the account to $250. Section 1026.52(a)(1) requires the card issuer to waive or remove fees from the account or to credit the account for an amount equal to $62.50 within a reasonable amount of time but no later than March 31 of year two.

4. *Date on which account may first be used by consumer to engage in transactions.* i. *Methods of compliance.* For purposes of § 1026.52(a)(1), an account is considered open no earlier than the date on which the

account may first be used by the consumer to engage in transactions. A card issuer may consider an account open for purposes of § 1026.52(a)(1) on any of the following dates:

A. The date the account is first used by the consumer for a transaction (such as when an account is established in connection with financing the purchase of goods or services).

B. The date the consumer complies with any reasonable activation procedures imposed by the card issuer for preventing fraud or unauthorized use of a new account (such as requiring the consumer to provide information that verifies his or her identity), provided that the account may be used for transactions on that date.

C. The date that is seven days after the card issuer mails or delivers to the consumer account-opening disclosures that comply with § 1026.6, provided that the consumer may use the account for transactions after complying with any reasonable activation procedures imposed by the card issuer for preventing fraud or unauthorized use of the new account (such as requiring the consumer to provide information that verifies his or her identity). If a card issuer has reasonable procedures designed to ensure that account-opening disclosures that comply with § 1026.6 are mailed or delivered to consumers no later than a certain number of days after the card issuer establishes the account, the card issuer may add that number of days to the seven-day period for purposes of determining the date on which the account was opened.

ii. *Examples.* A. Assume that, on July 1 of year one, a credit card account under an open-end (not home-secured) consumer credit plan is established in connection with financing the purchase of goods or services and a $500 transaction is charged to the account by the consumer. The card issuer may consider the account open on July 1 of year one for purposes of § 1026.52(a)(1). Accordingly, § 1026.52(a)(1) ceases to apply to the account on July 1 of year two.

B. Assume that, on July 1 of year one, a card issuer approves a consumer's application for a credit card account under an open-end (not home-secured) consumer credit plan and establishes the account on its internal systems. On July 5, the card issuer mails or delivers to the consumer account-opening disclosures that comply with § 1026.6. If the consumer may use the account for transactions on the date the consumer complies with any reasonable procedures imposed by the card issuer for preventing fraud or unauthorized use, the card issuer may consider the account open on July 12 of year one for purposes of § 1026.52(a)(1). Accordingly, § 1026.52(a)(1) ceases to apply to the account on July 12 of year two.

C. Same facts as in paragraph B above except that the card issuer has adopted reasonable procedures designed to ensure that account-opening disclosures that comply with § 1026.6 are mailed or delivered to consumers no later than three days after an account is established on its systems. If the consumer may use the account for transactions on the date the consumer complies with any reasonable procedures imposed by the card issuer for preventing fraud or unauthorized use, the card issuer may consider the account open on July 11 of year one for purposes of § 1026.52(a)(1). Accordingly, § 1026.52(a)(1) ceases to apply to the account on July 11 of year two. However, if the consumer uses the account for a transaction or complies with the card issuer's reasonable procedures for preventing fraud or unauthorized use on July 8 of year one, the card issuer may, at its option, consider the account open on that date for purposes of § 1026.52(a)(1) and § 1026.52(a)(1) therefore ceases to apply to the account on July 8 of year two.

52(a)(2) Fees Not Subject to Limitations

1. *Covered fees.* Except as provided in § 1026.52(a)(2), § 1026.52(a) applies to any fees or other charges that a card issuer will or may require the consumer to pay with respect to a credit card account prior to account opening and during the first year after account opening, other than charges attributable to periodic interest rates. For example, § 1026.52(a) applies to:

i. Fees that the consumer is required to pay for the issuance or availability of credit described in § 1026.60(b)(2), including any fee based on account activity or inactivity and any fee that a consumer is required to pay in order to receive a particular credit limit;

ii. Fees for insurance described in § 1026.4(b)(7) or debt cancellation or debt suspension coverage described in § 1026.4(b)(10) written in connection with a credit transaction, if the insurance or debt cancellation or debt suspension coverage is required by the terms of the account;

iii. Fees that the consumer is required to pay in order to engage in transactions using the account (such as cash advance fees, balance transfer fees, foreign transaction fees, and fees for using the account for purchases);

iv. Fees that the consumer is required to pay for violating the terms of the account (except to the extent specifically excluded by § 1026.52(a)(2)(i));

v. Fixed finance charges; and

vi. Minimum charges imposed if a charge would otherwise have been determined by applying a periodic interest rate to a balance except for the fact that such charge is smaller than the minimum.

2. *Fees the consumer is not required to pay.* Section 1026.52(a)(2)(ii) provides that § 1026.52(a) does not apply to fees that the consumer is not required to pay with respect to the account. For example, § 1026.52(a) generally does not apply to fees for making an expedited payment (to the extent permitted by § 1026.10(e)), fees for optional services (such as travel insurance), fees for reissuing a lost or stolen card, or statement reproduction fees.

3. *Security deposits.* A security deposit that is charged to a credit card account is a fee for purposes of § 1026.52(a). In contrast, however, a security deposit is not subject to the 25 percent limit in § 1026.52(a)(1) if it is not charged to the account. For example, § 1026.52(a)(1) does not prohibit a card issuer from requiring a consumer to provide funds at account opening pledged as security for the account that exceed 25 percent of the credit limit at account opening so long as those funds are not obtained from the account.

52(a)(3) Rule of Construction

1. *Fees or charges otherwise prohibited by law.* Section 1026.52(a) does not authorize the imposition or payment of fees or charges otherwise prohibited by law. For example, see 16 CFR 310.4(a)(4).

52(b) Limitations on Penalty Fees

1. *Fees for violating the account terms or other requirements.* For purposes of § 1026.52(b), a fee includes any charge imposed by a card issuer based on an act or omission that violates the terms of the account or any other requirements imposed by the card issuer with respect to the account, other than charges attributable to periodic interest rates. Accordingly, for purposes of § 1026.52(b), a fee does not include charges attributable to an increase in an annual percentage rate based on an act or omission that violates the terms or other requirements of an account.

i. The following are examples of fees that are subject to the limitations in § 1026.52(b) or are prohibited by § 1026.52(b):

A. Late payment fees and any other fees imposed by a card issuer if an account becomes delinquent or if a payment is not received by a particular date.

B. Returned payment fees and any other fees imposed by a card issuer if a payment received via check, automated clearing house, or other payment method is returned.

C. Any fee or charge for an over-the-limit transaction as defined in § 1026.56(a), to the extent the imposition of such a fee or charge is permitted by § 1026.56.

D. Any fee imposed by a card issuer if payment on a check that accesses a credit card account is declined.

E. Any fee or charge for a transaction that the card issuer declines to authorize. *See* § 1026.52(b)(2)(i)(B).

F. Any fee imposed by a card issuer based on account inactivity (including the consumer's failure to use the account for a particular number or dollar amount of transactions or a particular type of transaction). *See* § 1026.52(b)(2)(i)(B).

G. Any fee imposed by a card issuer based on the closure or termination of an account. *See* § 1026.52(b)(2)(i)(B).

ii. The following are examples of fees to which § 1026.52(b) does not apply:

A. Balance transfer fees.

B. Cash advance fees.

C. Foreign transaction fees.

D. Annual fees and other fees for the issuance or availability of credit described in § 1026.60(b)(2), except to the extent that such fees are based on account inactivity. *See* § 1026.52(b)(2)(i)(B).

E. Fees for insurance described in § 1026.4(b)(7) or debt cancellation or debt suspension coverage described in § 1026.4(b)(10) written in connection with a credit transaction, provided that such fees are not imposed as a result of a violation of the account terms or other requirements of an account.

F. Fees for making an expedited payment (to the extent permitted by § 1026.10(e)).

G. Fees for optional services (such as travel insurance).

H. Fees for reissuing a lost or stolen card.

2. *Rounding to nearest whole dollar.* A card issuer may round any fee that complies with § 1026.52(b) to the nearest whole dollar. For example, if § 1026.52(b) permits a card issuer to impose a late payment fee of $21.50, the card issuer may round that amount up to the nearest whole dollar and impose a late payment fee of $22. However, if the late payment fee permitted by § 1026.52(b) were $21.49, the card issuer would not be permitted to round that amount up to $22, although the card issuer could round that amount down and impose a late payment fee of $21.

52(b)(1) General Rule

1. *Relationship between § 1026.52(b)(1)(i), (b)(1)(ii), and (b)(2).* i. *Relationship between § 1026.52(b)(1)(i) and (b)(1)(ii).* A card issuer may impose a fee for violating the terms or other requirements of an account pursuant to either § 1026.52(b)(1)(i) or (b)(1)(ii).

A. A card issuer that complies with the safe harbors in § 1026.52(b)(1)(ii) is not required to determine that its fees represent a reasonable proportion of the total costs incurred by the card issuer as a result of a type of violation under § 1026.52(b)(1)(i).

B. A card issuer may impose a fee for one type of violation pursuant to § 1026.52(b)(1)(i) and may impose a fee for a different type of violation pursuant to § 1026.52(b)(1)(ii). For example, a card issuer may impose a late payment fee of $30 based on a cost determination pursuant to § 1026.52(b)(1)(i) but impose returned payment and over-the-limit fees of $25 or $35 pursuant to the safe harbors in § 1026.52(b)(1)(ii).

C. A card issuer that previously based the amount of a penalty fee for a particular type of violation on a cost determination pursuant to § 1026.52(b)(1)(i) may begin to impose a penalty fee for that type of violation that is consistent with § 1026.52(b)(1)(ii) at any time (subject to the notice requirements in § 1026.9), provided that the first fee imposed pursuant to § 1026.52(b)(1)(ii) is consistent with § 1026.52(b)(1)(ii)(A). For example, assume that a late payment occurs on January 15 and that, based on a cost determination pursuant to § 1026.52(b)(1)(i), the card issuer imposes a $30 late payment fee. Another late payment occurs on July 15. The card issuer may impose another $30 late payment fee pursuant to § 1026.52(b)(1)(i) or may impose a $25 late payment fee pursuant to § 1026.52(b)(1)(ii)(A). However, the card issuer may not impose a $35 late payment fee pursuant to § 1026.52(b)(1)(ii)(B). If the card issuer imposes a $25 fee pursuant to § 1026.52(b)(1)(ii)(A) for the July 15 late payment and another late payment occurs on September 15, the card issuer may impose a $35 fee for the September 15 late payment pursuant to § 1026.52(b)(1)(ii)(B).

ii. *Relationship between § 1026.52(b)(1) and (b)(2).* Section 1026.52(b)(1) does not permit a card issuer to impose a fee that is inconsistent with the prohibitions in § 1026.52(b)(2). For example, if § 1026.52(b)(2)(i) prohibits the card issuer from imposing a late payment fee that exceeds $15, § 1026.52(b)(1)(ii) does not permit the card issuer to impose a higher late payment fee.

52(b)(1)(i) Fees Based on Costs

1. *Costs incurred as a result of violations.* Section 1026.52(b)(1)(i) does not require a card issuer to base a fee on the costs incurred as a result of a specific violation of the terms or other requirements of an account. Instead, for purposes of § 1026.52(b)(1)(i), a card issuer must have determined that a fee for violating the terms or other requirements of an account represents a reasonable proportion of the costs incurred by the card issuer as a result of that type of violation. A card issuer may make a single determination for all of its credit card portfolios or may make separate determinations for each portfolio. The factors relevant to this determination include:

i. The number of violations of a particular type experienced by the card issuer during a prior period of reasonable length (for example, a period of twelve months).

ii. The costs incurred by the card issuer during that period as a result of those violations.

iii. At the card issuer's option, the number of fees imposed by the card issuer as a result of those violations during that period that the card issuer reasonably estimates it will be unable to collect. *See* comment 52(b)(1)(i)–5.

iv. At the card issuer's option, reasonable estimates for an upcoming period of changes in the number of violations of that type, the resulting costs, and the number of fees that the card issuer will be unable to collect. *See* illustrative examples in comments 52(b)(1)(i)–6 through –9.

2. *Amounts excluded from cost analysis.* The following amounts are not costs incurred by a card issuer as a result of violations of the terms or other requirements of an account for purposes of § 1026.52(b)(1)(i):

i. Losses and associated costs (including the cost of holding reserves against potential losses and the cost of funding delinquent accounts).

ii. Costs associated with evaluating whether consumers who have not violated the terms or other requirements of an account are likely to do so in the future (such as the costs associated with underwriting new accounts). However, once a violation of the terms or other requirements of an account has occurred, the costs associated with preventing additional violations for a reasonable period of time are costs incurred by a card issuer as a result of violations of the terms or other requirements of an account for purposes of § 1026.52(b)(1)(i).

3. *Third party charges.* As a general matter, amounts charged to the card issuer by a third party as a result of a violation of the terms or other requirements of an account are costs incurred by the card issuer for purposes of § 1026.52(b)(1)(i). For example, if a card issuer is charged a specific amount by a third party for each returned payment, that amount is a cost incurred by the card issuer as a result of returned payments. However, if the amount is charged to the card issuer by an affiliate or subsidiary of the card issuer, the card issuer must have determined that the charge represents a reasonable proportion of the costs incurred by the affiliate or subsidiary as a result of the type of violation. For example, if an affiliate of a card issuer provides collection services to the card issuer on delinquent accounts, the card issuer must have determined that the amounts charged to the card issuer by the affiliate for such services represent a reasonable proportion of the costs incurred by the affiliate as a result of late payments.

4. *Amounts charged by other card issuers.* The fact that a card issuer's fees for violating the terms or other requirements of an account are comparable to fees assessed by other card issuers does not satisfy the requirements of § 1026.52(b)(1)(i).

5. *Uncollected fees.* For purposes of § 1026.52(b)(1)(i), a card issuer may consider fees that it is unable to collect when determining the appropriate fee amount. Fees that the card issuer is unable to collect include fees imposed on accounts that have been charged off by the card issuer, fees that have been discharged in bankruptcy, and fees that the card issuer is required to waive in order to comply with a legal requirement (such as a requirement imposed by 12 CFR Part 1026 or 50 U.S.C. app. 527). However, fees that the card issuer chooses not to impose or chooses not to collect (such as fees the card issuer chooses to waive at the request of the consumer or under a workout or temporary hardship arrangement) are not relevant for purposes of this determination. *See* illustrative examples in comments 52(b)(2)(i)–6 through –9.

6. *Late payment fees.* i. *Costs incurred as a result of late payments.* For purposes of § 1026.52(b)(1)(i), the costs incurred by a card issuer as a result of late payments include the costs associated with the collection of late payments, such as the costs associated with notifying consumers of delinquencies and resolving delinquencies (including the establishment of workout and temporary hardship arrangements).

ii. *Examples.* A. *Late payment fee based on past delinquencies and costs.* Assume that, during year one, a card issuer experienced 1 million delinquencies and incurred $26 million in costs as a result of those delinquencies. For purposes of § 1026.52(b)(1)(i), a $26 late payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

B. *Adjustment based on fees card issuer is unable to collect.* Same facts as above except that the card issuer imposed a late payment fee for each of the 1 million delinquencies experienced during year one but was unable to collect 25% of those fees (in other words, the card issuer was unable to collect 250,000 fees, leaving a total of 750,000 late payments for which the card issuer did collect or could have collected a fee). For purposes of § 1026.52(b)(2)(i), a late payment fee of $35 would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

C. *Adjustment based on reasonable estimate of future changes.* Same facts as paragraphs A and B above except the card issuer reasonably estimates that—based on past delinquency rates and other factors relevant to potential delinquency rates for year two—it will experience a 2% decrease in delinquencies during year two (in other words, 20,000 fewer delinquencies for a total of 980,000). The card issuer also reasonably

estimates that it will be unable to collect the same percentage of fees (25%) during year two as during year one (in other words, the card issuer will be unable to collect 245,000 fees, leaving a total of 735,000 late payments for which the card issuer will be able to collect a fee). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of delinquencies and other factors relevant to potential costs for year two—it will experience a 5% increase in costs during year two (in other words, $1.3 million in additional costs for a total of $27.3 million). For purposes of § 1026.52(b)(1)(i), a $37 late payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

7. *Returned payment fees.* i. *Costs incurred as a result of returned payments.* For purposes of § 1026.52(b)(1)(i), the costs incurred by a card issuer as a result of returned payments include:

A. Costs associated with processing returned payments and reconciling the card issuer's systems and accounts to reflect returned payments;

B. Costs associated with investigating potential fraud with respect to returned payments; and

C. Costs associated with notifying the consumer of the returned payment and arranging for a new payment.

ii. *Examples.* A. *Returned payment fee based on past returns and costs.* Assume that, during year one, a card issuer experienced 150,000 returned payments and incurred $3.1 million in costs as a result of those returned payments. For purposes of § 1026.52(b)(1)(i), a $21 returned payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

B. *Adjustment based on fees card issuer is unable to collect.* Same facts as above except that the card issuer imposed a returned payment fee for each of the 150,000 returned payments experienced during year one but was unable to collect 15% of those fees (in other words, the card issuer was unable to collect 22,500 fees, leaving a total of 127,500 returned payments for which the card issuer did collect or could have collected a fee). For purposes of § 1026.52(b)(2)(i), a returned payment fee of $24 would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

C. *Adjustment based on reasonable estimate of future changes.* Same facts as paragraphs A and B above except the card issuer reasonably estimates that—based on past returned payment rates and other factors relevant to potential returned payment rates for year two—it will experience a 2% increase in returned payments during year two (in other words, 3,000 additional returned payments for a total of 153,000). The card issuer also reasonably estimates that it will be unable to collect 25% of returned payment fees during year two (in other words, the card issuer will be unable to collect 38,250 fees, leaving a total of 114,750 returned payments for which the card issuer will be able to collect a fee). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of returned payments and other factors relevant to potential costs for year two—it will experience a 1% decrease in costs during year two (in other words, a $31,000 reduction in costs for a total of $3.069 million). For purposes of § 1026.52(b)(1)(i), a $27 returned payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

8. *Over-the-limit fees.* i. *Costs incurred as a result of over-the-limit transactions.* For purposes of § 1026.52(b)(1)(i), the costs incurred by a card issuer as a result of over-the-limit transactions include:

A. Costs associated with determining whether to authorize over-the-limit transactions; and

B. Costs associated with notifying the consumer that the credit limit has been exceeded and arranging for payments to reduce the balance below the credit limit.

ii. *Costs not incurred as a result of over-the-limit transactions.* For purposes of § 1026.52(b)(1)(i), costs associated with obtaining the affirmative consent of consumers to the card issuer's payment of transactions that exceed the credit limit consistent with § 1026.56 are not costs incurred by a card issuer as a result of over-the-limit transactions.

iii. *Examples.* A. *Over-the-limit fee based on past fees and costs.* Assume that, during year one, a card issuer authorized 600,000 over-the-limit transactions and incurred $4.5 million in costs as a result of those over-the-limit transactions. However, because of the affirmative consent requirements in § 1026.56, the card issuer was only permitted to impose 200,000 over-the-limit fees during year one. For purposes of § 1026.52(b)(1)(i), a $23 over-the-limit fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

B. *Adjustment based on fees card issuer is unable to collect.* Same facts as above except that the card issuer was unable to collect 30% of the 200,000 over-the-limit fees imposed during year one (in other words, the card issuer was unable to collect 60,000 fees, leaving a total of 140,000 over-the-limit transactions for which the card issuer did collect or could have collected a fee). For purposes of § 1026.52(b)(2)(i), an over-the-limit fee of $32 would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

C. *Adjustment based on reasonable estimate of future changes.* Same facts as paragraphs A and B above except the card issuer reasonably estimates that—based on past over-the-limit transaction rates, the percentages of over-the-limit transactions that resulted in an over-the-limit fee in the past (consistent with § 1026.56), and factors relevant to potential changes in those rates and percentages for year two—it will authorize approximately the same number of over-the-limit transactions during year two (600,000) and impose approximately the same number of over-the-limit fees (200,000). The card issuer also reasonably estimates that it will be unable to collect the same percentage of fees (30%) during year two as during year one (in other words, the card issuer was unable to collect 60,000 fees, leaving a total of 140,000 over-the-limit transactions for which the card issuer will be able to collect a fee). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of over-the-limit transactions and other factors relevant to potential costs for year two—it will experience a 6% decrease in costs during year two (in other words, a $270,000 reduction in costs for a total of $4.23 million). For purposes of § 1026.52(b)(1)(i), a $30 over-the-limit fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

9. *Declined access check fees.* i. *Costs incurred as a result of declined access checks.* For purposes of § 1026.52(b)(1)(i), the costs incurred by a card issuer as a result of declining payment on a check that accesses a credit card account include:

A. Costs associated with determining whether to decline payment on access checks;

B. Costs associated with processing declined access checks and reconciling the card issuer's systems and accounts to reflect declined access checks;

C. Costs associated with investigating potential fraud with respect to declined access checks; and

D. Costs associated with notifying the consumer and the merchant or other party that accepted the access check that payment on the check has been declined.

ii. *Example.* Assume that, during year one, a card issuer declined 100,000 access checks and incurred $2 million in costs as a result of those declined checks. The card issuer imposed a fee for each declined access check but was unable to collect 10% of those fees (in other words, the card issuer was unable to collect 10,000 fees, leaving a total of 90,000 declined access checks for which the card issuer did collect or could have collected a fee). For purposes of § 1026.52(b)(1)(i), a $22 declined access check fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of declined access checks during year two.

52(b)(1)(ii) Safe harbors

1. *Multiple violations of same type.* i. *Same billing cycle or next six billing cycles.* A card issuer cannot impose a fee for a violation pursuant to § 1026.52(b)(1)(ii)(B) unless a fee has previously been imposed for the same type of violation pursuant to § 1026.52(b)(1)(ii)(A). Once a fee has been imposed for a violation pursuant to § 1026.52(b)(1)(ii)(A), the card issuer may impose a fee pursuant to § 1026.52(b)(1)(ii)(B) for any subsequent violation of the same type until that type of violation has not occurred for a period of six consecutive complete billing cycles. A fee has been imposed for purposes of § 1026.52(b)(1)(ii) even if the card issuer waives or rebates all or part of the fee.

A. *Late payments.* For purposes of § 1026.52(b)(1)(ii), a late payment occurs during the billing cycle in which the

payment may first be treated as late consistent with the requirements of this part and the terms or other requirements of the account.

B. *Returned payments.* For purposes of § 1026.52(b)(1)(ii), a returned payment occurs during the billing cycle in which the payment is returned to the card issuer.

C. *Transactions that exceed the credit limit.* For purposes of § 1026.52(b)(1)(ii), a transaction that exceeds the credit limit for an account occurs during the billing cycle in which the transaction occurs or is authorized by the card issuer.

D. *Declined access checks.* For purposes of § 1026.52(b)(1)(ii), a check that accesses a credit card account is declined during the billing cycle in which the card issuer declines payment on the check.

ii. *Relationship to §§ 1026.52(b)(2)(ii) and 1026.56(j)(1).* If multiple violations are based on the same event or transaction such that § 1026.52(b)(2)(ii) prohibits the card issuer from imposing more than one fee, the event or transaction constitutes a single violation for purposes of § 1026.52(b)(1)(ii). Furthermore, consistent with § 1026.56(j)(1)(i), no more than one violation for exceeding an account's credit limit can occur during a single billing cycle for purposes of § 1026.52(b)(1)(ii). However, § 1026.52(b)(2)(ii) does not prohibit a card issuer from imposing fees for exceeding the credit limit in consecutive billing cycles based on the same over-the-limit transaction to the extent permitted by § 1026.56(j)(1). In these circumstances, the second and third over-the-limit fees permitted by § 1026.56(j)(1) may be imposed pursuant to § 1026.52(b)(1)(ii)(B). *See* comment 52(b)(2)(ii)–1.

iii. *Examples.* The following examples illustrate the application of § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B) with respect to credit card accounts under an open-end (not home-secured) consumer credit plan that are not charge card accounts. For purposes of these examples, assume that the billing cycles for the account begin on the first day of the month and end on the last day of the month and that the payment due date for the account is the twenty-fifth day of the month.

A. *Violations of same type (late payments).* A required minimum periodic payment of $50 is due on March 25. On March 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 1026.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on March 26. In order for the card issuer to impose a $35 late payment fee pursuant to § 1026.52(b)(1)(ii)(B), a second late payment must occur during the April, May, June, July, August, or September billing cycles.

1. The card issuer does not receive any payment during the March billing cycle. A required minimum periodic payment of $100 is due on April 25. On April 20, the card issuer receives a $50 payment. No further payment is received during the April billing cycle. Accordingly, consistent with § 1026.52(b)(1)(ii)(B), the card issuer may impose a $35 late payment fee on April 26. Furthermore, the card issuer may impose a $35 late payment fee for any late payment that occurs during the May, June, July, August, September, or October billing cycles.

2. Same facts as in paragraph A above. On March 30, the card issuer receives a $50 payment and the required minimum periodic payments for the April, May, June, July, August, and September billing cycles are received on or before the payment due date. A required minimum periodic payment of $60 is due on October 25. On October 26, a late payment has occurred because the required minimum periodic payment due on October 25 has not been received. However, because this late payment did not occur during the six billing cycles following the March billing cycle, § 1026.52(b)(1)(ii) only permits the card issuer to impose a late payment fee of $25.

B. *Violations of different types (late payment and over the credit limit).* The credit limit for an account is $1,000. Consistent with § 1026.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. A required minimum periodic payment of $30 is due on August 25. On August 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 1026.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on August 26. On August 30, the card issuer receives a $30 payment. On September 10, a transaction causes the account balance to increase to $1,150, which exceeds the account's $1,000 credit limit. On September 11, a second transaction increases the account balance to $1,350. On September 23, the card issuer receives the $50 required minimum periodic payment due on September 25, which reduces the account balance to $1,300. On September 30, the card issuer imposes a $25 over-the-limit fee, consistent with § 1026.52(b)(1)(ii)(A). On October 26, a late payment has occurred because the $60 required minimum periodic payment due on October 25 has not been received. Accordingly, consistent with § 1026.52(b)(1)(ii)(B), the card issuer imposes a $35 late payment fee on October 26.

C. *Violations of different types (late payment and returned payment).* A required minimum periodic payment of $50 is due on July 25. On July 26, a late payment has occurred because no payment has been received. Accordingly, consistent with § 1026.52(b)(1)(ii)(A), the card issuer imposes a $25 late payment fee on July 26. On July 30, the card issuer receives a $50 payment. A required minimum periodic payment of $50 is due on August 25. On August 24, a $50 payment is received. On August 27, the $50 payment is returned to the card issuer for insufficient funds. In these circumstances, § 1026.52(b)(2)(ii) permits the card issuer to impose either a late payment fee or a returned payment fee but not both because the late payment and the returned payment result from the same event or transaction. Accordingly, for purposes of § 1026.52(b)(1)(ii), the event or transaction constitutes a single violation. However, if the card issuer imposes a late payment fee, § 1026.52(b)(1)(ii)(B) permits the issuer to impose a fee of $35 because the late payment occurred during the six billing cycles following the July billing cycle. In contrast, if the card issuer imposes a returned payment fee, the amount of the fee may be no more than $25 pursuant to § 1026.52(b)(1)(ii)(A).

2. *Adjustments based on Consumer Price Index.* For purposes of § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B), the Bureau shall calculate each year price level adjusted amounts using the Consumer Price Index in effect on June 1 of that year. When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B) has risen by a whole dollar, those amounts will be increased by $1.00. Similarly, when the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B) has decreased by a whole dollar, those amounts will be decreased by $1.00. The Bureau will publish adjustments to the amounts in § 1026.52(b)(1)(ii)(A) and (b)(1)(ii)(B).

3. *Delinquent balance for charge card accounts.* Section 1026.52(b)(1)(ii)(C) provides that, when a charge card issuer that requires payment of outstanding balances in full at the end of each billing cycle has not received the required payment for two or more consecutive billing cycles, the card issuer may impose a late payment fee that does not exceed three percent of the delinquent balance. For purposes of § 1026.52(b)(1)(ii)(C), the delinquent balance is any previously billed amount that remains unpaid at the time the late payment fee is imposed pursuant to § 1026.52(b)(1)(ii)(C). Consistent with § 1026.52(b)(2)(ii), a charge card issuer that imposes a fee pursuant to § 1026.52(b)(1)(ii)(C) with respect to a late payment may not impose a fee pursuant to § 1026.52(b)(1)(ii)(B) with respect to the same late payment. The following examples illustrate the application of § 1026.52(b)(1)(ii)(C):

i. Assume that a charge card issuer requires payment of outstanding balances in full at the end of each billing cycle and that the billing cycles for the account begin on the first day of the month and end on the last day of the month. At the end of the June billing cycle, the account has a balance of $1,000. On July 5, the card issuer provides a periodic statement disclosing the $1,000 balance consistent with § 1026.7. During the July billing cycle, the account is used for $300 in transactions, increasing the balance to $1,300. At the end of the July billing cycle, no payment has been received and the card issuer imposes a $25 late payment fee consistent with § 1026.52(b)(1)(ii)(A). On August 5, the card issuer provides a periodic statement disclosing the $1,325 balance consistent with § 1026.7. During the August billing cycle, the account is used for $200 in transactions, increasing the balance to $1,525. At the end of the August billing cycle, no payment has been received. Consistent with § 1026.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $40, which is 3% of the $1,325 balance that was due at the end of the August billing cycle. Section 1026.52(b)(1)(ii)(C) does not permit the card issuer to include the $200 in transactions that occurred during the August billing cycle.

ii. Same facts as above except that, on August 25, a $100 payment is received. Consistent with § 1026.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $37, which is 3% of the unpaid portion of the $1,325 balance that was due at the end of the August billing cycle ($1,225).

iii. Same facts as in paragraph A above except that, on August 25, a $200 payment is received. Consistent with § 1026.52(b)(1)(ii)(C), the card issuer may impose a late payment fee of $34, which is 3% of the unpaid portion of the $1,325 balance that was due at the end of the August billing cycle ($1,125). In the alternative, the card issuer may impose a late payment fee of $35 consistent with § 1026.52(b)(1)(ii)(B). However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing both fees.

52(b)(2) Prohibited fees

1. *Relationship to § 1026.52(b)(1).* A card issuer does not comply with § 1026.52(b) if it imposes a fee that is inconsistent with the prohibitions in § 1026.52(b)(2). Thus, the prohibitions in § 1026.52(b)(2) apply even if a fee is consistent with § 1026.52(b)(1)(i) or (b)(1)(ii). For example, even if a card issuer has determined for purposes of § 1026.52(b)(1)(i) that a $27 fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of a particular type of violation, § 1026.52(b)(2)(i) prohibits the card issuer from imposing that fee if the dollar amount associated with the violation is less than $27. Similarly, even if § 1026.52(b)(1)(ii) permits a card issuer to impose a $25 fee, § 1026.52(b)(2)(i) prohibits the card issuer from imposing that fee if the dollar amount associated with the violation is less than $25.

52(b)(2)(i) Fees That Exceed Dollar Amount Associated With Violation

1. *Late payment fees.* For purposes of § 1026.52(b)(2)(i), the dollar amount associated with a late payment is the amount of the required minimum periodic payment due immediately prior to assessment of the late payment fee. Thus, § 1026.52(b)(2)(i)(A) prohibits a card issuer from imposing a late payment fee that exceeds the amount of that required minimum periodic payment. For example:

i. Assume that a $15 required minimum periodic payment is due on September 25. The card issuer does not receive any payment on or before September 25. On September 26, the card issuer imposes a late payment fee. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the late payment is the amount of the required minimum periodic payment due on September 25 ($15). Thus, under § 1026.52(b)(2)(i)(A), the amount of that fee cannot exceed $15 (even if a higher fee would be permitted under § 1026.52(b)(1)).

ii. Same facts as above except that, on September 25, the card issuer receives a $10 payment. No further payments are received. On September 26, the card issuer imposes a late payment fee. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the late payment is the full amount of the required minimum periodic payment due on September 25 ($15), rather than the unpaid portion of that payment ($5). Thus, under § 1026.52(b)(2)(i)(A), the amount of the late payment fee cannot exceed $15 (even if a higher fee would be permitted under § 1026.52(b)(1)).

iii. Assume that a $15 required minimum periodic payment is due on October 28 and the billing cycle for the account closes on October 31. The card issuer does not receive any payment on or before November 3. On November 3, the card issuer determines that the required minimum periodic payment due on November 28 is $50. On November 5, the card issuer imposes a late payment fee. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the late payment is the amount of the required minimum periodic payment due on October 28 ($15), rather than the amount of the required minimum periodic payment due on November 28 ($50). Thus, under § 1026.52(b)(2)(i)(A), the amount of that fee cannot exceed $15 (even if a higher fee would be permitted under § 1026.52(b)(1)).

2. *Returned payment fees.* For purposes of § 1026.52(b)(2)(i), the dollar amount associated with a returned payment is the amount of the required minimum periodic payment due immediately prior to the date on which the payment is returned to the card issuer. Thus, § 1026.52(b)(2)(i)(A) prohibits a card issuer from imposing a returned payment fee that exceeds the amount of that required minimum periodic payment. However, if a payment has been returned and is submitted again for payment by the card issuer, there is no additional dollar amount associated with a subsequent return of that payment and § 1026.52(b)(2)(i)(B) prohibits the card issuer from imposing an additional returned payment fee. For example:

i. Assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. A minimum payment of $15 is due on March 25. The card issuer receives a check for $100 on March 23, which is returned to the card issuer for insufficient funds on March 26. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the returned payment is the amount of the required minimum periodic payment due on March 25 ($15). Thus, § 1026.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned payment fee that exceeds $15 (even if a higher fee would be permitted under § 1026.52(b)(1)). Furthermore, § 1026.52(b)(2)(ii) prohibits the card issuer from assessing both a late payment fee and a returned payment fee in these circumstances. *See* comment 52(b)(2)(ii)–1.

ii. Same facts as above except that the card issuer receives the $100 check on March 31 and the check is returned for insufficient funds on April 2. The minimum payment due on April 25 is $30. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the returned payment is the amount of the required minimum periodic payment due on March 25 ($15), rather than the amount of the required minimum periodic payment due on April 25 ($30). Thus, § 1026.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned payment fee that exceeds $15 (even if a higher fee would be permitted under § 1026.52(b)(1)). Furthermore, § 1026.52(b)(2)(ii) prohibits the card issuer from assessing both a late payment fee and a returned payment fee in these circumstances. *See* comment 52(b)(2)(ii)–1.

iii. Same facts as paragraph i above except that, on March 28, the card issuer presents the $100 check for payment a second time. On April 1, the check is again returned for insufficient funds. Section 1026.52(b)(2)(i)(B) prohibits the card issuer from imposing a returned payment fee based on the return of the payment on April 1.

iv. Assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. A minimum payment of $15 is due on August 25. The card issuer receives a check for $15 on August 23, which is not returned. The card issuer receives a check for $50 on September 5, which is returned to the card issuer for insufficient funds on September 7. Section 1026.52(b)(2)(i)(B) does not prohibit the card issuer from imposing a returned payment fee in these circumstances. Instead, for purposes of § 1026.52(b)(2)(i), the dollar amount associated with the returned payment is the amount of the required minimum periodic payment due on August 25 ($15). Thus, § 1026.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned payment fee that exceeds $15 (even if a higher fee would be permitted under § 1026.52(b)(1)).

3. *Over-the-limit fees.* For purposes of § 1026.52(b)(2)(i), the dollar amount associated with extensions of credit in excess of the credit limit for an account is the total amount of credit extended by the card issuer in excess of the credit limit during the billing cycle in which the over-the-limit fee is imposed. Thus, § 1026.52(b)(2)(i)(A) prohibits a card issuer from imposing an over-the-limit fee that exceeds that amount. Nothing in § 1026.52(b) permits a card issuer to impose an over-the-limit fee if imposition of the fee is inconsistent with § 1026.56. The following examples illustrate the application of § 1026.52(b)(2)(i)(A) to over-the-limit fees:

i. Assume that the billing cycles for a credit card account with a credit limit of $5,000 begin on the first day of the month and end on the last day of the month. Assume also that, consistent with § 1026.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On March 1, the account has a $4,950 balance. On March 6, a $60 transaction is charged to the account, increasing the balance to $5,010. On March 25, a $5 transaction is charged to the account, increasing the balance to $5,015. On the last day of the billing cycle (March 31), the card issuer imposes an over-the-limit fee. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the extensions of credit in excess of the credit limit is the total amount of credit extended by the card issuer in excess of the credit limit during the March billing cycle ($15). Thus, § 1026.52(b)(2)(i)(A) prohibits the card issuer from imposing an over-the-limit fee that exceeds $15 (even if a higher fee would be permitted under § 1026.52(b)(1)).

ii. Same facts as above except that, on March 26, the card issuer receives a payment

of $20, reducing the balance below the credit limit to $4,995. Nevertheless, for purposes of § 1026.52(b)(2)(i), the dollar amount associated with the extensions of credit in excess of the credit limit is the total amount of credit extended by the card issuer in excess of the credit limit during the March billing cycle ($15). Thus, consistent with § 1026.52(b)(2)(i)(A), the card issuer may impose an over-the-limit fee of $15.

4. *Declined access check fees.* For purposes of § 1026.52(b)(2)(i), the dollar amount associated with declining payment on a check that accesses a credit card account is the amount of the check. Thus, when a check that accesses a credit card account is declined, § 1026.52(b)(2)(i)(A) prohibits a card issuer from imposing a fee that exceeds the amount of that check. For example, assume that a check that accesses a credit card account is used as payment for a $50 transaction, but payment on the check is declined by the card issuer because the transaction would have exceeded the credit limit for the account. For purposes of § 1026.52(b)(2)(i), the dollar amount associated with the declined check is the amount of the check ($50). Thus, § 1026.52(b)(2)(i)(A) prohibits the card issuer from imposing a fee that exceeds $50. However, the amount of this fee must also comply with § 1026.52(b)(1)(i) or (b)(1)(ii).

5. *Inactivity fees.* Section 1026.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a fee with respect to a credit card account under an open-end (not home-secured) consumer credit plan based on inactivity on that account (including the consumer's failure to use the account for a particular number or dollar amount of transactions or a particular type of transaction). For example, § 1026.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a $50 fee when a credit card account under an open-end (not home-secured) consumer credit plan is not used for at least $2,000 in purchases over the course of a year. Similarly, § 1026.52(b)(2)(i)(B)(*2*) prohibits a card issuer from imposing a $50 annual fee on all accounts of a particular type but waiving the fee on any account that is used for at least $2,000 in purchases over the course of a year if the card issuer promotes the waiver or rebate of the annual fee for purposes of § 1026.55(e). However, if the card issuer does not promote the waiver or rebate of the annual fee for purposes of § 1026.55(e), § 1026.52(b)(2)(i)(B)(*2*) does not prohibit a card issuer from considering account activity along with other factors when deciding whether to waive or rebate annual fees on individual accounts (such as in response to a consumer's request).

6. *Closed account fees.* Section 1026.52(b)(2)(i)(B)(*3*) prohibits a card issuer from imposing a fee based on the closure or termination of an account. For example, § 1026.52(b)(2)(i)(B)(*3*) prohibits a card issuer from:

i. Imposing a one-time fee to consumers who close their accounts.

ii. Imposing a periodic fee (such as an annual fee, a monthly maintenance fee, or a closed account fee) after an account is closed or terminated if that fee was not imposed prior to closure or termination. This prohibition applies even if the fee was disclosed prior to closure or termination. *See also* comment 55(d)–1.

iii. Increasing a periodic fee (such as an annual fee or a monthly maintenance fee) after an account is closed or terminated. However, a card issuer is not prohibited from continuing to impose a periodic fee that was imposed before the account was closed or terminated.

52(b)(2)(ii) Multiple Fees Based on a Single Event or Transaction

1. *Single event or transaction.* Section 1026.52(b)(2)(ii) prohibits a card issuer from imposing more than one fee for violating the terms or other requirements of an account based on a single event or transaction. If § 1026.56(j)(1) permits a card issuer to impose fees for exceeding the credit limit in consecutive billing cycles based on the same over-the-limit transaction, those fees are not based on a single event or transaction for purposes of § 1026.52(b)(2)(ii). The following examples illustrate the application of § 1026.52(b)(2)(ii). Assume for purposes of these examples that the billing cycles for a credit card account begin on the first day of the month and end on the last day of the month and that the payment due date for the account is the twenty-fifth day of the month.

i. Assume that the required minimum periodic payment due on March 25 is $20. On March 26, the card issuer has not received any payment and imposes a late payment fee. Consistent with §§ 1026.52(b)(1)(ii)(A) and (b)(2)(i), the card issuer may impose a $20 late payment fee on March 26. However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing an additional late payment fee if the $20 minimum payment has not been received by a subsequent date (such as March 31).

A. On April 3, the card issuer provides a periodic statement disclosing that a $70 required minimum periodic payment is due on April 25. This minimum payment includes the $20 minimum payment due on March 25 and the $20 late payment fee imposed on March 26. On April 20, the card issuer receives a $20 payment. No additional payments are received during the April billing cycle. Section 1026.52(b)(2)(ii) does not prohibit the card issuer from imposing a late payment fee based on the consumer's failure to make the $70 required minimum periodic payment on or before April 25. Accordingly, consistent with § 1026.52(b)(1)(ii)(B) and (b)(2)(i), the card issuer may impose a $35 late payment fee on April 26.

B. On April 3, the card issuer provides a periodic statement disclosing that a $20 required minimum periodic payment is due on April 25. This minimum payment does not include the $20 minimum payment due on March 25 or the $20 late payment fee imposed on March 26. On April 20, the card issuer receives a $20 payment. No additional payments are received during the April billing cycle. Because the card issuer has received the required minimum periodic payment due on April 25 and because § 1026.52(b)(2)(ii) prohibits the card issuer from imposing a second late payment fee based on the consumer's failure to make the $20 minimum payment due on March 25, the card issuer cannot impose a late payment fee in these circumstances.

ii. Assume that the required minimum periodic payment due on March 25 is $30.

A. On March 25, the card issuer receives a check for $50, but the check is returned for insufficient funds on March 27. Consistent with §§ 1026.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 or a returned payment fee of $25. However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction.

B. Same facts as paragraph ii.A above except that that card issuer receives the $50 check on March 27 and the check is returned for insufficient funds on March 29. Consistent with §§ 1026.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 or a returned payment fee of $25. However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction. If no payment is received on or before the next payment due date (April 25), § 1026.52(b)(2)(ii) does not prohibit the card issuer from imposing a late payment fee.

iii. Assume that the required minimum periodic payment due on July 25 is $30. On July 10, the card issuer receives a $50 payment, which is not returned. On July 20, the card issuer receives a $100 payment, which is returned for insufficient funds on July 24. Consistent with § 1026.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a returned payment fee of $25. Nothing in § 1026.52(b)(2)(ii) prohibits the imposition of this fee.

iv. Assume that the credit limit for an account is $1,000 and that, consistent with § 1026.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On March 31, the balance on the account is $970 and the card issuer has not received the $35 required minimum periodic payment due on March 25. On that same date (March 31), a $70 transaction is charged to the account, which increases the balance to $1,040. Consistent with § 1026.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 and an over-the-limit fee of $25. Section 1026.52(b)(2)(ii) does not prohibit the imposition of both fees because those fees are based on different events or transactions. No additional transactions are charged to the account during the March, April, or May billing cycles. If the account balance remains more than $35 above the credit limit on April 26, the card issuer may impose an over-the-limit fee of $35 pursuant to § 1026.52(b)(1)(ii)(B), to the extent consistent with § 1026.56(j)(1). Furthermore, if the account balance remains more than $35 above the credit limit on May 26, the card issuer may again impose an over-the-limit fee of $35 pursuant to § 1026.52(b)(1)(ii)(B), to the extent consistent with § 1026.56(j)(1). Thereafter, § 1026.56(j)(1) does not permit the card issuer to impose additional over-the-limit fees unless another over-the-limit transaction occurs. However, if an over-the-limit transaction occurs during the six billing cycles following the May billing cycle, the

card issuer may impose an over-the-limit fee of $35 pursuant to § 1026.52(b)(1)(ii)(B).

v. Assume that the credit limit for an account is $5,000 and that, consistent with § 1026.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On July 23, the balance on the account is $4,950. On July 24, the card issuer receives the $100 required minimum periodic payment due on July 25, reducing the balance to $4,850. On July 26, a $75 transaction is charged to the account, which increases the balance to $4,925. On July 27, the $100 payment is returned for insufficient funds, increasing the balance to $5,025. Consistent with §§ 1026.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a returned payment fee of $25 or an over-the-limit fee of $25. However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction.

vi. Assume that the required minimum periodic payment due on March 25 is $50. On March 20, the card issuer receives a check for $50, but the check is returned for insufficient funds on March 22. Consistent with §§ 1026.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a returned payment fee of $25. On March 25, the card issuer receives a second check for $50, but the check is returned for insufficient funds on March 27. Consistent with §§ 1026.52(b)(1)(ii)(A), (b)(1)(ii)(B), and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 or a returned payment fee of $35. However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction.

vii. Assume that the required minimum periodic payment due on February 25 is $100. On February 25, the card issuer receives a check for $100. On March 3, the card issuer provides a periodic statement disclosing that a $120 required minimum periodic payment is due on March 25. On March 4, the $100 check is returned to the card issuer for insufficient funds. Consistent with §§ 1026.52(b)(1)(ii)(A) and (b)(2)(i)(A), the card issuer may impose a late payment fee of $25 or a returned payment fee of $25 with respect to the $100 payment. However, § 1026.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction. On March 20, the card issuer receives a $120 check, which is not returned. No additional payments are received during the March billing cycle. Because the card issuer has received the required minimum periodic payment due on March 25 and because § 1026.52(b)(2)(ii) prohibits the card issuer from imposing a second fee based on the $100 payment that was returned for insufficient funds, the card issuer cannot impose a late payment fee in these circumstances.

Section 1026.53—Allocation of Payments

1. *Required minimum periodic payment.* Section 1026.53 addresses the allocation of amounts paid by the consumer in excess of the minimum periodic payment required by the card issuer. Section 1026.53 does not limit or otherwise address the card issuer's ability to determine, consistent with applicable law and regulatory guidance, the amount of the required minimum periodic payment or how that payment is allocated. A card issuer may, but is not required to, allocate the required minimum periodic payment consistent with the requirements in § 1026.53 to the extent consistent with other applicable law or regulatory guidance.

2. *Applicable rates and balances.* Section 1026.53 permits a card issuer to allocate an amount paid by the consumer in excess of the required minimum periodic payment based on the annual percentage rates and balances on the day the preceding billing cycle ends, on the day the payment is credited to the account, or on any day in between those two dates. The day used by the card issuer to determine the applicable annual percentage rates and balances for purposes of § 1026.53 generally must be consistent from billing cycle to billing cycle, although the card issuer may adjust this day from time to time. For example:

i. Assume that the billing cycles for a credit card account start on the first day of the month and end on the last day of the month. On the date the March billing cycle ends (March 31), the account has a purchase balance of $500 at a promotional annual percentage rate of 5% and another purchase balance of $200 at a non-promotional annual percentage rate of 15%. On April 5, a $100 purchase to which the 15% rate applies is charged to the account. On April 15, the promotional rate expires and § 1026.55(b)(1) permits the card issuer to increase the rate that applies to the $500 balance from 5% to 18%. On April 25, the card issuer credits to the account $400 paid by the consumer in excess of the required minimum periodic payment. If the card issuer's practice is to allocate payments based on the rates and balances on the last day of the prior billing cycle, the card issuer would allocate the $400 payment to pay in full the $200 balance to which the 15% rate applied on March 31 and then allocate the remaining $200 to the $500 balance to which the 5% rate applied on March 31. In the alternative, if the card issuer's practice is to allocate payments based on the rates and balances on the day a payment is credited to the account, the card issuer would allocate the $400 payment to the $500 balance to which the 18% rate applied on April 25.

ii. Same facts as above except that, on April 25, the card issuer credits to the account $750 paid by the consumer in excess of the required minimum periodic payment. If the card issuer's practice is to allocate payments based on the rates and balances on the last day of the prior billing cycle, the card issuer would allocate the $750 payment to pay in full the $200 balance to which the 15% rate applied on March 31 and the $500 balance to which the 5% rate applied on March 31 and then allocate the remaining $50 to the $100 purchase made on April 5. In the alternative, if the card issuer's practice is to allocate payments based on the rates and balances on the day a payment is credited to the account, the card issuer would allocate the $750 payment to pay in full the $500 balance to which the 18% rate applied on April 25 and then allocate the remaining $250 to the $300 balance to which the 15% rate applied on April 25.

3. *Claims or defenses under § 1026.12(c) and billing error disputes under § 1026.13.* When a consumer has asserted a claim or defense against the card issuer pursuant to § 1026.12(c) or alleged a billing error under § 1026.13, the card issuer must apply the consumer's payment in a manner that avoids or minimizes any reduction in the amount subject to that claim, defense, or dispute. For example:

i. Assume that a credit card account has a $500 cash advance balance at an annual percentage rate of 25% and a $1,000 purchase balance at an annual percentage rate of 17%. Assume also that $200 of the cash advance balance is subject to a claim or defense under § 1026.12(c) or a billing error dispute under § 1026.13. If the consumer pays $900 in excess of the required minimum periodic payment, the card issuer must allocate $300 of the excess payment to pay in full the portion of the cash advance balance that is not subject to the claim, defense, or dispute and then allocate the remaining $600 to the $1,000 purchase balance.

ii. Same facts as above except that the consumer pays $1,400 in excess of the required minimum periodic payment. The card issuer must allocate $1,300 of the excess payment to pay in full the $300 cash advance balance that is not subject to the claim, defense, or dispute and the $1,000 purchase balance. If there are no new transactions or other amounts to which the remaining $100 can be allocated, the card issuer may apply that amount to the $200 cash advance balance that is subject to the claim, defense, or dispute. However, if the card issuer subsequently determines that a billing error occurred as asserted by the consumer, the card issuer must credit the account for the disputed amount and any related finance or other charges and send a correction notice consistent with § 1026.13(e).

4. *Balances with the same rate.* When the same annual percentage rate applies to more than one balance on an account and a different annual percentage rate applies to at least one other balance on that account, § 1026.53 generally does not require that any particular method be used when allocating among the balances with the same annual percentage rate. Under these circumstances, a card issuer may treat the balances with the same rate as a single balance or separate balances. *See* example in comment 53–5.iv. However, when a balance on a credit card account is subject to a deferred interest or similar program that provides that a consumer will not be obligated to pay interest that accrues on the balance if the balance is paid in full prior to the expiration of a specified period of time, that balance must be treated as a balance with an annual percentage rate of zero for purposes of § 1026.53 during that period of time. For example, if an account has a $1,000 purchase balance and a $2,000 balance that is subject to a deferred interest program that expires on July 1 and a 15% annual percentage rate applies to both, the balances must be treated as balances with different rates for purposes

of § 1026.53 until July 1. In addition, unless the card issuer allocates amounts paid by the consumer in excess of the required minimum periodic payment in the manner requested by the consumer pursuant to § 1026.53(b)(1)(ii), § 1026.53(b)(1)(i) requires the card issuer to apply any excess payments first to the $1,000 purchase balance except during the last two billing cycles of the deferred interest period (when it must be applied first to any remaining portion of the $2,000 balance). *See* example in comment 53–5.v.

5. *Examples.* For purposes of the following examples, assume that none of the required minimum periodic payment is allocated to the balances discussed (unless otherwise stated).

i. Assume that a credit card account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $800 in excess of the required minimum periodic payment. Under § 1026.53(a), the card issuer must allocate $500 to pay off the cash advance balance and then allocate the remaining $300 to the purchase balance.

ii. Assume that a credit card account has a cash advance balance of $500 at an annual percentage rate of 20% and a purchase balance of $1,500 at an annual percentage rate of 15% and that the consumer pays $400 in excess of the required minimum periodic payment. Under § 1026.53(a), the card issuer must allocate the entire $400 to the cash advance balance.

iii. Assume that a credit card account has a cash advance balance of $100 at an annual percentage rate of 20%, a purchase balance of $300 at an annual percentage rate of 18%, and a $600 protected balance on which the 12% annual percentage rate cannot be increased pursuant to § 1026.55. If the consumer pays $500 in excess of the required minimum periodic payment, § 1026.53(a) requires the card issuer to allocate $100 to pay off the cash advance balance, $300 to pay off the purchase balance, and $100 to the protected balance.

iv. Assume that a credit card account has a cash advance balance of $500 at an annual percentage rate of 20%, a purchase balance of $1,000 at an annual percentage rate of 15%, and a transferred balance of $2,000 that was previously at a discounted annual percentage rate of 5% but is now at an annual percentage rate of 15%. Assume also that the consumer pays $800 in excess of the required minimum periodic payment. Under § 1026.53(a), the card issuer must allocate $500 to pay off the cash advance balance and allocate the remaining $300 among the purchase balance and the transferred balance in the manner the card issuer deems appropriate.

v. Assume that on January 1 a consumer uses a credit card account to make a $1,200 purchase subject to a deferred interest program under which interest accrues at an annual percentage rate of 15% but the consumer will not be obligated to pay that interest if the balance is paid in full on or before June 30. The billing cycles for this account begin on the first day of the month and end on the last day of the month. Each month from January through June, the consumer uses the account to make $200 in purchases that are not subject to the deferred interest program but are subject to the 15% rate.

A. Each month from February through June, the consumer pays $400 in excess of the required minimum periodic payment on the payment due date, which is the twenty-fifth of the month. Any interest that accrues on the purchases not subject to the deferred interest program is paid by the required minimum periodic payment. The card issuer does not accept requests from consumers regarding the allocation of excess payments pursuant to § 1026.53(b)(1)(ii). Thus, § 1026.53(b)(1)(i) requires the card issuer to allocate the $400 excess payments received on February 25, March 25, and April 25 consistent with § 1026.53(a). In other words, the card issuer must allocate those payments as follows: $200 to pay off the balance not subject to the deferred interest program (which is subject to the 15% rate) and the remaining $200 to the deferred interest balance (which is treated as a balance with a rate of zero). However, § 1026.53(b)(1)(i) requires the card issuer to allocate the entire $400 excess payment received on May 25 to the deferred interest balance. Similarly, § 1026.53(b)(1)(i) requires the card issuer to allocate the $400 excess payment received on June 25 as follows: $200 to the deferred interest balance (which pays that balance in full) and the remaining $200 to the balance not subject to the deferred interest program.

B. Same facts as above, except that the card issuer does accept requests from consumers regarding the allocation of excess payments pursuant to § 1026.53(b)(1)(ii). In addition, on April 25, the card issuer receives an excess payment of $800, which the consumer requests be allocated to pay off the $800 balance subject to the deferred interest program. Section 1026.53(b)(1)(ii) permits the card issuer to allocate the $800 excess payment in the manner requested by the consumer.

53(b) Special Rules

1. *Deferred interest and similar programs.* Section 1026.53(b)(1) applies to deferred interest or similar programs under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. For purposes of § 1026.53(b)(1), ''deferred interest'' has the same meaning as in § 1026.16(h)(2) and associated commentary. Section 1026.53(b)(1) applies regardless of whether the consumer is required to make payments with respect to that balance during the specified period. However, a grace period during which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate is not a deferred interest or similar program for purposes of § 1026.53(b)(1). Similarly, a temporary annual percentage rate of zero percent that applies for a specified period of time consistent with § 1026.55(b)(1) is not a deferred interest or similar program for purposes of § 1026.53(b)(1) unless the consumer may be obligated to pay interest that accrues during the period if a balance is not paid in full prior to expiration of the period.

2. *Expiration of deferred interest or similar program during billing cycle.* For purposes of § 1026.53(b)(1)(i), a billing cycle does not constitute one of the two billing cycles immediately preceding expiration of a deferred interest or similar program if the expiration date for the program precedes the payment due date in that billing cycle. For example, assume that a credit card account has a balance subject to a deferred interest program that expires on June 15. Assume also that the billing cycles for the account begin on the first day of the month and end on the last day of the month and that the required minimum periodic payment is due on the twenty-fifth day of the month. The card issuer does not accept requests from consumers regarding the allocation of excess payments pursuant to § 1026.53(b)(1)(ii). Because the expiration date for the deferred interest program (June 15) precedes the due date in the June billing cycle (June 25), § 1026.53(b)(1)(i) requires the card issuer to allocate first to the deferred interest balance any amount paid by the consumer in excess of the required minimum periodic payment during the April and May billing cycles (as well as any amount paid by the consumer before June 15). However, if the deferred interest program expired on June 25 or on June 30 (or on any day in between), § 1026.53(b)(1)(i) would apply only to the May and June billing cycles.

3. *Consumer requests.* i. *Generally.* Section 1026.53(b) does not require a card issuer to allocate amounts paid by the consumer in excess of the required minimum periodic payment in the manner requested by the consumer, provided that the card issuer instead allocates such amounts consistent with § 1026.53(a) or (b)(1)(i), as applicable. For example, a card issuer may decline consumer requests regarding payment allocation as a general matter or may decline such requests when a consumer does not comply with requirements set by the card issuer (such as submitting the request in writing or submitting the request prior to or contemporaneously with submission of the payment), provided that amounts paid by the consumer in excess of the required minimum periodic payment are allocated consistent with § 1026.53(a) or (b)(1)(i), as applicable. Similarly, a card issuer that accepts requests pursuant to § 1026.53(b)(1)(ii) or (b)(2) must allocate amounts paid by a consumer in excess of the required minimum periodic payment consistent with § 1026.53(a) or (b)(1)(i), as applicable, if the consumer does not submit a request. Furthermore, a card issuer that accepts requests pursuant to § 1026.53(b)(1)(ii) or (b)(2) must allocate consistent with § 1026.53(a) or (b)(1)(i), as applicable, if the consumer submits a request with which the card issuer cannot comply (such as a request that contains a mathematical error), unless the consumer submits an additional request with which the card issuer can comply.

ii. *Examples of consumer requests that satisfy § 1026.53(b)(1)(ii) or (b)(2).* A consumer has made a request for purposes of § 1026.53(b)(1)(ii) or (b)(2) if:

A. The consumer contacts the card issuer orally, electronically, or in writing and specifically requests that a payment or

payments be allocated in a particular manner during the period of time that the deferred interest or similar program applies to a balance on the account or the period of time that a balance on the account is secured.

B. The consumer completes and submits to the card issuer a form or payment coupon provided by the card issuer for the purpose of requesting that a payment or payments be allocated in a particular manner during the period of time that the deferred interest or similar program applies to a balance on the account or the period of time that a balance on the account is secured.

C. The consumer contacts the card issuer orally, electronically, or in writing and specifically requests that a payment that the card issuer has previously allocated consistent with § 1026.53(a) or (b)(1)(i), as applicable, instead be allocated in a different manner.

iii. *Examples of consumer requests that do not satisfy § 1026.53(b)(1)(ii) or (b)(2).* A consumer has not made a request for purposes of § 1026.53(b)(1)(ii) or (b)(2) if:

A. The terms and conditions of the account agreement contain preprinted language stating that by applying to open an account, by using that account for transactions subject to a deferred interest or similar program, or by using the account to purchase property in which the card issuer holds a security interest the consumer requests that payments be allocated in a particular manner.

B. The card issuer's online application contains a preselected check box indicating that the consumer requests that payments be allocated in a particular manner and the consumer does not deselect the box.

C. The payment coupon provided by the card issuer contains preprinted language or a preselected check box stating that by submitting a payment the consumer requests that the payment be allocated in a particular manner.

D. The card issuer requires a consumer to accept a particular payment allocation method as a condition of using a deferred interest or similar program, purchasing property in which the card issuer holds a security interest, making a payment, or receiving account services or features.

Section 1026.54—Limitations on the Imposition of Finance Charges

54(a) Limitations on imposing finance charges as a result of the loss of a grace period

54(a)(1) General Rule

1. *Eligibility for grace period.* Section 1026.54 prohibits the imposition of finance charges as a result of the loss of a grace period in certain specified circumstances. Section 1026.54 does not require the card issuer to provide a grace period. Furthermore, § 1026.54 does not prohibit the card issuer from placing limitations and conditions on a grace period (such as limiting application of the grace period to certain types of transactions or conditioning eligibility for the grace period on certain transactions being paid in full by a particular date), provided that such limitations and conditions are consistent with § 1026.5(b)(2)(ii)(B) and § 1026.54. Finally, § 1026.54 does not limit the imposition of finance charges with respect to a transaction when the consumer is not eligible for a grace period on that transaction at the end of the billing cycle in which the transaction occurred. For example:

i. Assume that the billing cycles for a credit card account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. Assume also that, for purchases made during the current billing cycle (for purposes of this example, the June billing cycle), the grace period applies from the date of the purchase until the payment due date in the following billing cycle (July 25), subject to two conditions. First, the purchase balance at the end of the preceding billing cycle (the May billing cycle) must have been paid in full by the payment due date in the current billing cycle (June 25). Second, the purchase balance at the end of the current billing cycle (the June billing cycle) must be paid in full by the following payment due date (July 25). Finally, assume that the consumer was eligible for a grace period at the start of the June billing cycle (in other words, assume that the purchase balance for the April billing cycle was paid in full by May 25).

A. If the consumer pays the purchase balance for the May billing cycle in full by June 25, then at the end of the June billing cycle the consumer is eligible for a grace period with respect to purchases made during that billing cycle. Therefore, § 1026.54 limits the imposition of finance charges with respect to purchases made during the June billing cycle if the consumer does not pay the purchase balance for the June billing cycle in full by July 25. Specifically, § 1026.54(a)(1)(i) prohibits the card issuer from imposing finance charges based on the purchase balance at the end of the June billing cycle for days that precede the July billing cycle. Furthermore, § 1026.54(a)(1)(ii) prohibits the card issuer from imposing finance charges based on any portion of the balance at the end of the June billing cycle that was paid on or before July 25.

B. If the consumer does not pay the purchase balance for the May billing cycle in full by June 25, then the consumer is not eligible for a grace period with respect to purchases made during the June billing cycle at the end of that cycle. Therefore, § 1026.54 does not limit the imposition of finance charges with respect to purchases made during the June billing cycle regardless of whether the consumer pays the purchase balance for the June billing cycle in full by July 25.

ii. Same facts as above except that the card issuer places only one condition on the provision of a grace period for purchases made during the current billing cycle (the June billing cycle): that the purchase balance at the end of the current billing cycle (the June billing cycle) be paid in full by the following payment due date (July 25). In these circumstances, § 1026.54 applies to the same extent as discussed in paragraphs i.A and i.B above regardless of whether the purchase balance for the April billing cycle was paid in full by May 25.

2. *Definition of grace period.* For purposes of §§ 1026.5(b)(2)(ii)(B) and 1026.54, a grace period is a period within which any credit extended may be repaid without incurring a finance charge due to a periodic interest rate. The following are not grace periods for purposes of § 1026.54:

i. *Deferred interest and similar programs.* A deferred interest or similar promotional program under which a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time is not a grace period for purposes of § 1026.54. Thus, § 1026.54 does not prohibit the card issuer from charging accrued interest to an account upon expiration of a deferred interest or similar program if the balance was not paid in full prior to expiration (to the extent consistent with § 1026.55 and other applicable law and regulatory guidance).

ii. *Waivers or rebates of interest.* As a general matter, a card issuer has not provided a grace period with respect to transactions for purposes of § 1026.54 if, on an individualized basis (such as in response to a consumer's request), the card issuer waives or rebates finance charges that have accrued on transactions. In addition, when a balance at the end of the preceding billing cycle is paid in full on or before the payment due date in the current billing cycle, a card issuer that waives or rebates trailing or residual interest accrued on that balance or any other transactions during the current billing cycle has not provided a grace period with respect to that balance or any other transactions for purposes of § 1026.54. However, if the terms of the account provide that all interest accrued on transactions will be waived or rebated if the balance for those transactions at the end of the billing cycle during which the transactions occurred is paid in full by the following payment due date, the card issuer is providing a grace period with respect to those transactions for purposes of § 1026.54. For example:

A. Assume that the billing cycles for a credit card account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. On March 31, the balance on the account is $1,000 and the consumer is not eligible for a grace period with respect to that balance because the balance at the end of the prior billing cycle was not paid in full on March 25. On April 15, the consumer uses the account for a $500 purchase. On April 25, the card issuer receives a payment of $1,000. On May 3, the card issuer mails or delivers a periodic statement reflecting trailing or residual interest that accrued on the $1,000 balance from April 1 through April 24 as well as interest that accrued on the $500 purchase from April 15 through April 30. On May 10, the consumer requests that the trailing or residual interest charges be waived and the card issuer complies. By waiving these interest charges, the card issuer has not provided a grace period with respect to the $1,000 balance or the $500 purchase.

B. Same facts as in paragraph ii.A above except that the terms of the account state that trailing or residual interest will be waived in these circumstances or it is the card issuer's practice to waive trailing or residual interest in these circumstances. By waiving these

interest charges, the card issuer has not provided a grace period with respect to the $1,000 balance or the $500 purchase.

C. Assume that the billing cycles for a credit card account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. Assume also that, for purchases made during the current billing cycle (for purposes of this example, the June billing cycle), the terms of the account provide that interest accrued on those purchases from the date of the purchase until the payment due date in the following billing cycle (July 25) will be waived or rebated, subject to two conditions. First, the purchase balance at the end of the preceding billing cycle (the May billing cycle) must have been paid in full by the payment due date in the current billing cycle (June 25). Second, the purchase balance at the end of the current billing cycle (the June billing cycle) must be paid in full by the following payment due date (July 25). Under these circumstances, the card issuer is providing a grace period on purchases for purposes of § 1026.54. Therefore, assuming that the consumer was eligible for this grace period at the start of the June billing cycle (in other words, assuming that the purchase balance for the April billing cycle was paid in full by May 25) and assuming that the consumer pays the purchase balance for the May billing cycle in full by June 25, § 1026.54 applies to the imposition of finance charges with respect to purchases made during the June billing cycle. Specifically, § 1026.54(a)(1)(i) prohibits the card issuer from imposing finance charges based on the purchase balance at the end of the June billing cycle for days that precede the July billing cycle. Furthermore, § 1026.54(a)(1)(ii) prohibits the card issuer from imposing finance charges based on any portion of the balance at the end of the June billing cycle that was paid on or before July 25.

3. *Relationship to payment allocation requirements in § 1026.53.* Card issuers must comply with the payment allocation requirements in § 1026.53 even if doing so will result in the loss of a grace period.

4. *Prohibition on two-cycle balance computation method.* When a consumer ceases to be eligible for a grace period, § 1026.54(a)(1)(i) prohibits the card issuer from computing the finance charge using the two-cycle average daily balance computation method. This method calculates the finance charge using a balance that is the sum of the average daily balances for two billing cycles. The first balance is for the current billing cycle, and is calculated by adding the total balance (including or excluding new purchases and deducting payments and credits) for each day in the billing cycle, and then dividing by the number of days in the billing cycle. The second balance is for the preceding billing cycle.

5. *Prohibition on imposing finance charges on amounts paid within grace period.* When a balance on a credit card account is eligible for a grace period and the card issuer receives payment for some but not all of that balance prior to the expiration of the grace period, § 1026.54(a)(1)(ii) prohibits the card issuer from imposing finance charges on the portion of the balance paid. Card issuers are not required to use a particular method to comply with § 1026.54(a)(1)(ii). However, when § 1026.54(a)(1)(ii) applies, a card issuer is in compliance if, for example, it applies the consumer's payment to the balance subject to the grace period at the end of the preceding billing cycle (in a manner consistent with the payment allocation requirements in § 1026.53) and then calculates interest charges based on the amount of the balance that remains unpaid.

6. *Examples.* Assume that the annual percentage rate for purchases on a credit card account is 15%. The billing cycle starts on the first day of the month and ends on the last day of the month. The payment due date for the account is the twenty-fifth day of the month. For purchases made during the current billing cycle, the card issuer provides a grace period from the date of the purchase until the payment due date in the following billing cycle, provided that the purchase balance at the end of the current billing cycle is paid in full by the following payment due date. For purposes of this example, assume that none of the required minimum periodic payment is allocated to the balances discussed. During the March billing cycle, the following transactions are charged to the account: A $100 purchase on March 10, a $200 purchase on March 15, and a $300 purchase on March 20. On March 25, the purchase balance for the February billing cycle is paid in full. Thus, for purposes of § 1026.54, the consumer is eligible for a grace period on the March purchases. At the end of the March billing cycle (March 31), the consumer's total purchase balance is $600 and the consumer will not be charged interest on that balance if it is paid in full by the following due date (April 25).

i. On April 10, a $150 purchase is charged to the account. On April 25, the card issuer receives $500 in excess of the required minimum periodic payment. Section 1026.54(a)(1)(i) prohibits the card issuer from reaching back and charging interest on any of the March transactions from the date of the transaction through the end of the March billing cycle (March 31). In these circumstances, the card issuer may comply with § 1026.54(a)(1)(ii) by applying the $500 excess payment to the $600 purchase balance and then charging interest only on the portion of the $600 purchase balance that remains unpaid ($100) from the start of the April billing cycle (April 1) through the end of the April billing cycle (April 30). In addition, the card issuer may charge interest on the $150 purchase from the date of the transaction (April 10) through the end of the April billing cycle (April 31).

ii. Same facts as in paragraph 6 above except that, on March 18, a $250 cash advance is charged to the account at an annual percentage rate of 25%. The card issuer's grace period does not apply to cash advances, but the card issuer does provide a grace period on the March purchases because the purchase balance for the February billing cycle is paid in full on March 25. On April 25, the card issuer receives $600 in excess of the required minimum periodic payment. As required by § 1026.53, the card issuer allocates the $600 excess payment first to the balance with the highest annual percentage rate (the $250 cash advance balance). Although § 1026.54(a)(1)(i) prohibits the card issuer from charging interest on the March purchases based on days in the March billing cycle, the card issuer may charge interest on the $250 cash advance from the date of the transaction (March 18) through April 24. In these circumstances, the card issuer may comply with § 1026.54(a)(1)(ii) by applying the remainder of the excess payment ($350) to the $600 purchase balance and then charging interest only on the portion of the $600 purchase balance that remains unpaid ($250) from the start of the April billing cycle (April 1) through the end of the April billing cycle (April 30).

iii. Same facts as in paragraph 6 above except that the consumer does not pay the balance for the February billing cycle in full on March 25 and therefore is not eligible for a grace period on the March purchases. Under these circumstances, § 1026.54 does not apply and the card issuer may charge interest from the date of each transaction through April 24 and interest on the remaining $100 from April 25 through the end of the April billing cycle (April 25).

Section 1026.55—Limitations on Increasing Annual Percentage Rates, Fees, and Charges

55(a) General Rule

1. *Increase in rate, fee, or charge.* Section 1026.55(a) prohibits card issuers from increasing an annual percentage rate or any fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on a credit card account unless specifically permitted by one of the exceptions in § 1026.55(b). Except as specifically provided in § 1026.55(b), this prohibition applies even if the circumstances under which an increase will occur are disclosed in advance. The following examples illustrate the general application of § 1026.55(a) and (b). Additional examples illustrating specific aspects of the exceptions in § 1026.55(b) are provided in the commentary to those exceptions.

i. *Account-opening disclosure of non-variable rate for six months, then variable rate.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases is a non-variable rate of 15% and will apply for six months. The card issuer also discloses that, after six months, the annual percentage rate for purchases will be a variable rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly-available index not under the card issuer's control. Furthermore, the card issuer discloses that the annual percentage rate for cash advances is the same variable rate that will apply to purchases after six months. Finally, the card issuer discloses that, to the extent consistent with § 1026.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer makes a late payment. The payment due date for the account is the twenty-fifth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase and cash advance balances.

A. *Change-in-terms rate increase for new transactions after first year.* On January 15 of year one, the consumer uses the account to make a $2,000 purchase and a $500 cash advance. No other transactions are made on the account. At the start of each quarter, the card issuer may adjust the variable rate that applies to the $500 cash advance consistent with changes in the index (pursuant to § 1026.55(b)(2)). All required minimum periodic payments are received on or before the payment due date until May of year one, when the payment due on May 25 is received by the creditor on May 28. At this time, the card issuer is prohibited by § 1026.55 from increasing the rates that apply to the $2,000 purchase, the $500 cash advance, or future purchases and cash advances. Six months after account opening (July 1), the card issuer may begin to accrue interest on the $2,000 purchase at the previously-disclosed variable rate determined using an 8-point margin (pursuant to § 1026.55(b)(1)). Because no other increases in rate were disclosed at account opening, the card issuer may not subsequently increase the variable rate that applies to the $2,000 purchase and the $500 cash advance (except due to increases in the index pursuant to § 1026.55(b)(2)). On November 16, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (calculated using the same index and an increased margin of 12 percentage points). On December 15, the consumer makes a $100 purchase. On January 1 of year two, the card issuer may increase the margin used to determine the variable rate that applies to new purchases to 12 percentage points (pursuant to § 1026.55(b)(3)). However, § 1026.55(b)(3)(ii) does not permit the card issuer to apply the variable rate determined using the 12-point margin to the $2,000 purchase balance. Furthermore, although the $100 purchase occurred more than 14 days after provision of the § 1026.9(c) notice, § 1026.55(b)(3)(iii) does not permit the card issuer to apply the variable rate determined using the 12-point margin to that purchase because it occurred during the first year after account opening. On January 15 of year two, the consumer makes a $300 purchase. The card issuer may apply the variable rate determined using the 12-point margin to the $300 purchase.

B. *Account becomes more than 60 days delinquent during first year.* Same facts as above except that the required minimum periodic payment due on May 25 of year one is not received by the card issuer until July 30 of year one. Because the card issuer received the required minimum periodic payment more than 60 days after the payment due date, § 1026.55(b)(4) permits the card issuer to increase the annual percentage rate applicable to the $2,000 purchase, the $500 cash advance, and future purchases and cash advances. However, § 1026.55(b)(4)(i) requires the card issuer to first comply with the notice requirements in § 1026.9(g). Thus, if the card issuer provided a § 1026.9(g) notice on July 25 stating that all rates on the account would be increased to the 30% penalty rate, the card issuer could apply that rate beginning on September 8 to all balances and to future transactions.

ii. *Account-opening disclosure of non-variable rate for six months, then increased non-variable rate for six months, then variable rate; change-in-terms rate increase for new transactions after first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases will increase as follows: A non-variable rate of 5% for six months; a non-variable rate of 10% for an additional six months; and thereafter a variable rate that is currently 15% and will be adjusted monthly by adding a margin of 5 percentage points to a publicly-available index not under the card issuer's control. The payment due date for the account is the fifteenth day of the month and the required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance. On January 15 of year one, the consumer uses the account to make a $1,500 purchase. Six months after account opening (July 1), the card issuer may begin to accrue interest on the $1,500 purchase at the previously-disclosed 10% non-variable rate (pursuant to § 1026.55(b)(1)). On September 15, the consumer uses the account for a $700 purchase. On November 16, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two (calculated using the same index and an increased margin of 8 percentage points). One year after account opening (January 1 of year two), the card issuer may begin accruing interest on the $2,200 purchase balance at the previously-disclosed variable rate determined using a 5-point margin (pursuant to § 1026.55(b)(1)). Section 1026.55 does not permit the card issuer to apply the variable rate determined using the 8-point margin to the $2,200 purchase balance. Furthermore, § 1026.55 does not permit the card issuer to subsequently increase the variable rate determined using the 5-point margin that applies to the $2,200 purchase balance (except due to increases in the index pursuant to § 1026.55(b)(2)). The card issuer may, however, apply the variable rate determined using the 8-point margin to purchases made on or after January 1 of year two (pursuant to § 1026.55(b)(3)).

iii. *Change-in-terms rate increase for new transactions after first year; penalty rate increase after first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that the annual percentage rate for purchases is a variable rate determined by adding a margin of 6 percentage points to a publicly-available index outside of the card issuer's control. The card issuer also discloses that, to the extent consistent with § 1026.55 and other applicable law, a non-variable penalty rate of 28% may apply if the consumer makes a late payment. The due date for the account is the fifteenth of the month. On May 30 of year two, the account has a purchase balance of $1,000. On May 31, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer of a new variable rate that will apply on July 16 for all purchases made on or after June 15 (calculated by using the same index and an increased margin of 8 percentage points). On June 14, the consumer makes a $500 purchase. On June 15, the consumer makes a $200 purchase. On July 1, the card issuer has not received the payment due on June 15 and provides the consumer with a notice pursuant to § 1026.9(g) stating that the 28% penalty rate will apply as of August 15 to all transactions made on or after July 16 and that, if the consumer becomes more than 60 days late, the penalty rate will apply to all balances on the account. On July 17, the consumer makes a $300 purchase.

A. *Account does not become more than 60 days delinquent.* The payment due on June 15 of year two is received on July 2. On July 16, § 1026.55(b)(3)(ii) permits the card issuer to apply the variable rate determined using the 8-point margin disclosed in the § 1026.9(c) notice to the $200 purchase made on June 15 but does not permit the card issuer to apply this rate to the $1,500 purchase balance. On August 15, § 1026.55(b)(3)(ii) permits the card issuer to apply the 28% penalty rate disclosed at account opening and in the § 1026.9(g) notice to the $300 purchase made on July 17 but does not permit the card issuer to apply this rate to the $1,500 purchase balance (which remains at the variable rate determined using the 6-point margin) or the $200 purchase (which remains at the variable rate determined using the 8-point margin).

B. *Account becomes more than 60 days delinquent after provision of § 1026.9(g) notice.* Same facts as above except the payment due on June 15 of year two has not been received by August 15. Section 1026.55(b)(4) permits the card issuer to apply the 28% penalty rate to the $1,500 purchase balance and the $200 purchase because it has not received the June 15 payment within 60 days after the due date. However, in order to do so, § 1026.55(b)(4)(i) requires the card issuer to first provide an additional notice pursuant to § 1026.9(g). This notice must be sent no earlier than August 15, which is the first day the account became more than 60 days' delinquent. If the notice is sent on August 15, the card issuer may begin accruing interest on the $1,500 purchase balance and the $200 purchase at the 28% penalty rate beginning on September 29.

2. *Relationship to grace period.* Nothing in § 1026.55 prohibits a card issuer from assessing interest due to the loss of a grace period to the extent consistent with § 1026.5(b)(2)(ii)(B) and § 1026.54. In addition, a card issuer has not reduced an annual percentage rate on a credit card account for purposes of § 1026.55 if the card issuer does not charge interest on a balance or a portion thereof based on a payment received prior to the expiration of a grace period. For example, if the annual percentage rate for purchases on an account is 15% but the card issuer does not charge any interest on a $500 purchase balance because that balance was paid in full prior to the expiration of the grace period, the card issuer has not reduced the 15% purchase rate to 0% for purposes of § 1026.55.

55(b) Exceptions

1. *Exceptions not mutually exclusive.* A card issuer generally may increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to an exception set forth in § 1026.55(b) even if

that increase would not be permitted under a different exception. For example, although a card issuer cannot increase an annual percentage rate pursuant to § 1026.55(b)(1) unless that rate is provided for a specified period of at least six months, the card issuer may increase an annual percentage rate during a specified period due to an increase in an index consistent with § 1026.55(b)(2). Similarly, although § 1026.55(b)(3) does not permit a card issuer to increase an annual percentage rate during the first year after account opening, the card issuer may increase the rate during the first year after account opening pursuant to § 1026.55(b)(4) if the required minimum periodic payment is not received within 60 days after the due date. However, if § 1026.55(b)(4)(ii) requires a card issuer to decrease the rate, fee, or charge that applies to a balance while the account is subject to a workout or temporary hardship arrangement or subject to 50 U.S.C. app. 527 or a similar Federal or state statute or regulation, the card issuer may not impose a higher rate, fee, or charge on that balance pursuant to § 1026.55(b)(5) or (b)(6) upon completion or failure of the arrangement or once 50 U.S.C. app. 527 or the similar Federal or state statute or regulation no longer applies. For example, assume that, on January 1, the annual percentage rate that applies to a $1,000 balance is increased from 12% to 30% pursuant to § 1026.55(b)(4). On February 1, the rate on that balance is decreased from 30% to 15% consistent with § 1026.55(b)(5) as a part of a workout or temporary hardship arrangement. On July 1, § 1026.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $1,000 balance from 15% to 12%. If the consumer subsequently completes or fails to comply with the terms of the workout or temporary hardship arrangement, the card issuer may not increase the 12% rate that applies to any remaining portion of the $1,000 balance pursuant to § 1026.55(b)(5).

2. *Relationship between exceptions in § 1026.55(b) and notice requirements in § 1026.9.* Nothing in § 1026.55 alters the requirements in § 1026.9(c) and (g) that creditors provide written notice at least 45 days prior to the effective date of certain increases in annual percentage rates, fees, and charges.

i. *14-day rule in § 1026.55(b)(3)(ii).* Although § 1026.55(b)(3)(ii) permits a card issuer that discloses an increased rate pursuant to § 1026.9(c) or (g) to apply that rate to transactions that occur more than 14 days after provision of the notice, the card issuer cannot begin to accrue interest at the increased rate until that increase goes into effect, consistent with § 1026.9(c) or (g). For example, if on May 1 a card issuer provides a notice pursuant to § 1026.9(c) stating that a rate will increase from 15% to 18% on June 15, § 1026.55(b)(3)(ii) permits the card issuer to apply the 18% rate to transactions that occur on or after May 16. However, neither § 1026.55 nor § 1026.9(c) permits the card issuer to begin accruing interest at the 18% rate on those transactions until June 15. See additional examples in comment 55(b)(3)–4.

ii. *Mid-cycle increases; application of balance computation methods.* Once an increased rate has gone into effect, the card issuer cannot calculate interest charges based on that increased rate for days prior to the effective date. Assume that, in the example in paragraph i above, the billing cycles for the account begin on the first day of the month and end on the last day of the month. If, for example, the card issuer uses the average daily balance computation method, it cannot apply the 18% rate to the average daily balance for the entire June billing cycle because that rate did not become effective until June 15. However, the card issuer could apply the 15% rate to the average daily balance from June 1 through June 14 and the 18% rate to the average daily balance from June 15 through June 30. Similarly, if the card issuer that uses the daily balance computation method, it could apply the 15% rate to the daily balance for each day from June 1 through June 14 and the 18% rate to the daily balance for each day from June 15 through June 30.

iii. *Mid-cycle increases; delayed implementation of increase.* If § 1026.55(b) and § 1026.9(b), (c), or (g) permit a card issuer to apply an increased annual percentage rate, fee, or charge on a date that is not the first day of a billing cycle, the card issuer may delay application of the increased rate, fee, or charge until the first day of the following billing cycle without relinquishing the ability to apply that rate, fee, or charge. Thus, in the example in paragraphs i and ii above, the card issuer could delay application of the 18% rate until the start of the next billing cycle (April 1) without relinquishing its ability to apply that rate under § 1026.55(b)(3). Similarly, assume that, at account opening on January 1, a card issuer discloses that a non-variable annual percentage rate of 10% will apply to purchases for six months and a non-variable rate of 15% will apply thereafter. The first day of each billing cycle for the account is the fifteenth of the month. If the six-month period expires on July 1, the card issuer may delay application of the 15% rate until the start of the next billing cycle (July 15) without relinquishing its ability to apply that rate under § 1026.55(b)(1).

3. *Application of a lower rate, fee, or charge.* Nothing in § 1026.55 prohibits a card issuer from lowering an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii). However, a card issuer that does so cannot subsequently increase the rate, fee, or charge unless permitted by one of the exceptions in § 1026.55(b). The following examples illustrate the application of the rule:

i. *Application of lower rate during first year.* Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 15% will apply to purchases. The card issuer also discloses that, to the extent consistent with § 1026.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance.

A. *Temporary rate returns to standard rate at expiration.* On September 30 of year one, the account has a purchase balance of $1,400 at the 15% rate. On October 1, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 5% for six months (from October 1 through March 31 of year two) and that, beginning on April 1 of year two, the rate for purchases will increase to the 15% non-variable rate disclosed at account opening. The card issuer does not apply the 5% rate to the $1,400 purchase balance. On October 14 of year one, the consumer makes a $300 purchase at the 5% rate. On January 15 of year two, the consumer makes a $150 purchase at the 5% rate. On April 1 of year two, the card issuer may begin accruing interest on the $300 purchase and the $150 purchase at 15% as disclosed in the § 1026.9(c) notice (pursuant to § 1026.55(b)(1)).

B. *Penalty rate increase.* Same facts as above except that the required minimum periodic payment due on November 10 of year one is not received until November 15. Section 1026.55 does not permit the card issuer to increase any annual percentage rate on the account at this time. The card issuer may apply the 30% penalty rate to new transactions beginning on April 1 of year two pursuant to § 1026.55(b)(3) by providing a § 1026.9(g) notice informing the consumer of this increase no later than February 14 of year two. The card issuer may not, however, apply the 30% penalty rate to the $1,400 purchase balance as of September 30 of year one, the $300 purchase on October 15 of year one, or the $150 purchase on January 15 of year two.

ii. *Application of lower rate at end of first year.* Assume that, at account opening on January 1 of year one, a card issuer discloses that a non-variable annual percentage rate of 15% will apply to purchases for one year and discloses that, after the first year, the card issuer will apply a variable rate that is currently 20% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control. On December 31 of year one, the account has a purchase balance of $3,000.

A. *Notice of extension of existing temporary rate provided consistent with § 1026.55(b)(1)(i).* On December 15 of year one, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer that the existing 15% rate will continue to apply until July 1 of year two. The notice further states that, on July 1 of year two, the variable rate disclosed at account opening will apply. On July 1 of year two, § 1026.55(b)(1) permits the card issuer to apply that variable rate to any remaining portion of the $3,000 balance and to new transactions.

B. *Notice of new temporary rate provided consistent with § 1026.55(b)(1)(i).* On December 15 of year one, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer of a new variable rate that will apply on January 1 of year two that is lower than the variable rate disclosed at account opening. The new variable rate is calculated using the same index and a reduced margin of 8 percentage points. The

notice further states that, on July 1 of year two, the margin will increase to the margin disclosed at account opening (10 percentage points). On July 1 of year two, § 1026.55(b)(1) permits the card issuer to increase the margin used to determine the variable rate that applies to new purchases to 10 percentage points and to apply that rate to any remaining portion of the $3,000 purchase balance.

C. *No notice provided.* Same facts as in paragraph ii.B above except that the card issuer does not send a notice on December 15 of year one. Instead, on January 1 of year two, the card issuer lowers the margin used to determine the variable rate to 8 percentage points and applies that rate to the $3,000 purchase balance and to new purchases. Section 1026.9 does not require advance notice in these circumstances. However, unless the account becomes more than 60 days' delinquent, § 1026.55 does not permit the card issuer to subsequently increase the rate that applies to the $3,000 purchase balance except due to increases in the index (pursuant to § 1026.55(b)(2)).

iii. *Application of lower rate after first year.* Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 10% will apply to purchases for one year, after which that rate will increase to a non-variable rate of 15%. The card issuer also discloses that, to the extent consistent with § 1026.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the tenth of the month. The required minimum periodic payments are applied to accrued interest and fees but do not reduce the purchase balance.

A. *Effect of 14-day period.* On June 30 of year two, the account has a purchase balance of $1,000 at the 15% rate. On July 1, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer that the rate for new purchases will decrease to a non-variable rate of 5% for six months (from July 1 through December 31 of year two) and that, beginning on January 1 of year three, the rate for purchases will increase to a non-variable rate of 17%. On July 15 of year two, the consumer makes a $200 purchase. On July 16, the consumer makes a $100 purchase. On January 1 of year three, the card issuer may begin accruing interest on the $100 purchase at 17% (pursuant to § 1026.55(b)(1)). However, § 1026.55(b)(1)(ii)(B) does not permit the card issuer to apply the 17% rate to the $200 purchase because that transaction occurred within 14 days after provision of the § 1026.9(c) notice. Instead, the card issuer may apply the 15% rate that applied to purchases prior to provision of the § 1026.9(c) notice. In addition, if the card issuer applied the 5% rate to the $1,000 purchase balance, § 1026.55(b)(ii)(A) would not permit the card issuer to increase the rate that applies to that balance on January 1 of year three to a rate that is higher than 15% that previously applied to the balance.

B. *Penalty rate increase.* Same facts as above except that the required minimum periodic payment due on August 25 is received on August 30. At this time, § 1026.55 does not permit the card issuer to increase the annual percentage rates that apply to the $1,000 purchase balance, the $200 purchase, or the $100 purchase. Instead, those rates can only be increased as discussed in paragraph iii.A above. However, if the card issuer provides a notice pursuant to § 1026.9(c) or (g) on September 1, § 1026.55(b)(3) permits the card issuer to apply an increased rate (such as the 17% purchase rate or the 30% penalty rate) to transactions that occur on or after September 16 beginning on October 16.

C. *Application of lower temporary rate during specified period.* Same facts as in paragraph iii above. On June 30 of year two, the account has a purchase balance of $1,000 at the 15% non-variable rate. On July 1, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer that the rate for the $1,000 balance and new purchases will decrease to a non-variable rate of 12% for six months (from July 1 through December 31 of year two) and that, beginning on January 1 of year three, the rate for purchases will increase to a variable rate that is currently 20% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control. On August 15 of year two, the consumer makes a $500 purchase. On October 1, the card issuer provides another notice pursuant to § 1026.9(c) informing the consumer that the rate for the $1,000 balance, the $500 purchase, and new purchases will decrease to a non-variable rate of 5% for six months (from October 1 of year two through March 31 of year three) and that, beginning on April 1 of year three, the rate for purchases will increase to a variable rate that is currently 23% and is determined by adding a margin of 13 percentage points to the previously-disclosed index. On November 15 of year two, the consumer makes a $300 purchase. On April 1 of year three, § 1026.55 permits the card issuer to begin accruing interest using the following rates for any remaining portion of the following balances: The 15% non-variable rate for the $1,000 balance; the variable rate determined using the 10-point margin for the $500 purchase; and the variable rate determined using the 13-point margin for the $300 purchase.

4. *Date on which transaction occurred.* When a transaction occurred for purposes of § 1026.55 is generally determined by the date of the transaction. However, if a transaction that occurred within 14 days after provision of a § 1026.9(c) or (g) notice is not charged to the account prior to the effective date of the change or increase, the card issuer may treat the transaction as occurring more than 14 days after provision of the notice for purposes of § 1026.55. See example in comment 55(b)(3)–4.iii.B. In addition, when a merchant places a ''hold'' on the available credit on an account for an estimated transaction amount because the actual transaction amount will not be known until a later date, the date of the transaction for purposes of § 1026.55 is the date on which the card issuer receives the actual transaction amount from the merchant. See example in comment 55(b)(3)–4.iii.A.

5. *Category of transactions.* For purposes of § 1026.55, a ''category of transactions'' is a type or group of transactions to which an annual percentage rate applies that is different than the annual percentage rate that applies to other transactions. Similarly, a type or group of transactions is a ''category of transactions'' for purposes of § 1026.55 if a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) applies to those transactions that is different than the fee or charge that applies to other transactions. For example, purchase transactions, cash advance transactions, and balance transfer transactions are separate categories of transactions for purposes of § 1026.55 if a card issuer applies different annual percentage rates to each. Furthermore, if, for example, the card issuer applies different annual percentage rates to different types of purchase transactions (such as one rate for purchases of gasoline or purchases over $100 and a different rate for all other purchases), each type constitutes a separate category of transactions for purposes of § 1026.55.

55(b)(1) Temporary rate, fee, or charge exception

1. *Relationship to § 1026.9(c)(2)(v)(B).* A card issuer that has complied with the disclosure requirements in § 1026.9(c)(2)(v)(B) has also complied with the disclosure requirements in § 1026.55(b)(1)(i).

2. *Period of six months or longer.* A temporary annual percentage rate, fee, or charge must apply for a specified period of six months or longer before a card issuer can increase that rate, fee, or charge pursuant to § 1026.55(b)(1). The specified period must expire no less than six months after the date on which the card issuer provides the consumer with the disclosures required by § 1026.55(b)(1)(i) or, if later, the date on which the account can be used for transactions to which the temporary rate, fee, or charge applies. Section 1026.55(b)(1) does not prohibit a card issuer from limiting the application of a temporary annual percentage rate, fee, or charge to a particular category of transactions (such as to balance transfers or to purchases over $100). However, in circumstances where the card issuer limits application of the temporary rate, fee, or charge to a single transaction, the specified period must expire no less than six months after the date on which that transaction occurred. The following examples illustrate the application of § 1026.55(b)(1):

i. Assume that on January 1 a card issuer offers a consumer a 5% annual percentage rate on purchases made during the months of January through June. A 15% rate will apply thereafter. On February 15, a $500 purchase is charged to the account. On June 15, a $200 purchase is charged to the account. On July 1, the card issuer may begin accruing interest at the 15% rate on the $500 purchase and the $200 purchase (pursuant to § 1026.55(b)(1)).

ii. Same facts as above except that on January 1 the card issuer offered the 5% rate on purchases beginning in the month of February. Section 1026.55(b)(1) would not permit the card issuer to begin accruing interest at the 15% rate on the $500 purchase and the $200 purchase until August 1.

iii. Assume that on October 31 of year one the annual percentage rate for purchases is 17%. On November 1, the card issuer offers the consumer a 0% rate for six months on purchases made during the months of November and December. The 17% rate will apply thereafter. On November 15, a $500 purchase is charged to the account. On December 15, a $300 purchase is charged to the account. On January 15 of year two, a $150 purchase is charged to the account. Section 1026.55(b)(1) would not permit the card issuer to begin accruing interest at the 17% rate on the $500 purchase and the $300 purchase until May 1 of year two. However, the card issuer may accrue interest at the 17% rate on the $150 purchase beginning on January 15 of year two.

iv. Assume that on June 1 of year one a card issuer offers a consumer a 0% annual percentage rate for six months on the purchase of an appliance. An 18% rate will apply thereafter. On September 1, a $5,000 transaction is charged to the account for the purchase of an appliance. Section 1026.55(b)(1) would not permit the card issuer to begin accruing interest at the 18% rate on the $5,000 transaction until March 1 of year two.

v. Assume that on May 31 of year one the annual percentage rate for purchases is 15%. On June 1, the card issuer offers the consumer a 5% rate for six months on a balance transfer of at least $1,000. The 15% rate will apply thereafter. On June 15, a $3,000 balance is transferred to the account. On July 15, a $200 purchase is charged to the account. Section 1026.55(b)(1) would not permit the card issuer to begin accruing interest at the 15% rate on the $3,000 transferred balance until December 15. However, the card issuer may accrue interest at the 15% rate on the $200 purchase beginning on July 15.

vi. Same facts as in paragraph v above except that the card issuer offers the 5% rate for six months on all balance transfers of at least $1,000 during the month of June and a $2,000 balance is transferred to the account on June 30 (in addition to the $3,000 balance transfer on June 15). Because the 5% rate is not limited to a particular transaction, § 1026.55(b)(1) permits the card issuer to begin accruing interest on the $3,000 and $2,000 transferred balances on December 1.

vii. Assume that a card issuer discloses at account opening on January 1 of year one that the annual fee for the account is $0 until January 1 of year two, when the fee will increase to $50. On January 1 of year two, the card issuer may impose the $50 annual fee. However, the issuer must also comply with the notice requirements in § 1026.9(e).

viii. Assume that a card issuer discloses at account opening on January 1 of year one that the monthly maintenance fee for the account is $0 until July 1 of year one, when the fee will increase to $10. Beginning on July 1 of year one, the card issuer may impose the $10 monthly maintenance fee (to the extent consistent with § 1026.52(a)).

3. *Deferred interest and similar promotional programs.* i. *Application of § 1026.55.* The general prohibition in § 1026.55(a) applies to the imposition of accrued interest upon the expiration of a deferred interest or similar promotional program under which the consumer is not obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time. However, the exception in § 1026.55(b)(1) also applies to these programs, provided that the specified period is six months or longer and that, prior to the commencement of the period, the card issuer discloses the length of the period and the rate at which interest will accrue on the balance subject to the deferred interest or similar program if that balance is not paid in full prior to expiration of the period. See comment 9(c)(2)(v)–9. For purposes of § 1026.55, ''deferred interest'' has the same meaning as in § 1026.16(h)(2) and associated commentary.

ii. *Examples.* A. *Deferred interest offer at account opening.* Assume that, at account opening on January 1 of year one, the card issuer discloses the following with respect to a deferred interest program: ''No interest on purchases made in January of year one if paid in full by December 31 of year one. If the balance is not paid in full by that date, interest will be imposed from the transaction date at a rate of 20%.'' On January 15 of year one, the consumer makes a purchase of $2,000. No other transactions are made on the account. The terms of the deferred interest program require the consumer to make minimum periodic payments with respect to the deferred interest balance, and the payment due on April 1 is not received until April 10. Section 1026.55 does not permit the card issuer to charge to the account interest that has accrued on the $2,000 purchase at this time. Furthermore, if the consumer pays the $2,000 purchase in full on or before December 31 of year one, § 1026.55 does not permit the card issuer to charge to the account any interest that has accrued on that purchase. If, however, the $2,000 purchase has not been paid in full by January 1 of year two, § 1026.55(b)(1) permits the card issuer to charge to the account the interest accrued on that purchase at the 20% rate during year one (to the extent consistent with other applicable law).

B. *Deferred interest offer after account opening.* Assume that a card issuer discloses at account opening on January 1 of year one that the rate that applies to purchases is a variable annual percentage rate that is currently 18% and will be adjusted quarterly by adding a margin of 8 percentage points to a publicly-available index not under the card issuer's control. The card issuer also discloses that, to the extent consistent with § 1026.55 and other applicable law, a non-variable penalty rate of 30% may apply if the consumer's required minimum periodic payment is received after the payment due date, which is the first of the month. On June 30 of year two, the consumer uses the account for a $1,000 purchase in response to an offer of a deferred interest program. Under the terms of this program, interest on the purchase will accrue at the variable rate for purchases but the consumer will not be obligated to pay that interest if the purchase is paid in full by December 31 of year three. The terms of the deferred interest program require the consumer to make minimum periodic payments with respect to the deferred interest balance, and the payment due on September 1 of year two is not received until September 6. Section 1026.55 does not permit the card issuer to charge to the account interest that has accrued on the $1,000 purchase at this time. Furthermore, if the consumer pays the $1,000 purchase in full on or before December 31 of year three, § 1026.55 does not permit the card issuer to charge to the account any interest that has accrued on that purchase. On December 31 of year three, the $1,000 purchase has been paid in full. Under these circumstances, the card issuer may not charge any interest accrued on the $1,000 purchase.

C. *Application of § 1026.55(b)(4) to deferred interest programs.* Same facts as in paragraph ii.B above except that, on November 2 of year two, the card issuer has not received the required minimum periodic payments due on September 1, October 1, or November 1 of year two and sends a § 1026.9(c) or (g) notice stating that interest accrued on the $1,000 purchase since June 30 of year two will be charged to the account on December 17 of year two and thereafter interest will be charged on the $1,000 purchase consistent with the variable rate for purchases. On December 17 of year two, § 1026.55(b)(4) permits the card issuer to charge to the account interest accrued on the $1,000 purchase since June 30 of year two and § 1026.55(b)(3) permits the card issuer to begin charging interest on the $1,000 purchase consistent with the variable rate for purchases. However, if the card issuer receives the required minimum periodic payments due on January 1, February 1, March 1, April 1, May 1, and June 1 of year three, § 1026.55(b)(4)(ii) requires the card issuer to cease charging the account for interest on the $1,000 purchase no later than the first day of the next billing cycle. See comment 55(b)(4)–3.iii. However, § 1026.55(b)(4)(ii) does not require the card issuer to waive or credit the account for interest accrued on the $1,000 purchase since June 30 of year two. If the $1,000 purchase is paid in full on December 31 of year three, the card issuer is not permitted to charge to the account interest accrued on the $1,000 purchase after June 1 of year three.

4. *Contingent or discretionary increases.* Section 1026.55(b)(1) permits a card issuer to increase a temporary annual percentage rate, fee, or charge upon the expiration of a specified period of time. However, § 1026.55(b)(1) does not permit a card issuer to apply an increased rate, fee, or charge that is contingent on a particular event or occurrence or that may be applied at the card issuer's discretion. The following examples illustrate rate increases that are not permitted by § 1026.55:

i. Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 15% applies to purchases but that all rates on an account may be increased to a non-variable penalty rate of 30% if a consumer's required minimum periodic payment is received after the payment due date, which is the fifteenth of the month. On March 1, the account has a $2,000 purchase balance. The payment due on March 15 is not received

until March 20. Section 1026.55 does not permit the card issuer to apply the 30% penalty rate to the $2,000 purchase balance. However, pursuant to § 1026.55(b)(3), the card issuer could provide a § 1026.9(c) or (g) notice on or before November 16 informing the consumer that, on January 1 of year two, the 30% rate (or a different rate) will apply to new transactions.

ii. Assume that a card issuer discloses at account opening on January 1 of year one that a non-variable annual percentage rate of 5% applies to transferred balances but that this rate will increase to a non-variable rate of 18% if the consumer does not use the account for at least $200 in purchases each billing cycle. On July 1, the consumer transfers a balance of $4,000 to the account. During the October billing cycle, the consumer uses the account for $150 in purchases. Section 1026.55 does not permit the card issuer to apply the 18% rate to the $4,000 transferred balance or the $150 in purchases. However, pursuant to § 1026.55(b)(3), the card issuer could provide a § 1026.9(c) or (g) notice on or before November 16 informing the consumer that, on January 1 of year two, the 18% rate (or a different rate) will apply to new transactions.

iii. Assume that a card issuer discloses at account opening on January 1 of year one that the annual fee for the account is $10 but may be increased to $50 if a consumer's required minimum periodic payment is received after the payment due date, which is the fifteenth of the month. The payment due on July 15 is not received until July 23. Section 1026.55 does not permit the card issuer to impose the $50 annual fee at this time. Furthermore, § 1026.55(b)(3) does not permit the card issuer to increase the $10 annual fee during the first year after account opening. However, § 1026.55(b)(3) does permit the card issuer to impose the $50 fee (or a different fee) on January 1 of year two if, on or before November 16 of year one, the issuer informs the consumer of the increased fee consistent with § 1026.9(c) and the consumer does not reject that increase pursuant to § 1026.9(h).

iv. Assume that a card issuer discloses at account opening on January 1 of year one that the annual fee for a credit card account under an open-end (not home-secured) consumer credit plan is $0 but may be increased to $100 if the consumer's balance in a deposit account provided by the card issuer or its affiliate or subsidiary falls below $5,000. On June 1 of year one, the balance on the deposit account is $4,500. Section 1026.55 does not permit the card issuer to impose the $100 annual fee at this time. Furthermore, § 1026.55(b)(3) does not permit the card issuer to increase the $0 annual fee during the first year after account opening. However, § 1026.55(b)(3) does permit the card issuer to impose the $100 fee (or a different fee) on January 1 of year two if, on or before November 16 of year one, the issuer informs the consumer of the increased fee consistent with § 1026.9(c) and the consumer does not reject that increase pursuant to § 1026.9(h).

5. *Application of increased fees and charges.* Section 1026.55(b)(1)(ii) limits the ability of a card issuer to apply an increased fee or charge to certain transactions. However, to the extent consistent with § 1026.55(b)(3), (c), and (d), a card issuer generally is not prohibited from increasing a fee or charge that applies to the account as a whole. *See* comments 55(c)(1)–3 and 55(d)–1.

55(b)(2) Variable rate exception

1. *Increases due to increase in index.* Section 1026.55(b)(2) provides that an annual percentage rate that varies according to an index that is not under the card issuer's control and is available to the general public may be increased due to an increase in the index. This section does not permit a card issuer to increase the rate by changing the method used to determine a rate that varies with an index (such as by increasing the margin), even if that change will not result in an immediate increase. However, from time to time, a card issuer may change the day on which index values are measured to determine changes to the rate.

2. *Index not under card issuer's control.* A card issuer may increase a variable annual percentage rate pursuant to § 1026.55(b)(2) only if the increase is based on an index or indices outside the card issuer's control. For purposes of § 1026.55(b)(2), an index is under the card issuer's control if:

i. The index is the card issuer's own prime rate or cost of funds. A card issuer is permitted, however, to use a published prime rate, such as that in the *Wall Street Journal,* even if the card issuer's own prime rate is one of several rates used to establish the published rate.

ii. The variable rate is subject to a fixed minimum rate or similar requirement that does not permit the variable rate to decrease consistent with reductions in the index. A card issuer is permitted, however, to establish a fixed maximum rate that does not permit the variable rate to increase consistent with increases in an index. For example, assume that, under the terms of an account, a variable rate will be adjusted monthly by adding a margin of 5 percentage points to a publicly-available index. When the account is opened, the index is 10% and therefore the variable rate is 15%. If the terms of the account provide that the variable rate will not decrease below 15% even if the index decreases below 10%, the card issuer cannot increase that rate pursuant to § 1026.55(b)(2). However, § 1026.55(b)(2) does not prohibit the card issuer from providing in the terms of the account that the variable rate will not increase above a certain amount (such as 20%).

iii. The variable rate can be calculated based on any index value during a period of time (such as the 90 days preceding the last day of a billing cycle). A card issuer is permitted, however, to provide in the terms of the account that the variable rate will be calculated based on the average index value during a specified period. In the alternative, the card issuer is permitted to provide in the terms of the account that the variable rate will be calculated based on the index value on a specific day (such as the last day of a billing cycle). For example, assume that the terms of an account provide that a variable rate will be adjusted at the beginning of each quarter by adding a margin of 7 percentage points to a publicly-available index. At account opening at the beginning of the first quarter, the variable rate is 17% (based on an index value of 10%). During the first quarter, the index varies between 9.8% and 10.5% with an average value of 10.1%. On the last day of the first quarter, the index value is 10.2%. At the beginning of the second quarter, § 1026.55(b)(2) does not permit the card issuer to increase the variable rate to 17.5% based on the first quarter's maximum index value of 10.5%. However, if the terms of the account provide that the variable rate will be calculated based on the average index value during the prior quarter, § 1026.55(b)(2) permits the card issuer to increase the variable rate to 17.1% (based on the average index value of 10.1% during the first quarter). In the alternative, if the terms of the account provide that the variable rate will be calculated based on the index value on the last day of the prior quarter, § 1026.55(b)(2) permits the card issuer to increase the variable rate to 17.2% (based on the index value of 10.2% on the last day of the first quarter).

3. *Publicly available.* The index or indices must be available to the public. A publicly-available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify the annual percentage rate applied to the account.

4. *Changing a non-variable rate to a variable rate.* Section 1026.55 generally prohibits a card issuer from changing a non-variable annual percentage rate to a variable annual percentage rate because such a change can result in an increase. However, a card issuer may change a non-variable rate to a variable rate to the extent permitted by one of the exceptions in § 1026.55(b). For example, § 1026.55(b)(1) permits a card issuer to change a non-variable rate to a variable rate upon expiration of a specified period of time. Similarly, following the first year after the account is opened, § 1026.55(b)(3) permits a card issuer to change a non-variable rate to a variable rate with respect to new transactions (after complying with the notice requirements in § 1026.9(b), (c) or (g)).

5. *Changing a variable rate to a non-variable rate.* Nothing in § 1026.55 prohibits a card issuer from changing a variable annual percentage rate to an equal or lower non-variable rate. Whether the non-variable rate is equal to or lower than the variable rate is determined at the time the card issuer provides the notice required by § 1026.9(c). For example, assume that on March 1 a variable annual percentage rate that is currently 15% applies to a balance of $2,000 and the card issuer sends a notice pursuant to § 1026.9(c) informing the consumer that the variable rate will be converted to a non-variable rate of 14% effective April 15. On April 15, the card issuer may apply the 14% non-variable rate to the $2,000 balance and to new transactions even if the variable rate on March 2 or a later date was less than 14%.

6. *Substitution of index.* A card issuer may change the index and margin used to determine the annual percentage rate under § 1026.55(b)(2) if the original index becomes

unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable.

55(b)(3) Advance notice exception

1. *Relationship to § 1026.9(h).* A card issuer may not increase a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to § 1026.55(b)(3) if the consumer has rejected the increased fee or charge pursuant to § 1026.9(h).

2. *Notice provided pursuant to § 1026.9(b) and (c).* If an increased annual percentage rate, fee, or charge is disclosed pursuant to both § 1026.9(b) and (c), that rate, fee, or charge may only be applied to transactions that occur more than 14 days after provision of the § 1026.9(c) notice as provided in § 1026.55(b)(3)(ii).

3. *Account opening.* i. *Multiple accounts with same card issuer.* When a consumer has a credit card account with a card issuer and the consumer opens a new credit card account with the same card issuer (or its affiliate or subsidiary), the opening of the new account constitutes the opening of a credit card account for purposes of § 1026.55(b)(3)(iii) if, more than 30 days after the new account is opened, the consumer has the option to obtain additional extensions of credit on each account. For example, assume that, on January 1 of year one, a consumer opens a credit card account with a card issuer. On July 1 of year one, the consumer opens a second credit card account with that card issuer. On July 15, a $1,000 balance is transferred from the first account to the second account. The opening of the second account constitutes the opening of a credit card account for purposes of § 1026.55(b)(3)(iii) so long as, on August 1, the consumer has the option to engage in transactions using either account. Under these circumstances, the card issuer could not increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) on the second account pursuant to § 1026.55(b)(3) until July 1 of year two (which is one year after the second account was opened).

ii. *Substitution, replacement or consolidation.* A. *Generally.* A credit card account has not been opened for purposes of § 1026.55(b)(3)(iii) when a credit card account issued by a card issuer is substituted, replaced, or consolidated with another credit card account issued by the same card issuer (or its affiliate or subsidiary). Circumstances in which a credit card account has not been opened for purposes of § 1026.55(b)(3)(iii) include when:

1. A retail credit card account is replaced with a cobranded general purpose credit card account that can be used at a wider number of merchants;

2. A credit card account is replaced with another credit card account offering different features;

3. A credit card account is consolidated or combined with one or more other credit card accounts into a single credit card account; or

4. A credit card account acquired through merger or acquisition is replaced with a credit card account issued by the acquiring card issuer.

B. *Limitation.* A card issuer that replaces or consolidates a credit card account with another credit card account issued by the card issuer (or its affiliate or subsidiary) may not increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) in a manner otherwise prohibited by § 1026.55. For example, assume that, on January 1 of year one, a consumer opens a credit card account with an annual percentage rate of 15% for purchases. On July 1 of year one, the account is replaced with a credit card account that offers different features (such as rewards on purchases). Under these circumstances, § 1026.55(b)(3)(iii) prohibits the card issuer from increasing the annual percentage rate for new purchases to a rate that is higher than 15% pursuant to § 1026.55(b)(3) until January 1 of year two (which is one year after the first account was opened).

4. *Examples.* i. *Change-in-terms rate increase; temporary rate increase; 14-day period.* Assume that an account is opened on January 1 of year one. On March 14 of year two, the account has a purchase balance of $2,000 at a non-variable annual percentage rate of 15%. On March 15, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer that the rate for new purchases will increase to a non-variable rate of 18% on May 1. The notice further states that the 18% rate will apply for six months (until November 1) and that thereafter the card issuer will apply a variable rate that is currently 22% and is determined by adding a margin of 12 percentage points to a publicly-available index that is not under the card issuer's control. The fourteenth day after provision of the notice is March 29 and, on that date, the consumer makes a $200 purchase. On March 30, the consumer makes a $1,000 purchase. On May 1, the card issuer may begin accruing interest at 18% on the $1,000 purchase made on March 30 (pursuant to § 1026.55(b)(3)). Section 1026.55(b)(3)(ii) does not permit the card issuer to apply the 18% rate to the $2,200 purchase balance as of March 29 because that balance reflects transactions that occurred prior to or within 14 days after the provision of the § 1026.9(c) notice. After six months (November 2), the card issuer may begin accruing interest on any remaining portion of the $1,000 purchase at the previously-disclosed variable rate determined using the 12-point margin (pursuant to § 1026.55(b)(1) and (b)(3)).

ii. *Checks that access an account.* Assume that a card issuer discloses at account opening on January 1 of year one that the annual percentage rate that applies to cash advances is a variable rate that is currently 24% and will be adjusted quarterly by adding a margin of 14 percentage points to a publicly available index not under the card issuer's control. On July 1 of year two, the card issuer provides checks that access the account and, pursuant to § 1026.9(b)(3)(i)(A), discloses that a promotional rate of 15% will apply to credit extended by use of the checks until January 1 of year three, after which the cash advance rate determined using the 14-point margin will apply. On July 9 of year two, the consumer uses one of the checks to pay for a $500 transaction. Beginning on January 1 of year three, the card issuer may apply the cash advance rate determined using the 14-point margin to any remaining portion of the $500 transaction (pursuant to § 1026.55(b)(1) and (b)(3)).

iii. *Hold on available credit; 14-day period.* Assume that an account is opened on January 1 of year one. On September 14 of year two, the account has a purchase balance of $2,000 at a non-variable annual percentage rate of 17%. On September 15, the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer that the rate for new purchases will increase to a non-variable rate of 20% on October 30. The fourteenth day after provision of the notice is September 29. On September 28, the consumer uses the credit card to check into a hotel and the hotel obtains authorization for a $1,000 hold on the account to ensure there is adequate available credit to cover the anticipated cost of the stay.

A. The consumer checks out of the hotel on October 2. The actual cost of the stay is $1,100 because of additional incidental costs. On October 2, the hotel charges the $1,100 transaction to the account. For purposes of § 1026.55(b)(3), the transaction occurred on October 2. Therefore, on October 30, § 1026.55(b)(3) permits the card issuer to apply the 20% rate to new purchases and to the $1,100 transaction. However, § 1026.55(b)(3)(ii) does not permit the card issuer to apply the 20% rate to any remaining portion of the $2,000 purchase balance.

B. Same facts as above except that the consumer checks out of the hotel on September 29. The actual cost of the stay is $250, but the hotel does not charge this amount to the account until November 1. For purposes of § 1026.55(b)(3), the card issuer may treat the transaction as occurring more than 14 days after provision of the § 1026.9(c) notice (*i.e.,* after September 29). Accordingly, the card issuer may apply the 20% rate to the $250 transaction.

5. *Application of increased fees and charges. See* comment 55(c)(1)–3.

6. *Delayed implementation of increase.* Section 1026.55(b)(3)(iii) does not prohibit a card issuer from notifying a consumer of an increase in an annual percentage rate, fee, or charge consistent with § 1026.9(b), (c), or (g). However, § 1026.55(b)(3)(iii) does prohibit application of an increased rate, fee, or charge during the first year after the account is opened, while the account is closed, or while the card issuer does not permit the consumer to use the account for new transactions. If § 1026.9(b), (c), or (g) permits a card issuer to apply an increased rate, fee, or charge on a particular date and the account is closed on that date or the card issuer does not permit the consumer to use the account for new transactions on that date,

the card issuer may delay application of the increased rate, fee, or charge until the first day of the following billing cycle without relinquishing the ability to apply that rate, fee, or charge (assuming the increase is otherwise consistent with § 1026.55). *See* examples in comment 55(b)–2.iii. However, if the account is closed or the card issuer does not permit the consumer to use the account for new transactions on the first day of the following billing cycle, then the card issuer must provide a new notice of the increased rate, fee, or charge consistent with § 1026.9(b), (c), or (g).

7. *Date on which account may first be used by consumer to engage in transactions.* For purposes of § 1026.55(b)(3)(iii), an account is considered open no earlier than the date on which the account may first be used by the consumer to engage in transactions. An account is considered open for purposes of § 1026.55(b)(3)(iii) on any date that the card issuer may consider the account open for purposes of § 1026.52(a)(1). *See* comment 52(a)(1)–4.

55(b)(4) Delinquency exception

1. *Receipt of required minimum periodic payment within 60 days of due date.* Section 1026.55(b)(4) applies when a card issuer has not received the consumer's required minimum periodic payment within 60 days after the due date for that payment. In order to satisfy this condition, a card issuer that requires monthly minimum payments generally must not have received two consecutive required minimum periodic payments. Whether a required minimum periodic payment has been received for purposes of § 1026.55(b)(4) depends on whether the amount received is equal to or more than the first outstanding required minimum periodic payment. For example, assume that the required minimum periodic payments for a credit card account are due on the fifteenth day of the month. On May 13, the card issuer has not received the $50 required minimum periodic payment due on March 15 or the $150 required minimum periodic payment due on April 15. The sixtieth day after the March 15 payment due date is May 14. If the card issuer receives a $50 payment on May 14, § 1026.55(b)(4) does not apply because the payment is equal to the required minimum periodic payment due on March 15 and therefore the account is not more than 60 days delinquent. However, if the card issuer instead received a $40 payment on May 14, § 1026.55(b)(4) would apply beginning on May 15 because the payment is less than the required minimum periodic payment due on March 15. Furthermore, if the card issuer received the $50 payment on May 15, § 1026.55(b)(4) would apply because the card issuer did not receive the required minimum periodic payment due on March 15 within 60 days after the due date for that payment.

2. *Relationship to § 1026.9(g)(3)(i)(B).* A card issuer that has complied with the disclosure requirements in § 1026.9(g)(3)(i)(B) has also complied with the disclosure requirements in § 1026.55(b)(4)(i).

3. *Reduction in rate pursuant to § 1026.55(b)(4)(ii).* Section 1026.55(b)(4)(ii) provides that, if the card issuer receives six consecutive required minimum periodic payments on or before the payment due date beginning with the first payment due following the effective date of the increase, the card issuer must reduce any annual percentage rate, fee, or charge increased pursuant to § 1026.55(b)(4) to the annual percentage rate, fee, or charge that applied prior to the increase with respect to transactions that occurred prior to or within 14 days after provision of the § 1026.9(c) or (g) notice.

i. *Six consecutive payments immediately following effective date of increase.* Section 1026.55(b)(4)(ii) does not apply if the card issuer does not receive six consecutive required minimum periodic payments on or before the payment due date beginning with the payment due immediately following the effective date of the increase, even if, at some later point in time, the card issuer receives six consecutive required minimum periodic payments on or before the payment due date.

ii. *Rate, fee, or charge that does not exceed rate, fee, or charge that applied before increase.* Although § 1026.55(b)(4)(ii) requires the card issuer to reduce an annual percentage rate, fee, or charge increased pursuant to § 1026.55(b)(4) to the annual percentage rate, fee, or charge that applied prior to the increase, this provision does not prohibit the card issuer from applying an increased annual percentage rate, fee, or charge consistent with any of the other exceptions in § 1026.55(b). For example, if a temporary rate applied prior to the § 1026.55(b)(4) increase and the temporary rate expired before a reduction in rate pursuant to § 1026.55(b)(4)(ii), the card issuer may apply an increased rate to the extent consistent with § 1026.55(b)(1). Similarly, if a variable rate applied prior to the § 1026.55(b)(4) increase, the card issuer may apply any increase in that variable rate to the extent consistent with § 1026.55(b)(2).

iii. *Delayed implementation of reduction.* If § 1026.55(b)(4)(ii) requires a card issuer to reduce an annual percentage rate, fee, or charge on a date that is not the first day of a billing cycle, the card issuer may delay application of the reduced rate, fee, or charge until the first day of the following billing cycle.

iv. *Examples.* The following examples illustrate the application of § 1026.55(b)(4)(ii):

A. Assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the required minimum periodic payments are due on the fifteenth day of the month. Assume also that the account has a $5,000 purchase balance to which a non-variable annual percentage rate of 15% applies. On May 16 of year one, the card issuer has not received the required minimum periodic payments due on the fifteenth day of March, April, or May and sends a § 1026.9(c) or (g) notice stating that the annual percentage rate applicable to the $5,000 balance and to new transactions will increase to 28% effective July 1. On July 1, § 1026.55(b)(4) permits the card issuer to apply the 28% rate to the $5,000 balance and to new transactions. The card issuer receives the required minimum periodic payments due on the fifteenth day of July, August, September, October, November, and December. On January 1 of year two, § 1026.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $5,000 balance to 15%. The card issuer is not required to reduce the rate that applies to any transactions that occurred on or after May 31 (which is the fifteenth day after provision of the § 1026.9(c) or (g) notice).

B. Same facts as paragraph iv.A above except that the 15% rate that applied to the $5,000 balance prior to the § 1026.55(b)(4) increase was scheduled to increase to 20% on August 1 of year one (pursuant to § 1026.55(b)(1)). On January 1 of year two, § 1026.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $5,000 balance to 20%.

C. Same facts as paragraph iv.A above except that the 15% rate that applied to the $5,000 balance prior to the § 1026.55(b)(4) increase was scheduled to increase to 20% on March 1 of year two (pursuant to § 1026.55(b)(1)). On January 1 of year two, § 1026.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $5,000 balance to 15%.

D. Same facts as paragraph iv.A above except that the 15% rate that applied to the $5,000 balance prior to the § 1026.55(b)(4) increase was a variable rate that was determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control (consistent with § 1026.55(b)(2)). On January 1 of year two, § 1026.55(b)(4)(ii) requires the card issuer to reduce the rate that applies to any remaining portion of the $5,000 balance to the variable rate determined using the 10-point margin.

E. For an example of the application of § 1026.55(b)(4)(ii) to deferred interest or similar programs, see comment 55(b)(1)–3.ii.C.

55(b)(5) Workout and temporary hardship arrangement exception

1. *Scope of exception.* Nothing in § 1026.55(b)(5) permits a card issuer to alter the requirements of § 1026.55 pursuant to a workout or temporary hardship arrangement. For example, a card issuer cannot increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) pursuant to a workout or temporary hardship arrangement unless otherwise permitted by § 1026.55. In addition, a card issuer cannot require the consumer to make payments with respect to a protected balance that exceed the payments permitted under § 1026.55(c).

2. *Relationship to § 1026.9(c)(2)(v)(D).* A card issuer that has complied with the disclosure requirements in § 1026.9(c)(2)(v)(D) has also complied with the disclosure requirements in § 1026.55(b)(5)(i). See comment 9(c)(2)(v)–10. Thus, although the disclosures required by § 1026.55(b)(5)(i) must generally be provided in writing prior to commencement of the arrangement, a card issuer may comply with § 1026.55(b)(5)(i) by complying with § 1026.9(c)(2)(v)(D), which states that the disclosure of the terms of the arrangement may be made orally by telephone, provided that the card issuer mails or delivers a

written disclosure of the terms of the arrangement to the consumer as soon as reasonably practicable after the oral disclosure is provided.

3. *Rate, fee, or charge that does not exceed rate, fee, or charge that applied before workout or temporary hardship arrangement.* Upon the completion or failure of a workout or temporary hardship arrangement, § 1026.55(b)(5)(ii) prohibits the card issuer from applying to any transactions that occurred prior to commencement of the arrangement an annual percentage rate, fee, or charge that exceeds the annual percentage rate, fee, or charge that applied to those transactions prior to commencement of the arrangement. However, this provision does not prohibit the card issuer from applying an increased annual percentage rate, fee, or charge upon completion or failure of the arrangement, to the extent consistent with any of the other exceptions in § 1026.55(b). For example, if a temporary rate applied prior to the arrangement and that rate expired during the arrangement, the card issuer may apply an increased rate upon completion or failure of the arrangement to the extent consistent with § 1026.55(b)(1). Similarly, if a variable rate applied prior to the arrangement, the card issuer may apply any increase in that variable rate upon completion or failure of the arrangement to the extent consistent with § 1026.55(b)(2).

4. *Examples.* i. Assume that an account is subject to a $50 annual fee and that, consistent with § 1026.55(b)(4), the margin used to determine a variable annual percentage rate that applies to a $5,000 balance is increased from 5 percentage points to 15 percentage points. Assume also that the card issuer and the consumer subsequently agree to a workout arrangement that reduces the annual fee to $0 and reduces the margin back to 5 points on the condition that the consumer pay a specified amount by the payment due date each month. If the consumer does not pay the agreed-upon amount by the payment due date, § 1026.55(b)(5) permits the card issuer to increase the annual fee to $50 and increase the margin for the variable rate that applies to the $5,000 balance up to 15 percentage points.

ii. Assume that a consumer fails to make four consecutive monthly minimum payments totaling $480 on a consumer credit card account with a balance of $6,000 and that, consistent with § 1026.55(b)(4), the annual percentage rate that applies to that balance is increased from a non-variable rate of 15% to a non-variable penalty rate of 30%. Assume also that the card issuer and the consumer subsequently agree to a temporary hardship arrangement that reduces all rates on the account to 0% on the condition that the consumer pay an amount by the payment due date each month that is sufficient to cure the $480 delinquency within six months. If the consumer pays the agreed-upon amount by the payment due date during the six-month period and cures the delinquency, § 1026.55(b)(5) permits the card issuer to increase the rate that applies to any remaining portion of the $6,000 balance to 15% or any other rate up to the 30% penalty rate.

55(b)(6) Servicemembers Civil Relief Act exception

1. *Rate, fee, or charge that does not exceed rate, fee, or charge that applied before decrease.* When a rate or a fee or charge subject to § 1026.55 has been decreased pursuant to 50 U.S.C. app. 527 or a similar Federal or state statute or regulation, § 1026.55(b)(6) permits the card issuer to increase the rate, fee, or charge once 50 U.S.C. app. 527 or the similar statute or regulation no longer applies. However, § 1026.55(b)(6) prohibits the card issuer from applying to any transactions that occurred prior to the decrease a rate, fee, or charge that exceeds the rate, fee, or charge that applied to those transactions prior to the decrease (except to the extent permitted by one of the other exceptions in § 1026.55(b)). For example, if a temporary rate applied prior to a decrease in rate pursuant to 50 U.S.C. app. 527 and the temporary rate expired during the period that 50 U.S.C. app. 527 applied to the account, the card issuer may apply an increased rate once 50 U.S.C. app. 527 no longer applies to the extent consistent with § 1026.55(b)(1). Similarly, if a variable rate applied prior to a decrease in rate pursuant to 50 U.S.C. app. 527, the card issuer may apply any increase in that variable rate once 50 U.S.C. app. 527 no longer applies to the extent consistent with § 1026.55(b)(2).

2. *Decreases in rates, fees, and charges to amounts consistent with 50 U.S.C. app. 527 or similar statute or regulation.* If a card issuer deceases an annual percentage rate or a fee or charge subject to § 1026.55 pursuant to 50 U.S.C. app. 527 or a similar Federal or state statute or regulation and if the card issuer also decreases other rates, fees, or charges (such as the rate that applies to new transactions) to amounts that are consistent with 50 U.S.C. app. 527 or a similar Federal or state statute or regulation, the card issuer may increase those rates, fees, and charges consistent with § 1026.55(b)(6).

3. *Example.* Assume that on December 31 of year one the annual percentage rate that applies to a $5,000 balance on a credit card account is a variable rate that is determined by adding a margin of 10 percentage points to a publicly-available index that is not under the card issuer's control. The account is also subject to a monthly maintenance fee of $10. On January 1 of year two, the card issuer reduces the rate that applies to the $5,000 balance to a non-variable rate of 6% and ceases to impose the $10 monthly maintenance fee and other fees (including late payment fees) pursuant to 50 U.S.C. app. 527. The card issuer also decreases the rate that applies to new transactions to 6%. During year two, the consumer uses the account for $1,000 in new transactions. On January 1 of year three, 50 U.S.C. app. 527 ceases to apply and the card issuer provides a notice pursuant to § 1026.9(c) informing the consumer that on February 15 of year three the variable rate determined using the 10-point margin will apply to any remaining portion of the $5,000 balance and to any remaining portion of the $1,000 balance. The notice also states that the $10 monthly maintenance fee and other fees (including late payment fees) will resume on February 15 of year three. Consistent with § 1026.9(c)(2)(iv)(B), the card issuer is not required to provide a right to reject in these circumstances. On February 15 of year three, § 1026.55(b)(6) permits the card issuer to begin accruing interest on any remaining portion of the $5,000 and $1,000 balances at the variable rate determined using the 10-point margin and to resume imposing the $10 monthly maintenance fee and other fees (including late payment fees).

55(c) Treatment of protected balances

55(c)(1) Definition of protected balance

1. *Example of protected balance.* Assume that, on March 15 of year two, an account has a purchase balance of $1,000 at a non-variable annual percentage rate of 12% and that, on March 16, the card issuer sends a notice pursuant to § 1026.9(c) informing the consumer that the annual percentage rate for new purchases will increase to a non-variable rate of 15% on May 1. The fourteenth day after provision of the notice is March 29. On March 29, the consumer makes a $100 purchase. On March 30, the consumer makes a $150 purchase. On May 1, § 1026.55(b)(3)(ii) permits the card issuer to begin accruing interest at 15% on the $150 purchase made on March 30 but does not permit the card issuer to apply that 15% rate to the $1,100 purchase balance as of March 29. Accordingly, the protected balance for purposes of § 1026.55(c) is the $1,100 purchase balance as of March 29. The $150 purchase made on March 30 is not part of the protected balance.

2. *First year after account opening.* Section 1026.55(c) applies to amounts owed for a category of transactions to which an increased annual percentage rate or an increased fee or charge cannot be applied after the rate, fee, or charge for that category of transactions has been increased pursuant to § 1026.55(b)(3). Because § 1026.55(b)(3)(iii) does not permit a card issuer to increase an annual percentage rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) during the first year after account opening, § 1026.55(c) does not apply to balances during the first year after account opening.

3. *Increased fees and charges.* Except as provided in § 1026.55(b)(3)(iii), § 1026.55(b)(3) permits a card issuer to increase a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) after complying with the applicable notice requirements in § 1026.9(b) or (c), provided that the increased fee or charge is not applied to a protected balance. To the extent consistent with § 1026.55(b)(3)(iii), a card issuer is not prohibited from increasing a fee or charge that applies to the account as a whole or to balances other than the protected balance. For example, after the first year following account opening, a card issuer generally may add or increase an annual or a monthly maintenance fee for an account after complying with the notice requirements in § 1026.9(c), including notifying the consumer of the right to reject the new or increased fee under § 1026.9(h). However, except as otherwise provided in § 1026.55(b), an increased fee or charge cannot be applied to an account while the account is closed or

while the card issuer does not permit the consumer to use the account for new transactions. *See* § 1026.55(b)(3)(iii); *see also* §§ 1026.52(b)(2)(i)(B)(*3*) and 1026.55(d)(1). Furthermore, if the consumer rejects an increase in a fee or charge pursuant to § 1026.9(h), the card issuer is prohibited from applying the increased fee or charge to the account and from imposing any other fee or charge solely as a result of the rejection. *See* § 1026.9(h)(2)(i) and (ii); comment 9(h)(2)(ii)–2.

4. *Changing balance computation method.* Nothing in § 1026.55 prohibits a card issuer from changing the balance computation method that applies to new transactions as well as protected balances.

55(c)(2) Repayment of protected balance

1. *No less beneficial to the consumer.* A card issuer may provide a method of repaying the protected balance that is different from the methods listed in § 1026.55(c)(2) so long as the method used is no less beneficial to the consumer than one of the listed methods. A method is no less beneficial to the consumer if the method results in a required minimum periodic payment that is equal to or less than a minimum payment calculated using the method for the account before the effective date of the increase. Similarly, a method is no less beneficial to the consumer if the method amortizes the balance in five years or longer or if the method results in a required minimum periodic payment that is equal to or less than a minimum payment calculated consistent with § 1026.55(c)(2)(iii). For example:

i. If at account opening the cardholder agreement stated that the required minimum periodic payment would be either the total of fees and interest charges plus 1% of the total amount owed or $20 (whichever is greater), the card issuer may require the consumer to make a minimum payment of $20 even if doing so would pay off the balance in less than five years or constitute more than 2% of the balance plus fees and interest charges.

ii. A card issuer could increase the percentage of the balance included in the required minimum periodic payment from 2% to 5% so long as doing so would not result in amortization of the balance in less than five years.

iii. A card issuer could require the consumer to make a required minimum periodic payment that amortizes the balance in four years so long as doing so would not more than double the percentage of the balance included in the minimum payment prior to the date on which the increased annual percentage rate, fee, or charge became effective.

Paragraph 55(c)(2)(ii)

1. *Amortization period starting from effective date of increase.* Section 1026.55(c)(2)(ii) provides for an amortization period for the protected balance of no less than five years, starting from the date on which the increased annual percentage rate or fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) became effective. A card issuer is not required to recalculate the required minimum periodic payment for the protected balance if, during the amortization period, that balance is reduced as a result of the allocation of payments by the consumer in excess of that minimum payment consistent with § 1026.53 or any other practice permitted by these rules and other applicable law.

2. *Amortization when applicable rate is variable.* If the annual percentage rate that applies to the protected balance varies with an index, the card issuer may adjust the interest charges included in the required minimum periodic payment for that balance accordingly in order to ensure that the balance is amortized in five years. For example, assume that a variable rate that is currently 15% applies to a protected balance and that, in order to amortize that balance in five years, the required minimum periodic payment must include a specific amount of principal plus all accrued interest charges. If the 15% variable rate increases due to an increase in the index, the creditor may increase the required minimum periodic payment to include the additional interest charges.

Paragraph 55(c)(2)(iii)

1. *Portion of required minimum periodic payment on other balances.* Section 1026.55(c)(2)(iii) addresses the portion of the required minimum periodic payment based on the protected balance. Section 1026.55(c)(2)(iii) does not limit or otherwise address the card issuer's ability to determine the portion of the required minimum periodic payment based on other balances on the account or the card issuer's ability to apply that portion of the minimum payment to the balances on the account.

2. *Example.* Assume that the method used by a card issuer to calculate the required minimum periodic payment for a credit card account requires the consumer to pay either the total of fees and accrued interest charges plus 2% of the total amount owed or $50, whichever is greater. Assume also that the account has a purchase balance of $2,000 at an annual percentage rate of 15% and a cash advance balance of $500 at an annual percentage rate of 20% and that the card issuer increases the rate for purchases to 18% but does not increase the rate for cash advances. Under § 1026.55(c)(2)(iii), the card issuer may require the consumer to pay fees and interest plus 4% of the $2,000 purchase balance. Section 1026.55(c)(2)(iii) does not limit the card issuer's ability to increase the portion of the required minimum periodic payment that is based on the cash advance balance.

55(d) Continuing application

1. *Closed accounts.* If a credit card account under an open-end (not home-secured) consumer credit plan with a balance is closed, § 1026.55 continues to apply to that balance. For example, if a card issuer or a consumer closes a credit card account with a balance, § 1026.55(d)(1) prohibits the card issuer from increasing the annual percentage rate that applies to that balance or imposing a periodic fee based solely on that balance that was not charged before the account was closed (such as a closed account fee) unless permitted by one of the exceptions in § 1026.55(b).

2. *Acquired accounts.* If, through merger or acquisition (for example), a card issuer acquires a credit card account under an open-end (not home-secured) consumer credit plan with a balance, § 1026.55 continues to apply to that balance. For example, if a credit card account has a $1,000 purchase balance with an annual percentage rate of 15% and the card issuer that acquires that account applies an 18% rate to purchases, § 1026.55(d)(1) prohibits the card issuer from applying the 18% rate to the $1,000 balance unless permitted by one of the exceptions in § 1026.55(b).

3. *Balance transfers.* i. *Between accounts issued by the same creditor.* If a balance is transferred from a credit card account under an open-end (not home-secured) consumer credit plan issued by a creditor to another credit account issued by the same creditor or its affiliate or subsidiary, § 1026.55 continues to apply to that balance. For example, if a credit card account has a $2,000 purchase balance with an annual percentage rate of 15% and that balance is transferred to another credit card account issued by the same creditor that applies an 18% rate to purchases, § 1026.55(d)(2) prohibits the creditor from applying the 18% rate to the $2,000 balance unless permitted by one of the exceptions in § 1026.55(b). However, the creditor would not generally be prohibited from charging a new periodic fee (such as an annual fee) on the second account so long as the fee is not based solely on the $2,000 balance and the creditor has notified the consumer of the fee either by providing written notice 45 days before imposing the fee pursuant to § 1026.9(c) or by providing account-opening disclosures pursuant to § 1026.6(b). See also § 1026.55(b)(3)(iii); comment 55(b)(3)–3; comment 5(b)(1)(i)–6. Additional circumstances in which a balance is considered transferred for purposes of § 1026.55(d)(2) include when:

A. A retail credit card account with a balance is replaced or substituted with a cobranded general purpose credit card account that can be used with a broader merchant base;

B. A credit card account with a balance is replaced or substituted with another credit card account offering different features;

C. A credit card account with a balance is consolidated or combined with one or more other credit card accounts into a single credit card account; and

D. A credit card account is replaced or substituted with a line of credit that can be accessed solely by an account number.

ii. *Between accounts issued by different creditors.* If a balance is transferred to a credit card account under an open-end (not home-secured) consumer credit plan issued by a creditor from a credit card account issued by a different creditor or an institution that is not an affiliate or subsidiary of the creditor that issued the account to which the balance is transferred, § 1026.55(d)(2) does not prohibit the creditor to which the balance is transferred from applying its account terms to that balance, provided that those terms comply with this part. For example, if a credit card account issued by creditor A has a $1,000 purchase balance at an annual percentage rate of 15% and the consumer

transfers that balance to a credit card account with a purchase rate of 17% issued by creditor B, creditor B may apply the 17% rate to the $1,000 balance. However, creditor B may not subsequently increase the rate on that balance unless permitted by one of the exceptions in § 1026.55(b).

55(e) Promotional waivers or rebates of interest, fees, and other charges

1. *Generally.* Nothing in § 1026.55 prohibits a card issuer from waiving or rebating finance charges due to a periodic interest rate or a fee or charge required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii). However, if a card issuer promotes and applies the waiver or rebate to an account, the card issuer cannot temporarily or permanently cease or terminate any portion of the waiver or rebate on that account unless permitted by one of the exceptions in § 1026.55(b). For example:

i. A card issuer applies an annual percentage rate of 15% to balance transfers but promotes a program under which all of the interest accrued on transferred balances will be waived or rebated for one year. If, prior to the commencement of the one-year period, the card issuer discloses the length of the period and the annual percentage rate that will apply to transferred balances after expiration of that period consistent with § 1026.55(b)(1)(i), § 1026.55(b)(1) permits the card issuer to begin imposing interest charges on transferred balances after one year. Furthermore, if, during the one-year period, a required minimum periodic payment is not received within 60 days of the payment due date, § 1026.55(b)(4) permits the card issuer to begin imposing interest charges on transferred balances (after providing a notice consistent with § 1026.9(g) and § 1026.55(b)(4)(i)). However, if a required minimum periodic payment is not more than 60 days delinquent or if the consumer otherwise violates the terms or other requirements of the account, § 1026.55 does not permit the card issuer to begin imposing interest charges on transferred balances until the expiration of the one-year period.

ii. A card issuer imposes a monthly maintenance fee of $10 but promotes a program under which the fee will be waived or rebated for the six months following account opening. If, prior to account opening, the card issuer discloses the length of the period and the monthly maintenance fee that will be imposed after expiration of that period consistent with § 1026.55(b)(1)(i), § 1026.55(b)(1) permits the card issuer to begin imposing the monthly maintenance fee six months after account opening. Furthermore, if, during the six-month period, a required minimum periodic payment is not received within 60 days of the payment due date, § 1026.55(b)(4) permits the card issuer to begin imposing the monthly maintenance fee (after providing a notice consistent with § 1026.9(c) and § 1026.55(b)(4)(i)). However, if a required minimum periodic payment is not more than 60 days delinquent or if the consumer otherwise violates the terms or other requirements of the account, § 1026.55 does not permit the card issuer to begin imposing the monthly maintenance fee until the expiration of the six-month period.

2. *Promotion of waiver or rebate.* For purposes of § 1026.55(e), a card issuer generally promotes a waiver or rebate if the card issuer discloses the waiver or rebate in an advertisement (as defined in § 1026.2(a)(2)). *See* comment 2(a)(2)–1. In addition, a card issuer generally promotes a waiver or rebate for purposes of § 1026.55(e) if the card issuer discloses the waiver or rebate in communications regarding existing accounts (such as communications regarding a promotion that encourages additional or different uses of an existing account). However, a card issuer does not promote a waiver or rebate for purposes of § 1026.55(e) if the advertisement or communication relates to an inquiry or dispute about a specific charge or to interest, fees, or charges that have already been waived or rebated.

i. *Examples of promotional communications.* The following are examples of circumstances in which a card issuer is promoting a waiver or rebate for purposes of § 1026.55(e):

A. A card issuer discloses the waiver or rebate in a newspaper, magazine, leaflet, promotional flyer, catalog, sign, or point-of-sale display, unless the disclosure relates to interest, fees, or charges that have already been waived.

B. A card issuer discloses the waiver or rebate on radio or television or through electronic advertisements (such as on the Internet), unless the disclosure relates to interest, fees, or charges that have already been waived or rebated.

C. A card issuer discloses a waiver or rebate to individual consumers, such as by telephone, letter, or electronic communication, through direct mail literature, or on or with account statements, unless the disclosure relates to an inquiry or dispute about a specific charge or to interest, fees, or charges that have already been waived or rebated.

ii. *Examples of non-promotional communications.* The following are examples of circumstances in which a card issuer is not promoting a waiver or rebate for purposes of § 1026.55(e):

A. After a card issuer has waived or rebated interest, fees, or other charges subject to § 1026.55 with respect to an account, the issuer discloses the waiver or rebate to the accountholder on the periodic statement or by telephone, letter, or electronic communication. However, if the card issuer also discloses prospective waivers or rebates in the same communication, the issuer is promoting a waiver or rebate for purposes of § 1026.55(e).

B. A card issuer communicates with a consumer about a waiver or rebate of interest, fees, or other charges subject to § 1026.55 in relation to an inquiry or dispute about a specific charge, including a dispute under §§ 1026.12 or 1026.13.

C. A card issuer waives or rebates interest, fees, or other charges subject to § 1026.55 in order to comply with a legal requirement (such as the limitations in § 1026.52(a)).

D. A card issuer discloses a grace period, as defined in § 1026.5(b)(2)(ii)(*3*).

E. A card issuer provides a period after the payment due date during which interest, fees, or other charges subject to § 1026.55 are waived or rebated even if a payment has not been received.

F. A card issuer provides benefits (such as rewards points or cash back on purchases or finance charges) that can be applied to the account as credits, provided that the benefits are not promoted as reducing interest, fees, or other charges subject to § 1026.55.

3. *Relationship of § 1026.55(e) to grace period.* Section 1026.55(e) does not apply to the waiver of finance charges due to a periodic rate consistent with a grace period, as defined in § 1026.5(b)(2)(ii)(*3*).

Section 1026.56—Requirements for Over-the-Limit Transactions

56(b) Opt-in requirement.

1. *Policy and practice of declining over-the-limit transactions.* Section 1026.56(b)(1)(i)–(v), including the requirements to provide notice and obtain consumer consent, do not apply to any card issuer that has a policy and practice of declining to pay any over-the-limit transactions for the consumer's credit card account when the card issuer has a reasonable belief that completing a transaction will cause the consumer to exceed the consumer's credit limit for that account. For example, if a card issuer only authorizes those transactions which, at the time of authorization, would not cause the consumer to exceed a credit limit, it is not subject to the requirement to provide consumers notice and an opportunity to affirmatively consent to the card issuer's payment of over-the-limit transactions. However, if an over-the-limit transaction is paid without the consumer providing affirmative consent, the card issuer may not charge a fee for paying the transaction.

2. *Over-the-limit transactions not required to be authorized or paid.* Section 1026.56 does not require a card issuer to authorize or pay an over-the-limit transaction even if the consumer has affirmatively consented to the card issuer's over-the-limit service.

3. *Examples of reasonable opportunity to provide affirmative consent.* A card issuer provides a reasonable opportunity for the consumer to provide affirmative consent to the card issuer's payment of over-the-limit transactions when, among other things, it provides reasonable methods by which the consumer may affirmatively consent. A card issuer provides such reasonable methods if:

i. *On the application.* The card issuer provides the notice on the application form that the consumer can fill out to request the service as part of the application;

ii. *By mail.* The card issuer provides a form with the account-opening disclosures or the periodic statement for the consumer to fill out and mail to affirmatively request the service;

iii. *By telephone.* The card issuer provides a readily available telephone line that consumers may call to provide affirmative consent.

iv. *By electronic means.* The card issuer provides an electronic means for the consumer to affirmatively consent. For example, a card issuer could provide a form that can be accessed and processed at its Web site, where the consumer can check a box to opt in and confirm that choice by clicking on a button that affirms the consumer's consent.

4. *Separate consent required.* A consumer's affirmative consent, or opt-in, to a card issuer's payment of over-the-limit transactions must be obtained separately from other consents or acknowledgments obtained by the card issuer. For example, a consumer's signature on a credit application to request a credit card would not by itself sufficiently evidence the consumer's consent to the card issuer's payment of over-the-limit transactions. However, a card issuer may obtain a consumer's affirmative consent by providing a blank signature line or a check box on the application that the consumer can sign or select to request the over-the-limit service, provided that the signature line or check box is used solely for purposes of evidencing the choice and not for any other purpose, such as to also obtain consumer consents for other account services or features or to receive disclosures electronically.

5. *Written confirmation.* A card issuer may comply with the requirement in § 1026.56(b)(1)(iv) to provide written confirmation of the consumer's decision to affirmatively consent, or opt in, to the card issuer's payment of over-the-limit transactions by providing the consumer a copy of the consumer's completed opt-in form or by sending a letter or notice to the consumer acknowledging that the consumer has elected to opt into the card issuer's service. A card issuer may also satisfy the written confirmation requirement by providing the confirmation on the first periodic statement sent after the consumer has opted in. For example, a card issuer could provide a written notice consistent with § 1026.56(e)(2) on the periodic statement. A card issuer may not, however, assess any over-the-limit fees or charges on the consumer's credit card account unless and until the card issuer has sent the written confirmation. Thus, if a card issuer elects to provide written confirmation on the first periodic statement after the consumer has opted in, it would not be permitted to assess any over-the-limit fees or charges until the next statement cycle.

56(b)(2) Completion of over-the-limit transactions without consumer consent

1. *Examples of over-the-limit transactions paid without consumer consent.* Section 1026.56(b)(2) provides that a card issuer may pay an over-the-limit transaction even if the consumer has not provided affirmative consent, so long as the card issuer does not impose a fee or charge for paying the transaction. The prohibition on imposing fees for paying an over-the-limit transaction applies even in circumstances where the card issuer is unable to avoid paying a transaction that exceeds the consumer's credit limit.

i. *Transactions not submitted for authorization.* A consumer has not affirmatively consented to a card issuer's payment of over-the-limit transactions. The consumer purchases a $3 cup of coffee using his credit card. Because of the small dollar amount of the transaction, the merchant does not submit the transaction to the card issuer for authorization. The transaction causes the consumer to exceed the credit limit. Under these circumstances, the card issuer is prohibited from imposing a fee or charge on the consumer's credit card account for paying the over-the-limit transaction because the consumer has not opted in to the card issuer's over-the-limit service.

ii. *Settlement amount exceeds authorization amount.* A consumer has not affirmatively consented to a card issuer's payment of over-the-limit transactions. The consumer uses his credit card at a pay-at-the-pump fuel dispenser to purchase $50 of fuel. Before permitting the consumer to use the fuel pump, the merchant verifies the validity of the card by requesting an authorization hold of $1. The subsequent $50 transaction amount causes the consumer to exceed his credit limit. Under these circumstances, the card issuer is prohibited from imposing a fee or charge on the consumer's credit card account for paying the over-the-limit transaction because the consumer has not opted in to the card issuer's over-the-limit service.

iii. *Intervening charges.* A consumer has not affirmatively consented to a card issuer's payment of over-the-limit transactions. The consumer makes a $50 purchase using his credit card. However, before the $50 transaction is charged to the consumer's account, a separate recurring charge is posted to the account. The $50 purchase then causes the consumer to exceed his credit limit. Under these circumstances, the card issuer is prohibited from imposing a fee or charge on the consumer's credit card account for paying the over-the-limit transaction because the consumer has not opted in to the card issuer's over-the-limit service.

2. *Permissible fees or charges when a consumer has not consented.* Section 1026.56(b)(2) does not preclude a card issuer from assessing fees or charges other than over-the-limit fees when an over-the-limit transaction is completed. For example, if a consumer has not opted in, the card issuer may assess a balance transfer fee in connection with a balance transfer, provided such a fee is assessed whether or not the transfer exceeds the credit limit. Section 1026.56(b)(2) does not limit the card issuer's ability to debit the consumer's account for the amount of the over-the-limit transaction if the card issuer is permitted to do so under applicable law. The card issuer may also assess interest charges in connection with the over-the-limit transaction.

56(c) Method of election

1. *Card issuer-determined methods.* A card issuer may determine the means available to consumers to affirmatively consent, or opt in, to the card issuer's payment of over-the-limit transactions. For example, a card issuer may decide to obtain consents in writing, electronically, or orally, or through some combination of these methods. Section 1026.56(c) further requires, however, that such methods must be made equally available for consumers to revoke a prior consent. Thus, for example, if a card issuer allows a consumer to consent in writing or electronically, it must also allow the consumer to revoke that consent in writing or electronically.

2. *Electronic requests.* A consumer consent or revocation request submitted electronically is not considered a consumer disclosure for purposes of the E-Sign Act.

56(d) Timing and placement of notices

1. *Contemporaneous notice for oral or electronic consent.* Under § 1026.56(d)(1)(ii), if a card issuer seeks to obtain consent from the consumer orally or by electronic means, the card issuer must provide a notice containing the disclosures in § 1026.56(e)(1) prior to and as part of the process of obtaining the consumer's consent.

56(e) Content

1. *Amount of over-the-limit fee.* See Model Forms G–25(A) and G–25(B) for guidance on how to disclose the amount of the over-the-limit fee.

2. *Notice content.* In describing the consumer's right to affirmatively consent to a card issuer's payment of over-the-limit transactions, the card issuer may explain that any transactions that exceed the consumer's credit limit will be declined if the consumer does not consent to the service. In addition, the card issuer should explain that even if a consumer consents, the payment of over-the-limit transactions is at the discretion of the card issuer. For example, the card issuer may indicate that it may decline a transaction for any reason, such as if the consumer is past due or significantly over the limit. The card issuer may also disclose the consumer's right to revoke consent.

56(f) Joint relationships

1. *Authorized users.* Section 1026.56(f) does not permit a card issuer to treat a request to opt in to or to revoke a prior request for the card issuer's payment of over-the-limit transactions from an authorized user that is not jointly liable on a credit card account as a consent or revocation request for that account.

56(g) Continuing right to opt in or revoke opt-in

1. *Fees or charges for over-the-limit transactions incurred prior to revocation.* Section 1026.56(g) provides that a consumer may revoke his or her prior consent at any time. If a consumer does so, this provision does not require the card issuer to waive or reverse any over-the-limit fees or charges assessed to the consumer's account for transactions that occurred prior to the card issuer's implementation of the consumer's revocation request. Nor does this requirement prevent the card issuer from assessing over-the-limit fees in subsequent cycles if the consumer's account balance continues to exceed the credit limit after the payment due date as a result of an over-the-limit transaction that occurred prior to the consumer's revocation of consent.

56(h) Duration of opt-in

1. *Card issuer ability to stop paying over-the-limit transactions after consumer consent.* A card issuer may cease paying over-the-limit transactions for consumers that have previously opted in at any time and for any reason. For example, a card issuer may stop paying over-the-limit transactions for a consumer to respond to changes in the credit risk presented by the consumer.

56(j) Prohibited practices

1. *Periodic fees or charges.* A card issuer may charge an over-the-limit fee or charge only if the consumer has exceeded the credit

limit during the billing cycle. Thus, a card issuer may not impose any recurring or periodic fees for paying over-the-limit transactions (for example, a monthly ''over-the-limit protection'' service fee), even if the consumer has affirmatively consented to or opted in to the service, unless the consumer has in fact exceeded the credit limit during that cycle.

2. *Examples of limits on fees or charges imposed per billing cycle.* Section 1026.56(j)(1) generally prohibits a card issuer from assessing a fee or charge due to the same over-the-limit transaction for more than three billing cycles. The following examples illustrate the prohibition.

i. Assume that a consumer has opted into a card issuer's payment of over-the-limit transactions. The consumer exceeds the credit limit during the December billing cycle and does not make sufficient payment to bring the account balance back under the limit for four consecutive cycles. The consumer does not engage in any additional transactions during this period. In this case, § 1026.56(j)(1) would permit the card issuer to charge a maximum of three over-the-limit fees for the December over-the-limit transaction.

ii. Assume the same facts as above except that the consumer makes sufficient payment to reduce his account balance by the payment due date during the February billing cycle. The card issuer may charge over-the-limit fees for the December and January billing cycles. However, because the consumer's account balance was below the credit limit by the payment due date for the February billing cycle, the card issuer may not charge an over-the-limit fee for the February billing cycle.

iii. Assume the same facts as in paragraph i, except that the consumer engages in another over-the-limit transaction during the February billing cycle. Because the consumer has obtained an additional extension of credit which causes the consumer to exceed his credit limit, the card issuer may charge over-the-limit fees for the December transaction on the January, February and March billing statements, and additional over-the-limit fees for the February transaction on the April and May billing statements. The card issuer may not charge an over-the-limit fee for each of the December and the February transactions on the March billing statement because it is prohibited from imposing more than one over-the-limit fee during a billing cycle.

3. *Replenishment of credit line.* Section 1026.56(j)(2) does not prevent a card issuer from delaying replenishment of a consumer's available credit where appropriate, for example, where the card issuer may suspect fraud on the credit card account. However, a card issuer may not assess an over-the-limit fee or charge if the over-the-limit transaction is caused by the card issuer's decision not to promptly replenish the available credit after the consumer's payment is credited to the consumer's account.

4. *Examples of conditioning.* Section 1026.56(j)(3) prohibits a card issuer from conditioning or otherwise tying the amount of a consumer's credit limit on the consumer affirmatively consenting to the card issuer's payment of over-the-limit transactions where the card issuer assesses an over-the-limit fee for the transaction. The following examples illustrate the prohibition.

i. *Amount of credit limit.* Assume that a card issuer offers a credit card with a credit limit of $1,000. The consumer is informed that if the consumer opts in to the payment of the card issuer's payment of over-the-limit transactions, the initial credit limit would be increased to $1,300. If the card issuer would have offered the credit card with the $1,300 credit limit but for the fact that the consumer did not consent to the card issuer's payment of over-the-limit transactions, the card issuer would not be in compliance with § 1026.56(j)(3). Section 1026.56(j)(3) prohibits the card issuer from tying the consumer's opt-in to the card issuer's payment of over-the-limit transactions as a condition of obtaining the credit card with the $1,300 credit limit.

ii. *Access to credit.* Assume the same facts as above, except that the card issuer declines the consumer's application altogether because the consumer has not affirmatively consented or opted in to the card issuer's payment of over-the-limit transactions. The card issuer is not in compliance with § 1026.56(j)(3) because the card issuer has required the consumer's consent as a condition of obtaining credit.

5. *Over-the-limit fees caused by accrued fees or interest.* Section 1026.56(j)(4) prohibits a card issuer from imposing any over-the-limit fees or charges on a consumer's account if the consumer has exceeded the credit limit solely because charges imposed as part of the plan as described in § 1026.6(b)(3) were charged to the consumer's account during the billing cycle. For example, a card issuer may not assess an over-the-limit fee or charge even if the credit limit was exceeded due to fees for services requested by the consumer if such fees would constitute charges imposed as part of the plan (such as fees for voluntary debt cancellation or suspension coverage). Section 1026.56(j)(4) does not, however, restrict card issuers from assessing over-the-limit fees or charges due to accrued finance charges or fees from prior cycles that have subsequently been added to the account balance. The following examples illustrate the prohibition.

i. Assume that a consumer has opted in to a card issuer's payment of over-the-limit transactions. The consumer's account has a credit limit of $500. The billing cycles for the account begin on the first day of the month and end on the last day of the month. The account is not eligible for a grace period as defined in § 1026.5(b)(2)(ii)(B)(3). On December 31, the only balance on the account is a purchase balance of $475. On that same date, $50 in fees charged as part of the plan under § 1026.6(b)(3)(i) and interest charges are imposed on the account, increasing the total balance at the end of the December billing cycle to $525. Although the total balance exceeds the $500 credit limit, § 1026.56(j)(4) prohibits the card issuer from imposing an over-the-limit fee or charge for the December billing cycle in these circumstances because the consumer's credit limit was exceeded solely because of the imposition of fees and interest charges during that cycle.

ii. Same facts as above except that, on December 31, the only balance on the account is a purchase balance of $400. On that same date, $50 in fees imposed as part of the plan under § 1026.6(b)(3)(i), including interest charges, are imposed on the account, increasing the total balance at the end of the December billing cycle to $450. The consumer makes a $25 payment by the January payment due date and the remaining $25 in fees imposed as part of the plan in December is added to the outstanding balance. On January 25, an $80 purchase is charged to the account. At the close of the cycle on January 31, an additional $20 in fees imposed as part of the plan are imposed on the account, increasing the total balance to $525. Because § 1026.56(j)(4) does not require the issuer to consider fees imposed as part of the plan for the prior cycle in determining whether an over-the-limit fee may be properly assessed for the current cycle, the issuer need not take into account the remaining $25 in fees and interest charges from the December cycle in determining whether fees imposed as part of the plan caused the consumer to exceed the credit limit during the January cycle. Thus, under these circumstances, § 1026.56(j)(4) does not prohibit the card issuer from imposing an over-the-limit fee or charge for the January billing cycle because the $20 in fees imposed as part of the plan for the January billing cycle did not cause the consumer to exceed the credit limit during that cycle.

6. *Additional restrictions on over-the-limit fees.* See § 1026.52(b).

Section 1026.57—Reporting and Marketing Rules for College Student Open-End Credit

57(a) Definitions

57(a)(1) College student credit card

1. *Definition.* The definition of college student credit card excludes home-equity lines of credit accessed by credit cards and overdraft lines of credit accessed by debit cards. A college student credit card includes a college affinity card within the meaning of TILA section 127(r)(1)(A). In addition, a card may fall within the scope of the definition regardless of the fact that it is not intentionally targeted at or marketed to college students. For example, an agreement between a college and a card issuer may provide for marketing of credit cards to alumni, faculty, staff, and other non-student consumers who have a relationship with the college, but also contain provisions that contemplate the issuance of cards to students. A credit card issued to a student at the college in connection with such an agreement qualifies as a college student credit card.

57(a)(5) College credit card agreement

1. *Definition.* Section 1026.57(a)(5) defines ''college credit card agreement'' to include any business, marketing or promotional agreement between a card issuer and a college or university (or an affiliated organization, such as an alumni club or a foundation) if the agreement provides for the issuance of credit cards to full-time or part-time students. Business, marketing or

promotional agreements may include a broad range of arrangements between a card issuer and an institution of higher education or affiliated organization, including arrangements that do not meet the criteria to be considered college affinity card agreements as discussed in TILA section 127(r)(1)(A). For example, TILA section 127(r)(1)(A) specifies that under a college affinity card agreement, the card issuer has agreed to make a donation to the institution or affiliated organization, the card issuer has agreed to offer discounted terms to the consumer, or the credit card will display pictures, symbols, or words identified with the institution or affiliated organization; even if these conditions are not met, an agreement may qualify as a college credit card agreement, if the agreement is a business, marketing or promotional agreement that contemplates the issuance of college student credit cards to college students currently enrolled (either full-time or part-time) at the institution. An agreement may qualify as a college credit card agreement even if marketing of cards under the agreement is targeted at alumni, faculty, staff, and other non-student consumers, as long as cards may also be issued to students in connection with the agreement.

57(b) Public disclosure of agreements

1. *Public disclosure.* Section 1026.57(b) requires an institution of higher education to publicly disclose any contract or other agreement made with a card issuer or creditor for the purpose of marketing a credit card. Examples of publicly disclosing such contracts or agreements include, but are not limited to, posting such contracts or agreements on the institution's Web site or making such contracts or agreements available upon request, provided the procedures for requesting the documents are reasonable and free of cost to the requestor, and the requested contracts or agreements are provided within a reasonable time frame.

2. *Redaction prohibited.* An institution of higher education must publicly disclose any contract or other agreement made with a card issuer for the purpose of marketing a credit card in its entirety and may not redact any portion of such contract or agreement. Any clause existing in such contracts or agreements, providing for the confidentiality of any portion of the contract or agreement, would be invalid to the extent it restricts the ability of the institution of higher education to publicly disclose the contract or agreement in its entirety.

57(c) Prohibited inducements

1. *Tangible item clarified.* A tangible item includes any physical item, such as a gift card, a t-shirt, or a magazine subscription, that a card issuer or creditor offers to induce a college student to apply for or open an open-end consumer credit plan offered by such card issuer or creditor. Tangible items do not include non-physical inducements such as discounts, rewards points, or promotional credit terms.

2. *Inducement clarified.* If a tangible item is offered to a person whether or not that person applies for or opens an open-end consumer credit plan, the tangible item has not been offered to induce the person to apply for or open the plan. For example, refreshments offered to a college student on campus that are not conditioned on whether the student has applied for or agreed to open an open-end consumer credit plan would not violate § 1026.57(c).

3. *Near campus clarified.* A location that is within 1,000 feet of the border of the campus of an institution of higher education, as defined by the institution of higher education, is considered near the campus of an institution of higher education.

4. *Mailings included.* The prohibition in § 1026.57(c) on offering a tangible item to a college student to induce such student to apply for or open an open-end consumer credit plan offered by such card issuer or creditor applies to any solicitation or application mailed to a college student at an address on or near the campus of an institution of higher education.

5. *Related event clarified.* An event is related to an institution of higher education if the marketing of such event uses the name, emblem, mascot, or logo of an institution of higher education, or other words, pictures, symbols identified with an institution of higher education in a way that implies that the institution of higher education endorses or otherwise sponsors the event.

6. *Reasonable procedures for determining if applicant is a student.* Section 1026.57(c) applies solely to offering a tangible item to a college student. Therefore, a card issuer or creditor may offer any person who is not a college student a tangible item to induce such person to apply for or open an open-end consumer credit plan offered by such card issuer or creditor, on campus, near campus, or at an event sponsored by or related to an institution of higher education. The card issuer or creditor must have reasonable procedures for determining whether an applicant is a college student before giving the applicant the tangible item. For example, a card issuer or creditor may ask whether the applicant is a college student as part of the application process. The card issuer or creditor may rely on the representations made by the applicant.

57(d) Annual report to the Bureau

57(d)(2) Contents of report

1. *Memorandum of understanding.* Section 1026.57(d)(2) requires that the report to the Bureau include, among other items, a copy of any memorandum of understanding between the card issuer and the institution (or affiliated organization) that ''directly or indirectly relates to the college credit card agreement or that controls or directs any obligations or distribution of benefits between any such entities.'' Such a memorandum of understanding includes any document that amends the college credit card agreement, or that constitutes a further agreement between the parties as to the interpretation or administration of the agreement. For example, a memorandum of understanding required to be included in the report would include a document that provides details on the dollar amounts of payments from the card issuer to the university, to supplement the original agreement which only provided for payments in general terms (*e.g.,* as a percentage). A memorandum of understanding for these purposes would not include email (or other) messages that merely discuss matters such as the addresses to which payments should be sent or the names of contact persons for carrying out the agreement.

Section 1026.58—Internet Posting of Credit Card Agreements

58(b) Definitions

58(b)(1) Agreement

1. *Inclusion of pricing information.* For purposes of this section, a credit card agreement is deemed to include certain information, such as annual percentage rates and fees, even if the issuer does not otherwise include this information in the basic credit contract. This information is listed under the defined term ''pricing information'' in § 1026.58(b)(7). For example, the basic credit contract may not specify rates, fees and other information that constitutes pricing information as defined in § 1026.58(b)(7); instead, such information may be provided to the cardholder in a separate document sent along with the card. However, this information nevertheless constitutes part of the agreement for purposes of § 1026.58.

2. *Provisions contained in separate documents included.* A credit card agreement is defined as the written document or documents evidencing the terms of the legal obligation, or the prospective legal obligation, between a card issuer and a consumer for a credit card account under an open-end (not home-secured) consumer credit plan. An agreement therefore may consist of several documents that, taken together, define the legal obligation between the issuer and consumer. For example, provisions that mandate arbitration or allow an issuer to unilaterally alter the terms of the card issuer's or consumer's obligation are part of the agreement even if they are provided to the consumer in a document separate from the basic credit contract.

58(b)(2) Amends

1. *Substantive changes.* A change to an agreement is substantive, and therefore is deemed an amendment of the agreement, if it alters the rights or obligations of the parties. Section 1026.58(b)(2) provides that any change in the pricing information, as defined in § 1026.58(b)(7), is deemed to be substantive. Examples of other changes that generally would be considered substantive include:

i. Addition or deletion of a provision giving the issuer or consumer a right under the agreement, such as a clause that allows an issuer to unilaterally change the terms of an agreement.

ii. Addition or deletion of a provision giving the issuer or consumer an obligation under the agreement, such as a clause requiring the consumer to pay an additional fee.

iii. Changes that may affect the cost of credit to the consumer, such as changes in a provision describing how the minimum payment will be calculated.

iv. Changes that may affect how the terms of the agreement are construed or applied, such as changes in a choice-of-law provision.

v. Changes that may affect the parties to whom the agreement may apply, such as provisions regarding authorized users or assignment of the agreement.

2. *Non-substantive changes.* Changes that generally would not be considered substantive include, for example:

i. Correction of typographical errors that do not affect the meaning of any terms of the agreement.

ii. Changes to the card issuer's corporate name, logo, or tagline.

iii. Changes to the format of the agreement, such as conversion to a booklet from a full-sheet format, changes in font, or changes in margins.

iv. Changes to the name of the credit card to which the program applies.

v. Reordering sections of the agreement without affecting the meaning of any terms of the agreement.

vi. Adding, removing, or modifying a table of contents or index.

vii. Changes to titles, headings, section numbers, or captions.

58(b)(4) Card issuer

1. *Card issuer clarified.* Section 1026.58(b)(4) provides that, for purposes of § 1026.58, card issuer or issuer means the entity to which a consumer is legally obligated, or would be legally obligated, under the terms of a credit card agreement. For example, Bank X and Bank Y work together to issue credit cards. A consumer that obtains a credit card issued pursuant to this arrangement between Bank X and Bank Y is subject to an agreement that states ''This is an agreement between you, the consumer, and Bank X that governs the terms of your Bank Y Credit Card.'' The card issuer in this example is Bank X, because the agreement creates a legally enforceable obligation between the consumer and Bank X. Bank X is the issuer even if the consumer applied for the card through a link on Bank Y's Web site and the cards prominently feature the Bank Y logo on the front of the card.

2. *Use of third-party service providers.* An institution that is the card issuer as defined in § 1026.58(b)(4) has a legal obligation to comply with the requirements of § 1026.58. However, a card issuer generally may use a third-party service provider to satisfy its obligations under § 1026.58, provided that the issuer acts in accordance with regulatory guidance regarding use of third-party service providers and other applicable regulatory guidance. In some cases, an issuer may wish to arrange for the institution with which it partners to issue credit cards to fulfill the requirements of § 1026.58 on the issuer's behalf. For example, Retailer and Bank work together to issue credit cards. Under the § 1026.58(b)(4) definition, Bank is the issuer of these credit cards for purposes of § 1026.58. However, Retailer services the credit card accounts, including mailing account opening materials and periodic statements to cardholders. While Bank is responsible for ensuring compliance with § 1026.58, Bank may arrange for Retailer (or another appropriate third-party service provider) to submit credit card agreements to the Bureau under § 1026.58 on Bank's behalf. Bank must comply with regulatory guidance regarding use of third-party service providers and other applicable regulatory guidance.

3. *Partner institution Web sites.* i. As explained in comments 58(d)–2 and 58(e)–3, if an issuer provides cardholders with access to specific information about their individual accounts, such as balance information or copies of statements, through a third-party Web site, the issuer is deemed to maintain that Web site for purposes of § 1026.58. Such a Web site is deemed to be maintained by the issuer for purposes of § 1026.58 even where, for example, an unaffiliated entity designs the Web site and owns and maintains the information technology infrastructure that supports the Web site, cardholders with credit cards from multiple issuers can access individual account information through the same Web site, and the Web site is not labeled, branded, or otherwise held out to the public as belonging to the issuer. A partner institution's Web site is an example of a third-party Web site that may be deemed to be maintained by the issuer for purposes of § 1026.58. For example, Retailer and Bank work together to issue credit cards. Under the § 1026.58(b)(4) definition, Bank is the issuer of these credit cards for purposes of § 1026.58. Bank does not have a Web site. However, cardholders can access information about their individual accounts, such as balance information and copies of statements, through a Web site maintained by Retailer. Retailer designs the Web site and owns and maintains the information technology infrastructure that supports the Web site. The Web site is branded and held out to the public as belonging to Retailer. Because cardholders can access information about their individual accounts through this Web site, the Web site is deemed to be maintained by Bank for purposes of § 1026.58. Bank therefore may comply with § 1026.58(d) by ensuring that agreements offered to the public are posted on Retailer's Web site in accordance with § 1026.58(d). Bank may comply with § 1026.58(e) by ensuring that cardholders can request copies of their individual agreements through Retailer's Web site in accordance with § 1026.58(e)(1). Bank need not create and maintain a Web site branded and held out to the public as belonging to Bank in order to comply with §§ 1026.58(d) and (e) as long as Bank ensures that Retailer's Web site complies with these sections.

ii. In addition, § 1026.58(d)(1) provides that, with respect to an agreement offered solely for accounts under one or more private label credit card plans, an issuer may comply with § 1026.58(d) by posting the agreement on the publicly available Web site of at least one of the merchants at which credit cards issued under each private label credit card plan with 10,000 or more open accounts may be used. This rule is not conditioned on cardholders' ability to access account-specific information through the merchant's Web site.

58(b)(5) Offers

1. *Cards offered to limited groups.* A card issuer is deemed to offer a credit card agreement to the public even if the issuer solicits, or accepts applications from, only a limited group of persons. For example, a card issuer may market affinity cards to students and alumni of a particular educational institution, or may solicit only high-net-worth individuals for a particular card; in these cases, the agreement would be considered to be offered to the public. Similarly, agreements for credit cards issued by a credit union are considered to be offered to the public even though such cards are available only to credit union members.

2. *Individualized agreements.* A card issuer is deemed to offer a credit card agreement to the public even if the terms of the agreement are changed immediately upon opening of an account to terms not offered to the public.

58(b)(6) Open account

1. *Open account clarified.* The definition of open account includes a credit card account under an open-end (not home-secured) consumer credit plan if either (i) the cardholder can obtain extensions of credit on the account; or (ii) there is an outstanding balance on the account that has not been charged off. Under this definition, an account that meets either of these criteria is considered to be open even if the account is inactive. Similarly, if an account has been closed for new activity (for example, due to default by the cardholder), but the cardholder is still making payments to pay off the outstanding balance, the account is considered open.

58(b)(8) Private Label Credit Card Account and Private Label Credit Card Plan

1. *Private label credit card account.* The term private label credit card account means a credit card account under an open-end (not home-secured) consumer credit plan with a credit card that can be used to make purchases only at a single merchant or an affiliated group of merchants. This term applies to any such credit card account, regardless of whether it is issued by the merchant or its affiliate or by an unaffiliated third party.

2. *Co-branded credit cards.* The term private label credit card account does not include accounts with so-called co-branded credit cards. Credit cards that display the name, mark, or logo of a merchant or affiliated group of merchants as well as the mark, logo, or brand of payment network are generally referred to as co-branded cards. While these credit cards may display the brand of the merchant or affiliated group of merchants as the dominant brand on the card, such credit cards are usable at any merchant that participates in the payment network. Because these credit cards can be used at multiple unaffiliated merchants, accounts with such credit cards are not considered private label credit card accounts under § 1026.58(b)(8).

3. *Affiliated group of merchants.* The term ''affiliated group of merchants'' means two or more affiliated merchants or other persons that are related by common ownership or common corporate control. For example, the term would include franchisees that are subject to a common set of corporate policies or practices under the terms of their franchise licenses. The term also applies to two or more merchants or other persons that agree among each other, by contract or otherwise, to accept a credit card bearing the same name, mark, or logo (other than the mark,

logo, or brand of a payment network), for the purchase of goods or services solely at such merchants or persons. For example, several local clothing retailers jointly agree to issue credit cards called the ''Main Street Fashion Card'' that can be used to make purchases only at those retailers. For purposes of this section, these retailers would be considered an affiliated group of merchants.

4. *Private label credit card plan.* i. Which credit card accounts issued by a particular issuer constitute a private label credit card plan is determined by where the credit cards can be used. All of the private label credit card accounts issued by a particular card issuer with credit cards usable at the same merchant or affiliated group of merchants constitute a single private label credit card plan, regardless of whether the rates, fees, or other terms applicable to the individual credit card accounts differ. For example, a card issuer has 3,000 open private label credit card accounts with credit cards usable only at Merchant A and 5,000 open private label credit card accounts with credit cards usable only at Merchant B and its affiliates. The card issuer has two separate private label credit card plans, as defined by § 1026.58(b)(8)—one plan consisting of 3,000 open accounts with credit cards usable only at Merchant A and another plan consisting of 5,000 open accounts with credit cards usable only at Merchant B and its affiliates.

ii. The example above remains the same regardless of whether (or the extent to which) the terms applicable to the individual open accounts differ. For example, assume that, with respect to the card issuer's 3,000 open accounts with credit cards usable only at Merchant A in the example above, 1,000 of the open accounts have a purchase APR of 12 percent, 1,000 of the open accounts have a purchase APR of 15 percent, and 1,000 of the open accounts have a purchase APR of 18 percent. All of the 5,000 open accounts with credit cards usable only at Merchant B and Merchant B's affiliates have the same 15 percent purchase APR. The card issuer still has only two separate private label credit card plans, as defined by § 1026.58(b)(8). The open accounts with credit cards usable only at Merchant A do not constitute three separate private label credit card plans under § 1026.58(b)(8), even though the accounts are subject to different terms.

58(c) Submission of Agreements to Bureau

58(c)(1) Quarterly Submissions

1. *Quarterly submission requirement.* Section 1026.58(c)(1) requires card issuers to send quarterly submissions to the Bureau no later than the first business day on or after January 31, April 30, July 31, and October 31 of each year. For example, a card issuer has already submitted three credit card agreements to the Bureau. On October 15, the card issuer stops offering agreement A. On November 20, the card issuer amends agreement B. On December 1, the issuer starts offering a new agreement D. The card issuer must submit to the Bureau no later than the first business day on or after January 31 (i) notification that the card issuer is withdrawing agreement A, because it is no longer offered to the public; (ii) the amended version of agreement B; and (iii) agreement D.

2. *No quarterly submission required.* i. Under § 1026.58(c)(1), a card issuer is not required to make any submission to the Bureau at a particular quarterly submission deadline if, during the previous calendar quarter, the card issuer did not take any of the following actions:

A. Offering a new credit card agreement that was not submitted to the Bureau previously.

B. Amending an agreement previously submitted to the Bureau.

C. Ceasing to offer an agreement previously submitted to the Bureau.

ii. For example, a card issuer offers five agreements to the public as of September 30 and submits these to the Bureau by October 31, as required by § 1026.58(c)(1). Between September 30 and December 31, the card issuer continues to offer all five of these agreements to the public without amending them and does not begin offering any new agreements. The card issuer is not required to make any submission to the Bureau by the following January 31.

3. *Quarterly submission of complete set of updated agreements.* Section 1026.58(c)(1) permits a card issuer to submit to the Bureau on a quarterly basis a complete, updated set of the credit card agreements the card issuer offers to the public. For example, a card issuer offers agreements A, B, and C to the public as of March 31. The card issuer submits each of these agreements to the Bureau by April 30 as required by § 1026.58(c)(1). On May 15, the card issuer amends agreement A, but does not make any changes to agreements B or C. As of June 30, the card issuer continues to offer amended agreement A and agreements B and C to the public. At the next quarterly submission deadline, July 31, the card issuer must submit the entire amended agreement A and is not required to make any submission with respect to agreements B and C. The card issuer may either: (i) Submit the entire amended agreement A and make no submission with respect to agreements B and C; or (ii) submit the entire amended agreement A and also resubmit agreements B and C. A card issuer may choose to resubmit to the Bureau all of the agreements it offered to the public as of a particular quarterly submission deadline even if the card issuer has not introduced any new agreements or amended any agreements since its last submission and continues to offer all previously submitted agreements.

58(c)(3) Amended Agreements

1. *No requirement to resubmit agreements not amended.* Under § 1026.58(c)(3), if a credit card agreement has been submitted to the Bureau, the agreement has not been amended, and the card issuer continues to offer the agreement to the public, no additional submission regarding that agreement is required. For example, a credit card issuer begins offering an agreement in October and submits the agreement to the Bureau the following January 31, as required by § 1026.58(c)(1). As of March 31, the card issuer has not amended the agreement and is still offering the agreement to the public. The card issuer is not required to submit anything to the Bureau regarding that agreement by April 30.

2. *Submission of amended agreements.* If a card issuer amends a credit card agreement previously submitted to the Bureau, § 1026.58(c)(3) requires the card issuer to submit the entire amended agreement to the Bureau. The issuer must submit the amended agreement to the Bureau by the first quarterly submission deadline after the last day of the calendar quarter in which the change became effective. However, the issuer is required to submit the amended agreement to the Bureau only if the issuer offered the amended agreement to the public as of the last business day of the calendar quarter in which the change became effective. For example, a card issuer submits an agreement to the Bureau on October 31. On November 15, the issuer changes the balance computation method used under the agreement. Because an element of the pricing information has changed, the agreement has been amended for purposes of § 1026.58(c)(3). On December 31, the last business day of the calendar quarter in which the change in the balance computation method became effective, the issuer still offers the agreement to the public as amended on November 15. The issuer must submit the entire amended agreement to the Bureau no later than January 31.

3. *Agreements amended but no longer offered to the public.* A card issuer should submit an amended agreement to the Bureau under § 1026.58(c)(3) only if the issuer offered the amended agreement to the public as of the last business day of the calendar quarter in which the amendment became effective. Agreements that are not offered to the public as of the last day of the calendar quarter should not be submitted to the Bureau. For example, on December 31 a card issuer offers two agreements, Agreement A and Agreement B. The issuer submits these agreements to the Bureau by January 31 as required by § 1026.58. On February 15, the issuer amends both Agreement A and Agreement B. On February 28, the issuer stops offering Agreement A to the public. On March 15, the issuer amends Agreement B a second time. As a result, on March 31, the last business day of the calendar quarter, the issuer offers to the public one agreement—Agreement B as amended on March 15. By the April 30 quarterly submission deadline, the issuer must (i) notify the Bureau that it is withdrawing Agreement A because Agreement A is no longer offered to the public; and (ii) submit to the Bureau Agreement B as amended on March 15. The issuer should not submit to the Bureau either Agreement A as amended on February 15 or the earlier version of Agreement B (as amended on February 15), as neither was offered to the public on March 31, the last business day of the calendar quarter.

4. *Change-in-terms notices not permissible.* Section 1026.58(c)(3) requires that if an agreement previously submitted to the Bureau is amended, the card issuer must submit the entire revised agreement to the Bureau. A card issuer may not fulfill this requirement by submitting a change-in-terms or similar notice covering only the terms that have changed. In addition, amendments must be integrated into the text of the agreement (or the addenda described in § 1026.58(c)(8)), not provided as separate riders. For example,

a card issuer changes the purchase APR associated with an agreement the issuer has previously submitted to the Bureau. The purchase APR for that agreement was included in the addendum of pricing information, as required by § 1026.58(c)(8). The card issuer may not submit a change-in-terms or similar notice reflecting the change in APR, either alone or accompanied by the original text of the agreement and original pricing information addendum. Instead, the card issuer must revise the pricing information addendum to reflect the change in APR and submit to the Bureau the entire text of the agreement and the entire revised addendum, even though no changes have been made to the provisions of the agreement and only one item on the pricing information addendum has changed.

58(c)(4) Withdrawal of Agreements

1. *Notice of withdrawal of agreement.* Section 1026.58(c)(4) requires a card issuer to notify the Bureau if any agreement previously submitted to the Bureau by that issuer is no longer offered to the public by the first quarterly submission deadline after the last day of the calendar quarter in which the card issuer ceased to offer the agreement. For example, on January 5 a card issuer stops offering to the public an agreement it previously submitted to the Bureau. The card issuer must notify the Bureau that the agreement is being withdrawn by April 30, the first quarterly submission deadline after March 31, the last day of the calendar quarter in which the card issuer stopped offering the agreement.

58(c)(5) De Minimis Exception

1. *Relationship to other exceptions.* The de minimis exception is distinct from the private label credit card exception under § 1026.58(c)(6) and the product testing exception under § 1026.58(c)(7). The de minimis exception provides that a card issuer with fewer than 10,000 open credit card accounts is not required to submit any agreements to the Bureau, regardless of whether those agreements qualify for the private label credit card exception or the product testing exception. In contrast, the private label credit card exception and the product testing exception provide that a card issuer is not required to submit to the Bureau agreements offered solely in connection with certain types of credit card plans with fewer than 10,000 open accounts, regardless of the card issuer's total number of open accounts.

2. *De minimis exception.* Under § 1026.58(c)(5), a card issuer is not required to submit any credit card agreements to the Bureau under § 1026.58(c)(1) if the card issuer has fewer than 10,000 open credit card accounts as of the last business day of the calendar quarter. For example, a card issuer offers five credit card agreements to the public as of September 30. However, the card issuer has only 2,000 open credit card accounts as of September 30. The card issuer is not required to submit any agreements to the Bureau by October 31 because the issuer qualifies for the de minimis exception.

3. *Date for determining whether card issuer qualifies clarified.* Whether a card issuer qualifies for the de minimis exception is determined as of the last business day of each calendar quarter. For example, as of December 31, a card issuer offers three agreements to the public and has 9,500 open credit card accounts. As of January 30, the card issuer still offers three agreements, but has 10,100 open accounts. As of March 31, the card issuer still offers three agreements, but has only 9,700 open accounts. Even though the card issuer had 10,100 open accounts at one time during the calendar quarter, the card issuer qualifies for the de minimis exception because the number of open accounts was less than 10,000 as of March 31. The card issuer therefore is not required to submit any agreements to the Bureau under § 1026.58(c)(1) by April 30.

4. *Date for determining whether card issuer ceases to qualify clarified.* Whether a card issuer has ceased to qualify for the de minimis exception under § 1026.58(c)(5) is determined as of the last business day of the calendar quarter, For example, as of June 30, a card issuer offers three agreements to the public and has 9,500 open credit card accounts. The card issuer is not required to submit any agreements to the Bureau under § 1026.58(c)(1) because the card issuer qualifies for the de minimis exception. As of July 15, the card issuer still offers the same three agreements, but now has 10,000 open accounts. The card issuer is not required to take any action at this time, because whether a card issuer qualifies for the de minimis exception under § 1026.58(c)(5) is determined as of the last business day of the calendar quarter. As of September 30, the card issuer still offers the same three agreements and still has 10,000 open accounts. Because the card issuer had 10,000 open accounts as of September 30, the card issuer ceased to qualify for the de minimis exception and must submit the three agreements it offers to the Bureau by October 31, the next quarterly submission deadline.

5. *Option to withdraw agreements clarified.* Section 1026.58(c)(5) provides that if a card issuer that did not previously qualify for the de minimis exception qualifies for the de minimis exception, the card issuer must continue to make quarterly submissions to the Bureau as required by § 1026.58(c)(1) until the card issuer notifies the Bureau that the issuer is withdrawing all agreements it previously submitted to the Bureau. For example, a card issuer has 10,001 open accounts and offers three agreements to the public as of December 31. The card issuer has submitted each of the three agreements to the Bureau as required under § 1026.58(c)(1). As of March 31, the card issuer has only 9,999 open accounts. The card issuer has two options. First, the card issuer may notify the Bureau that the card issuer is withdrawing each of the three agreements it previously submitted. Once the card issuer has notified the Bureau, the card issuer is no longer required to make quarterly submissions to the Bureau under § 1026.58(c)(1). Alternatively, the card issuer may choose not to notify the Bureau that it is withdrawing its agreements. In this case, the card issuer must continue making quarterly submissions to the Bureau as required by § 1026.58(c)(1). The card issuer might choose not to withdraw its agreements if, for example, the card issuer believes that it likely will cease to qualify for the de minimis exception again in the near future.

58(c)(6) Private Label Credit Card Exception

1. *Private label credit card exception.* i. Under § 1026.58(c)(6)(i), a card issuer is not required to submit to the Bureau a credit card agreement if, as of the last business day of the calendar quarter, the agreement (A) is offered for accounts under one or more private label credit card plans each of which has fewer than 10,000 open accounts; and (B) is not offered to the public other than for accounts under such a plan. For example, a card issuer offers to the public a credit card agreement offered solely for private label credit card accounts with credit cards that can be used only at Merchant A. The card issuer has 8,000 open accounts with such credit cards usable only at Merchant A. The card issuer is not required to submit this agreement to the Bureau under § 1026.58(c)(1) because the agreement is offered for a private label credit card plan with fewer than 10,000 open accounts, and the credit card agreement is not offered to the public other than for accounts under that private label credit card plan.

ii. In contrast, assume the same card issuer also offers to the public a different credit card agreement that is offered solely for private label credit card accounts with credit cards usable only at Merchant B. The card issuer has 12,000 open accounts with such credit cards usable only at Merchant B. The private label credit card exception does not apply. Although this agreement is offered for a private label credit card plan (*i.e.,* the 12,000 private label credit card accounts with credit cards usable only at Merchant B), and the agreement is not offered to the public other than for accounts under that private label credit card plan, the private label credit card plan has more than 10,000 open accounts. (The card issuer still is not required to submit to the Bureau the agreement offered in connection with credit cards usable only at Merchant A, as each agreement is evaluated separately under the private label credit card exception.)

2. *Card issuers with small private label and other credit card plans.* Whether the private label credit card exception applies is determined on an agreement-by-agreement basis. Therefore, some agreements offered by a card issuer may qualify for the private label credit card exception even though the card issuer also offers other agreements that do not qualify, such as agreements offered for accounts with cards usable at multiple unaffiliated merchants or agreements offered for accounts under private label plans with 10,000 or more open accounts.

3. *De minimis exception distinguished.* The private label credit card exception under § 1026.58(c)(6) is distinct from the de minimis exception under § 1026.58(c)(5). The private label credit card exception exempts card issuers from submitting certain agreements to the Bureau regardless of the card issuer's overall size as measured by total number of open accounts. In contrast, the de minimis exception exempts a particular card issuer from submitting any credit card agreements to the Bureau if the card issuer has fewer than 10,000 total open accounts. For example, a card issuer offers to the public

two credit card agreements. Agreement A is offered solely for private label credit card accounts with credit cards usable only at Merchant A. The card issuer has 5,000 open credit card accounts with such credit cards usable only at Merchant A. Agreement B is offered solely for credit card accounts with cards usable at multiple unaffiliated merchants that participate in a major payment network. The card issuer has 40,000 open credit card accounts with such payment network cards. The card issuer is not required to submit agreement A to the Bureau under § 1026.58(c)(1) because agreement A qualifies for the private label credit card exception under § 1026.58(c)(6). Agreement A is offered for accounts under a private label credit card plan with fewer than 10,000 open accounts (*i.e.,* the 5,000 accounts with credit cards usable only at Merchant A) and is not otherwise offered to the public. The card issuer is required to submit agreement B to the Bureau under § 1026.58(c)(1). The card issuer does not qualify for the de minimis exception under § 1026.58(c)(5) because it has more than 10,000 open accounts, and agreement B does not qualify for the private label credit card exception under § 1026.58(c)(6) because it is not offered solely for accounts under a private label credit card plan with fewer than 10,000 open accounts.

4. *Agreement otherwise offered to the public.* i. An agreement qualifies for the private label exception only if it is offered for accounts under one or more private label credit card plans with fewer than 10,000 open accounts and is not offered to the public other than for accounts under such a plan. For example, a card issuer offers a single agreement to the public. The agreement is offered for private label credit card accounts with credit cards usable only at Merchant A. The card issuer has 9,000 such open accounts with credit cards usable only at Merchant A. The agreement also is offered for credit card accounts with credit cards usable at multiple unaffiliated merchants that participate in a major payment network. The agreement does not qualify for the private label credit card exception. The agreement is offered for accounts under a private label credit card plan with fewer than 10,000 open accounts. However, the agreement also is offered to the public for accounts that are not part of a private label credit card plan and therefore does not qualify for the private label credit card exception.

ii. Similarly, an agreement does not qualify for the private label credit card exception if it is offered in connection with one private label credit card plan with fewer than 10,000 open accounts and one private label credit card plan with 10,000 or more open accounts. For example, a card issuer offers a single credit card agreement to the public. The agreement is offered for two types of accounts. The first type of account is a private label credit card account with a credit card usable only at Merchant A. The second type of account is a private label credit card account with a credit card usable only at Merchant B. The card issuer has 10,000 such open accounts with credit cards usable only at Merchant A and 5,000 such open accounts with credit cards usable only at Merchant B. The agreement does not qualify for the private label credit card exception. While the agreement is offered for accounts under a private label credit card plan with fewer than 10,000 open accounts (*i.e.,* the 5,000 open accounts with credit cards usable only at Merchant B), the agreement is also offered for accounts not under such a plan (*i.e.,* the 10,000 open accounts with credit cards usable only at Merchant A).

5. *Agreement used for multiple small private label plans.* The private label exception applies even if the same agreement is used for more than one private label credit card plan with fewer than 10,000 open accounts. For example, a card issuer has 15,000 total open private label credit card accounts. Of these, 7,000 accounts have credit cards usable only at Merchant A, 5,000 accounts have credit cards usable only at Merchant B, and 3,000 accounts have credit cards usable only at Merchant C. The card issuer offers to the public a single credit card agreement that is offered for all three types of accounts and is not offered for any other type of account. The card issuer is not required to submit the agreement to the Bureau under § 1026.58(c)(1). The agreement is used for three different private label credit card plans (*i.e.,* the accounts with credit cards usable at Merchant A, the accounts with credit cards usable at Merchant B, and the accounts with credit cards usable at Merchant C), each of which has fewer than 10,000 open accounts, and the card issuer does not offer the agreement for any other type of account. The agreement therefore qualifies for the private label credit card exception under § 1026.58(c)(6).

6. *Multiple agreements used for one private label credit card plan.* The private label credit card exception applies even if a card issuer offers more than one agreement in connection with a particular private label credit card plan. For example, a card issuer has 5,000 open private label credit card accounts with credit cards usable only at Merchant A. The card issuer offers to the public three different agreements each of which may be used in connection with private label credit card accounts with credit cards usable only at Merchant A. The agreements are not offered for any other type of credit card account. The card issuer is not required to submit any of the three agreements to the Bureau under § 1026.58(c)(1) because each of the agreements is used for a private label credit card plan which has fewer than 10,000 open accounts and none of the three is offered to the public other than for accounts under such a plan.

58(c)(8) Form and content of agreements submitted to the Bureau

1. *''As of'' date clarified.* Agreements submitted to the Bureau must contain the provisions of the agreement and pricing information in effect as of the last business day of the preceding calendar quarter. For example, on June 1, a card issuer decides to decrease the purchase APR associated with one of the agreements it offers to the public. The change in the APR will become effective on August 1. If the card issuer submits the agreement to the Bureau on July 31 (for example, because the agreement has been otherwise amended), the agreement submitted should not include the new lower APR because that APR was not in effect on June 30, the last business day of the preceding calendar quarter.

2. *Pricing agreement addendum.* Pricing information must be set forth in the separate addendum described in § 1026.58(c)(8)(ii)(A) even if it is also stated elsewhere in the agreement.

3. *Pricing agreement variations do not constitute separate agreements.* Pricing information that may vary from one cardholder to another depending on the cardholder's creditworthiness or state of residence or other factors must be disclosed by setting forth all the possible variations or by providing a range of possible variations. Two agreements that differ only with respect to variations in the pricing information do not constitute separate agreements for purposes of this section. For example, a card issuer offers two types of credit card accounts that differ only with respect to the purchase APR. The purchase APR for one type of account is 15 percent, while the purchase APR for the other type of account is 18 percent. The provisions of the agreement and pricing information for the two types of accounts are otherwise identical. The card issuer should not submit to the Bureau one agreement with a pricing information addendum listing a 15 percent purchase APR and another agreement with a pricing information addendum listing an 18 percent purchase APR. Instead, the card issuer should submit to the Bureau one agreement with a pricing information addendum listing possible purchase APRs of 15 or 18 percent.

4. *Optional variable terms addendum.* Examples of provisions that might be included in the variable terms addendum include a clause that is required by law to be included in credit card agreements in a particular state but not in other states (unless, for example, a clause is included in the agreement used for all cardholders under a heading such as ''For State X Residents''), the name of the credit card plan to which the agreement applies (if this information is included in the agreement), or the name of a charitable organization to which donations will be made in connection with a particular card (if this information is included in the agreement).

5. *Integrated agreement requirement.* Card issuers may not provide provisions of the agreement or pricing information in the form of change-in-terms notices or riders. The only two addenda that may be submitted as part of an agreement are the pricing information addendum and optional variable terms addendum described in § 1026.58(c)(8). Changes in provisions or pricing information must be integrated into the body of the agreement, pricing information addendum, or optional variable terms addendum described in § 1026.58(c)(8). For example, it would be impermissible for a card issuer to submit to the Bureau an agreement in the form of a terms and conditions document dated January 1, 2005, four subsequent change in terms notices, and 2 addenda showing variations in pricing information. Instead, the card issuer must submit a document that integrates the changes made by each of the

change in terms notices into the body of the original terms and conditions document and a single addendum displaying variations in pricing information.

58(d) Posting of Agreements Offered to the Public

1. *Requirement applies only to agreements submitted to the Bureau.* Card issuers are only required to post and maintain on their publicly available Web site the credit card agreements that the card issuer must submit to the Bureau under § 1026.58(c). If, for example, a card issuer is not required to submit any agreements to the Bureau because the card issuer qualifies for the de minimis exception under § 1026.58(c)(5), the card issuer is not required to post and maintain any agreements on its Web site under § 1026.58(d). Similarly, if a card issuer is not required to submit a specific agreement to the Bureau, such as an agreement that qualifies for the private label exception under § 1026.58(c)(6), the card issuer is not required to post and maintain that agreement under § 1026.58(d) (either on the card issuer's publicly available Web site or on the publicly available Web sites of merchants at which private label credit cards can be used). (The card issuer in both of these cases is still required to provide each individual cardholder with access to his or her specific credit card agreement under § 1026.58(e) by posting and maintaining the agreement on the card issuer's Web site or by providing a copy of the agreement upon the cardholder's request.)

2. *Card issuers that do not otherwise maintain Web sites.* Unlike § 1026.58(e), § 1026.58(d) does not include a special rule for card issuers that do not otherwise maintain a Web site. If a card issuer is required to submit one or more agreements to the Bureau under § 1026.58(c), that card issuer must post those agreements on a publicly available Web site it maintains (or, with respect to an agreement for a private label credit card, on the publicly available Web site of at least one of the merchants at which the card may be used, as provided in § 1026.58(d)(1)). If an issuer provides cardholders with access to specific information about their individual accounts, such as balance information or copies of statements, through a third-party Web site, the issuer is considered to maintain that Web site for purposes of § 1026.58. Such a third-party Web site is deemed to be maintained by the issuer for purposes of § 1026.58(d) even where, for example, an unaffiliated entity designs the Web site and owns and maintains the information technology infrastructure that supports the Web site, cardholders with credit cards from multiple issuers can access individual account information through the same Web site, and the Web site is not labeled, branded, or otherwise held out to the public as belonging to the issuer. Therefore, issuers that provide cardholders with access to account-specific information through a third-party Web site can comply with § 1026.58(d) by ensuring that the agreements the issuer submits to the Bureau are posted on the third-party Web site in accordance with § 1026.58(d). (In contrast, the § 1026.58(d)(1) rule regarding agreements for private label credit cards is not conditioned on cardholders' ability to access account-specific information through the merchant's Web site.)

3. *Private label credit card plans.* i. Section 1026.58(d) provides that, with respect to an agreement offered solely for accounts under one or more private label credit card plans, a card issuer may comply by posting and maintaining the agreement on the Web site of at least one of the merchants at which the cards issued under each private label credit card plan with 10,000 or more open accounts may be used. For example, a card issuer has 100,000 open private label credit card accounts. Of these, 75,000 open accounts have credit cards usable only at Merchant A and 25,000 open accounts have credit cards usable only at Merchant B and Merchant B's affiliates, Merchants C and D. The card issuer offers to the public a single credit card agreement that is offered for both of these types of accounts and is not offered for any other type of account.

ii. The card issuer is required to submit the agreement to the Bureau under § 1026.58(c)(1). (The card issuer has more than 10,000 open accounts, so the § 1026.58(c)(5) de minimis exception does not apply. The agreement is offered solely for two different private label credit card plans (*i.e.,* one plan consisting of the accounts with credit cards usable at Merchant A and one plan consisting of the accounts with credit cards usable at Merchant B and its affiliates, Merchants C and D), but both of these plans have more than 10,000 open accounts, so the § 1026.58(c)(6) private label credit card exception does not apply. Finally, the agreement is not offered solely in connection with a product test by the card issuer, so the § 1026.58(c)(7) product test exception does not apply.)

iii. Because the card issuer is required to submit the agreement to the Bureau under § 1026.58(c)(1), the card issuer is required to post and maintain the agreement on the card issuer's publicly available Web site under § 1026.58(d). However, because the agreement is offered solely for accounts under one or more private label credit card plans, the card issuer may comply with § 1026.58(d) in either of two ways. First, the card issuer may comply by posting and maintaining the agreement on the card issuer's own publicly available Web site. Alternatively, the card issuer may comply by posting and maintaining the agreement on the publicly available Web site of Merchant A *and* the publicly available Web site of at least one of Merchants B, C and D. It would not be sufficient for the card issuer to post the agreement on Merchant A's Web site alone because § 1026.58(d) requires the card issuer to post the agreement on the publicly available Web site of ''at least one of the merchants at which cards issued under *each* private label credit card plan may be used'' (emphasis added).

iv. In contrast, assume that a card issuer has 100,000 open private label credit card accounts. Of these, 5,000 open accounts have credit cards usable only at Merchant A and 95,000 open accounts have credit cards usable only at Merchant B and Merchant B's affiliates, Merchants C and D. The card issuer offers to the public a single credit card agreement that is offered for both of these types of accounts and is not offered for any other type of account.

v. The card issuer is required to submit the agreement to the Bureau under § 1026.58(c)(1). (The card issuer has more than 10,000 open accounts, so the § 1026.58(c)(5) de minimis exception does not apply. The agreement is offered solely for two different private label credit card plans (*i.e.,* one plan consisting of the accounts with credit cards usable at Merchant A and one plan consisting of the accounts with credit cards usable at Merchant B and its affiliates, Merchants C and D), but one of these plans has more than 10,000 open accounts, so the § 1026.58(c)(6) private label credit card exception does not apply. Finally, the agreement is not offered solely in connection with a product test by the card issuer, so the § 1026.58(c)(7) product test exception does not apply.)

vi. Because the card issuer is required to submit the agreement to the Bureau under § 1026.58(c)(1), the card issuer is required to post and maintain the agreement on the card issuer's publicly available Web site under § 1026.58(d). However, because the agreement is offered solely for accounts under one or more private label credit card plans, the card issuer may comply with § 1026.58(d) in either of two ways. First, the card issuer may comply by posting and maintaining the agreement on the card issuer's own publicly available Web site. Alternatively, the card issuer may comply by posting and maintaining the agreement on the publicly available Web site of at least one of Merchants B, C and D. The card issuer is not required to post and maintain the agreement on the publicly available Web site of Merchant A because the card issuer's private label credit card plan consisting of accounts with cards usable only at Merchant A has fewer than 10,000 open accounts.

58(e) Agreements for All Open Accounts

1. *Requirement applies to all open accounts.* The requirement to provide access to credit card agreements under § 1026.58(e) applies to all open credit card accounts, regardless of whether such agreements are required to be submitted to the Bureau pursuant to § 1026.58(c) (or posted on the card issuer's Web site pursuant to § 1026.58(d)). For example, a card issuer that is not required to submit agreements to the Bureau because it qualifies for the de minimis exception under § 1026.58(c)(5)) would still be required to provide cardholders with access to their specific agreements under § 1026.58(e). Similarly, an agreement that is no longer offered to the public would not be required to be submitted to the Bureau under § 1026.58(c), but would still need to be provided to the cardholder to whom it applies under § 1026.58(e).

2. *Readily available telephone line.* Section 1026.58(e) provides that card issuers that provide copies of cardholder agreements upon request must provide the cardholder with the ability to request a copy of their agreement by calling a readily available telephone line. To satisfy the readily available standard, the financial institution must provide enough telephone lines so that consumers get a reasonably prompt response.

The institution need only provide telephone service during normal business hours. Within its primary service area, an institution must provide a local or toll-free telephone number. It need not provide a toll-free number or accept collect long-distance calls from outside the area where it normally conducts business.

3. *Issuers without interactive Web sites.* Section 1026.58(e)(2) provides that a card issuer that does not maintain a Web site from which cardholders can access specific information about their individual accounts is not required to provide a cardholder with the ability to request a copy of the agreement by using the card issuer's Web site. A card issuer without a Web site of any kind could comply by disclosing the telephone number on each periodic statement; a card issuer with a non-interactive Web site could comply in the same way, or alternatively could comply by displaying the telephone number on the card issuer's Web site. An issuer is considered to maintain an interactive Web site for purposes of the § 1026.58(e)(2) special rule if the issuer provide cardholders with access to specific information about their individual accounts, such as balance information or copies of statements, through a third-party interactive Web site. Such a Web site is deemed to be maintained by the issuer for purposes of § 1026.58(e)(2) even where, for example, an unaffiliated entity designs the Web site and owns and maintains the information technology infrastructure that supports the Web site, cardholders with credit cards from multiple issuers can access individual account information through the same Web site, and the Web site is not labeled, branded, or otherwise held out to the public as belonging to the issuer. An issuer that provides cardholders with access to specific information about their individual accounts through such a Web site is not permitted to comply with the special rule in § 1026.58(e)(2). Instead, such an issuer must comply with § 1026.58(e)(1).

4. *Deadline for providing requested agreements clarified.* Sections 1026.58(e)(1)(ii) and (e)(2) require that credit card agreements provided upon request must be sent to the cardholder or otherwise made available to the cardholder in electronic or paper form no later than 30 days after the cardholder's request is received. For example, if a card issuer chooses to respond to a cardholder's request by mailing a paper copy of the cardholder's agreement, the card issuer must mail the agreement no later than 30 days after receipt of the cardholder's request. Alternatively, if a card issuer chooses to respond to a cardholder's request by posting the cardholder's agreement on the card issuer's Web site, the card issuer must post the agreement on its Web site no later than 30 days after receipt of the cardholder's request. Section 1026.58(e)(3)(v) provides that a card issuer may provide cardholder agreements in either electronic or paper form regardless of the form of the cardholder's request.

Section 1026.59—Reevaluation of Rate Increases

59(a) General Rule

59(a)(1) Evaluation of Increased Rate

1. *Types of rate increases covered.* Section 1026.59(a) applies both to increases in annual percentage rates imposed on a consumer's account based on that consumer's credit risk or other circumstances specific to that consumer and to increases in annual percentage rates imposed based on factors that are not specific to the consumer, such as changes in market conditions or the issuer's cost of funds.

2. *Rate increases actually imposed.* Under § 1026.59(a), a card issuer must review changes in factors only if the increased rate is actually imposed on the consumer's account. For example, if a card issuer increases the penalty rate for a credit card account under an open-end (not home-secured) consumer credit plan and the consumer's account has no balances that are currently subject to the penalty rate, the card issuer is required to provide a notice pursuant to § 1026.9(c) of the change in terms, but the requirements of § 1026.59 do not apply. However, if the consumer's account later becomes subject to the penalty rate, the card issuer is required to provide a notice pursuant to § 1026.9(g) and the requirements of § 1026.59 begin to apply upon imposition of the penalty rate. Similarly, if a card issuer raises the cash advance rate applicable to a consumer's account but the consumer engages in no cash advance transactions to which that increased rate is applied, the card issuer is required to provide a notice pursuant to § 1026.9(c) of the change in terms, but the requirements of § 1026.59 do not apply. If the consumer subsequently engages in a cash advance transaction, the requirements of § 1026.59 begin to apply at that time.

3. *Change in type of rate.* i. *Generally.* A change from a variable rate to a non-variable rate or from a non-variable rate to a variable rate is not a rate increase for purposes of § 1026.59, if the rate in effect immediately prior to the change in type of rate is equal to or greater than the rate in effect immediately after the change. For example, a change from a variable rate of 15.99% to a non-variable rate of 15.99% is not a rate increase for purposes of § 1026.59 at the time of the change. *See* § 1026.55 for limitations on the permissibility of changing from a non-variable rate to a variable rate.

ii. *Change from non-variable rate to variable rate.* A change from a non-variable to a variable rate constitutes a rate increase for purposes of § 1026.59 if the variable rate exceeds the non-variable rate that would have applied if the change in type of rate had not occurred. For example, assume a new credit card account under an open-end (not home-secured) consumer credit plan is opened on January 1 of year 1 and that a non-variable annual percentage rate of 12% applies to all transactions on the account. On January 1 of year 2, upon 45 days' advance notice pursuant to § 1026.9(c)(2), the rate on all new transactions is changed to a variable rate that is currently 12% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control. The change from the 12% non-variable rate to the 12% variable rate on January 1 of year 2 is not a rate increase for purposes of § 1026.59(a). On April 1 of year 2, the value of the variable rate increases to 12.5%. The increase in the rate from 12% to 12.5% is a rate increase for purposes of § 1026.59, and the card issuer must begin periodically conducting reviews of the account pursuant to § 1026.59. The increase that must be evaluated for purposes of § 1026.59 is the increase from a non-variable rate of 12% to a variable rate of 12.5%.

iii. *Change from variable rate to non-variable rate.* A change from a variable to a non-variable rate constitutes a rate increase for purposes of § 1026.59 if the non-variable rate exceeds the variable rate that would have applied if the change in type of rate had not occurred. For example, assume a new credit card account under an open-end (not home-secured) consumer credit plan is opened on January 1 of year 1 and that a variable annual percentage rate that is currently 15% and is determined by adding a margin of 10 percentage points to a publicly-available index not under the card issuer's control applies to all transactions on the account. On January 1 of year 2, upon 45 days' advance notice pursuant to § 1026.9(c)(2), the rate on all existing balances and new transactions is changed to a non-variable rate that is currently 15%. The change from the 15% variable rate to the 15% non-variable rate on January 1 of year 2 is not a rate increase for purposes of § 1026.59(a). On April 1 of year 2, the value of the variable rate that would have applied to the account decreases to 12.5%. Accordingly, on April 1 of year 2, the non-variable rate of 15% exceeds the 12.5% variable rate that would have applied but for the change in type of rate. At this time, the change to the non-variable rate of 15% constitutes a rate increase for purposes of § 1026.59, and the card issuer must begin periodically conducting reviews of the account pursuant to § 1026.59. The increase that must be evaluated for purposes of § 1026.59 is the increase from a variable rate of 12.5% to a non-variable rate of 15%.

4. *Rate increases prior to effective date of rule.* For increases in annual percentage rates made on or after January 1, 2009, and prior to August 22, 2010, § 1026.59(a) requires the card issuer to review the factors described in § 1026.59(d) and reduce the rate, as appropriate, if the rate increase is of a type for which 45 days' advance notice would currently be required under § 1026.9(c)(2) or (g). For example, 45 days' notice is not required under § 1026.9(c)(2) if the rate increase results from the increase in the index by which a properly-disclosed variable rate is determined in accordance with § 1026.9(c)(2)(v)(C) or if the increase occurs upon expiration of a specified period of time and disclosures complying with § 1026.9(c)(2)(v)(B) have been provided. The requirements of § 1026.59 do not apply to such rate increases.

5. *Amount of rate decrease.* i. *General.* Even in circumstances where a rate reduction is required, § 1026.59 does not require that a card issuer decrease the rate that applies to

a credit card account to the rate that was in effect prior to the rate increase subject to § 1026.59(a). The amount of the rate decrease that is required must be determined based upon the card issuer's reasonable policies and procedures under § 1026.59(b) for consideration of factors described in § 1026.59(a) and (d). For example, assume a consumer's rate on new purchases is increased from a variable rate of 15.99% to a variable rate of 23.99% based on the consumer's making a required minimum periodic payment five days late. The consumer makes all of the payments required on the account on time for the six months following the rate increase. Assume that the card issuer evaluates the account by reviewing the factors on which the increase in an annual percentage rate was originally based, in accordance with § 1026.59(d)(1)(i). The card issuer is not required to decrease the consumer's rate to the 15.99% that applied prior to the rate increase. However, the card issuer's policies and procedures for performing the review required by § 1026.59(a) must be reasonable, as required by § 1026.59(b), and must take into account any reduction in the consumer's credit risk based upon the consumer's timely payments.

ii. *Change in type of rate.* If the rate increase subject to § 1026.59 involves a change from a variable rate to a non-variable rate or from a non-variable rate to a variable rate, § 1026.59 does not require that the issuer reinstate the same type of rate that applied prior to the change. However, the amount of any rate decrease that is required must be determined based upon the card issuer's reasonable policies and procedures under § 1026.59(b) for consideration of factors described in § 1026.59(a) and (d).

59(a)(2) Rate Reductions

59(a)(2)(ii) Applicability of Rate Reduction

1. *Applicability of reduced rate to new transactions.* Section 1026.59(a)(2)(ii) requires, in part, that any reduction in rate required pursuant to § 1026.59(a)(1) must apply to new transactions that occur after the effective date of the rate reduction, if those transactions would otherwise have been subject to the increased rate described in § 1026.59(a)(1). A credit card account may have multiple types of balances, for example, purchases, cash advances, and balance transfers, to which different rates apply. For example, assume a new credit card account opened on January 1 of year one has a rate applicable to purchases of 15% and a rate applicable to cash advances and balance transfers of 20%. Effective March 1 of year two, consistent with the limitations in § 1026.55 and upon giving notice required by § 1026.9(c)(2), the card issuer raises the rate applicable to new purchases to 18% based on market conditions. The only transaction in which the consumer engages in year two is a $1,000 purchase made on July 1. The rate for cash advances and balance transfers remains at 20%. Based on a subsequent review required by § 1026.59(a)(1), the card issuer determines that the rate on purchases must be reduced to 16%. Section 1026.59(a)(2)(ii) requires that the 16% rate be applied to the $1,000 purchase made on July 1 and to all new purchases. The rate for new cash advances and balance transfers may remain at 20%, because there was no rate increase applicable to those types of transactions and, therefore, the requirements of § 1026.59(a) do not apply.

59(c) Timing

1. *In general.* The issuer may review all of its accounts subject to § 1026.59(a) at the same time once every six months, may review each account once each six months on a rolling basis based on the date on which the rate was increased for that account, or may otherwise review each account not less frequently than once every six months.

2. *Example.* A card issuer increases the rates applicable to one half of its credit card accounts on June 1, 2011. The card issuer increases the rates applicable to the other half of its credit card accounts on September 1, 2011. The card issuer may review the rate increases for all of its credit card accounts on or before December 1, 2011, and at least every six months thereafter. In the alternative, the card issuer may first review the rate increases for the accounts that were repriced on June 1, 2011 on or before December 1, 2011, and may first review the rate increases for the accounts that were repriced on September 1, 2011 on or before March 1, 2012.

3. *Rate increases prior to effective date of rule.* For increases in annual percentage rates applicable to a credit card account under an open-end (not home-secured) consumer credit plan on or after January 1, 2009 and prior to August 22, 2010, § 1026.59(c) requires that the first review for such rate increases be conducted prior to February 22, 2011.

59(d) Factors

1. *Change in factors.* A creditor that complies with § 1026.59(a) by reviewing the factors it currently considers in determining the annual percentage rates applicable to similar new credit card accounts may change those factors from time to time. When a creditor changes the factors it considers in determining the annual percentage rates applicable to similar new credit card accounts from time to time, it may comply with § 1026.59(a) by reviewing the set of factors it considered immediately prior to the change in factors for a brief transition period, or may consider the new factors. For example, a creditor changes the factors it uses to determine the rates applicable to similar new credit card accounts on January 1, 2012. The creditor reviews the rates applicable to its existing accounts that have been subject to a rate increase pursuant to § 1026.59(a) on January 25, 2012. The creditor complies with § 1026.59(a) by reviewing, at its option, either the factors that it considered on December 31, 2011 when determining the rates applicable to similar new credit card accounts or the factors that it considers as of January 25, 2012. For purposes of compliance with § 1026.59(d), a transition period of 60 days from the change of factors constitutes a brief transition period.

2. *Comparison of existing account to factors used for similar new accounts.* Under § 1026.59(a), if a creditor evaluates an existing account using the same factors that it considers in determining the rates applicable to similar new accounts, the review of factors need not result in existing accounts being subject to exactly the same rates and rate structure as a creditor imposes on similar new accounts. For example, a creditor may offer variable rates on similar new accounts that are computed by adding a margin that depends on various factors to the value of the LIBOR index. The account that the creditor is required to review pursuant to § 1026.59(a) may have variable rates that were determined by adding a different margin, depending on different factors, to a published prime rate. In performing the review required by § 1026.59(a), the creditor may review the factors it uses to determine the rates applicable to similar new accounts. If a rate reduction is required, however, the creditor need not base the variable rate for the existing account on the LIBOR index but may continue to use the published prime rate. Section 1026.59(a) requires, however, that the rate on the existing account after the reduction, as determined by adding the published prime rate and margin, be comparable to the rate, as determined by adding the margin and LIBOR, charged on a new account for which the factors are comparable.

3. *Similar new credit card accounts.* A card issuer complying with § 1026.59(d)(1)(ii) is required to consider the factors that the card issuer currently considers when determining the annual percentage rates applicable to similar new credit card accounts under an open-end (not home-secured) consumer credit plan. For example, a card issuer may review different factors in determining the annual percentage rate that applies to credit card plans for which the consumer pays an annual fee and receives rewards points than it reviews in determining the rates for credit card plans with no annual fee and no rewards points. Similarly, a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards than it reviews in determining the rates applicable to credit cards that can be used at a wider variety of merchants. In addition, a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards usable only at Merchant A than it may review for private label credit cards usable only at Merchant B. However, § 1026.59(d)(1)(ii) requires a card issuer to review the factors it considers when determining the rates for new credit card accounts with similar features that are offered for similar purposes.

4. *No similar new credit card accounts.* In some circumstances, a card issuer that complies with § 1026.59(a) by reviewing the factors that it currently considers in determining the annual percentage rates applicable to similar new accounts may not be able to identify a class of new accounts that are similar to the existing accounts on which a rate increase has been imposed. For example, consumers may have existing credit card accounts under an open-end (not home-secured) consumer credit plan but the card issuer may no longer offer a product to new consumers with similar characteristics, such as the availability of rewards, size of credit

line, or other features. Similarly, some consumers' accounts may have been closed and therefore cannot be used for new transactions, while all new accounts can be used for new transactions. In those circumstances, § 1026.59 requires that the card issuer nonetheless perform a review of the rate increase on the existing customers' accounts. A card issuer does not comply with § 1026.59 by maintaining an increased rate without performing such an evaluation. In such circumstances, § 1026.59(d)(1)(ii) requires that the card issuer compare the existing accounts to the most closely comparable new accounts that it offers.

5. *Consideration of consumer's conduct on existing account.* A card issuer that complies with § 1026.59(a) by reviewing the factors that it currently considers in determining the annual percentage rates applicable to similar new accounts may consider the consumer's payment or other account behavior on the existing account only to the same extent and in the same manner that the issuer considers such information when one of its current cardholders applies for a new account with the card issuer. For example, a card issuer might obtain consumer reports for all of its applicants. The consumer reports contain certain information regarding the applicant's past performance on existing credit card accounts. However, the card issuer may have additional information about an existing cardholder's payment history or account usage that does not appear in the consumer report and that, accordingly, it would not generally have for all new applicants. For example, a consumer may have made a payment that is five days late on his or her account with the card issuer, but this information does not appear on the consumer report. The card issuer may consider this additional information in performing its review under § 1026.59(a), but only to the extent and in the manner that it considers such information if a current cardholder applies for a new account with the issuer.

6. *Multiple rate increases between January 1, 2009 and February 21, 2010.* i. *General.* Section 1026.59(d)(2) applies if an issuer increased the rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan between January 1, 2009 and February 21, 2010, and the increase was not based solely upon factors specific to the consumer. In some cases, a credit card account may have been subject to multiple rate increases during the period from January 1, 2009 to February 21, 2010. Some such rate increases may have been based solely upon factors specific to the consumer, while others may have been based on factors not specific to the consumer, such as the issuer's cost of funds or market conditions. In such circumstances, when conducting the first two reviews required under § 1026.59, the card issuer may separately review: (i) Rate increases imposed based on factors not specific to the consumer, using the factors described in § 1026.59(d)(1)(ii) (as required by § 1026.59(d)(2)); and (ii) rate increases imposed based on consumer-specific factors, using the factors described in § 1026.59(d)(1)(i). If the review of factors described in § 1026.59(d)(1)(i) indicates that it is appropriate to continue to apply a penalty or other increased rate to the account as a result of the consumer's payment history or other factors specific to the consumer, § 1026.59 permits the card issuer to continue to impose the penalty or other increased rate, even if the review of the factors described in § 1026.59(d)(1)(ii) would otherwise require a rate decrease.

ii. *Example.* Assume a credit card account was subject to a rate of 15% on all transactions as of January 1, 2009. On May 1, 2009, the issuer increased the rate on existing balances and new transactions to 18%, based upon market conditions or other factors not specific to the consumer or the consumer's account. Subsequently, on September 1, 2009, based on a payment that was received five days after the due date, the issuer increased the applicable rate on existing balances and new transactions from 18% to a penalty rate of 25%. When conducting the first review required under § 1026.59, the card issuer reviews the rate increase from 15% to 18% using the factors described in § 1026.59(d)(1)(ii) (as required by § 1026.59(d)(2)), and separately but concurrently reviews the rate increase from 18% to 25% using the factors described in paragraph § 1026.59(d)(1)(i). The review of the rate increase from 15% to 18% based upon the factors described in § 1026.59(d)(1)(ii) indicates that a similarly situated new consumer would receive a rate of 17%. The review of the rate increase from 18% to 25% based upon the factors described in § 1026.59(d)(1)(i) indicates that it is appropriate to continue to apply the 25% penalty rate based upon the consumer's late payment. Section 1026.59 permits the rate on the account to remain at 25%.

59(f) Termination of Obligation to Review Factors

1. *Revocation of temporary rates.* i. *In general.* If an annual percentage rate is increased due to revocation of a temporary rate, § 1026.59(a) requires that the card issuer periodically review the increased rate. In contrast, if the rate increase results from the expiration of a temporary rate previously disclosed in accordance with § 1026.9(c)(2)(v)(B), the review requirements in § 1026.59(a) do not apply. If a temporary rate is revoked such that the requirements of § 1026.59(a) apply, § 1026.59(f) permits an issuer to terminate the review of the rate increase if and when the applicable rate is the same as the rate that would have applied if the increase had not occurred.

ii. *Examples.* Assume that on January 1, 2011, a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan. The annual percentage rate applicable to purchases is 15%. The card issuer offers the consumer a 10% rate on purchases made between February 1, 2012 and August 1, 2013 and discloses pursuant to § 1026.9(c)(2)(v)(B) that on August 1, 2013 the rate on purchases will revert to the original 15% rate. The consumer makes a payment that is five days late in July 2012.

A. Upon providing 45 days' advance notice and to the extent permitted under § 1026.55, the card issuer increases the rate applicable to new purchases to 15%, effective on September 1, 2012. The card issuer must review that rate increase under § 1026.59(a) at least once each six months during the period from September 1, 2012 to August 1, 2013, unless and until the card issuer reduces the rate to 10%. The card issuer performs reviews of the rate increase on January 1, 2013 and July 1, 2013. Based on those reviews, the rate applicable to purchases remains at 15%. Beginning on August 1, 2013, the card issuer is not required to continue periodically reviewing the rate increase, because if the temporary rate had expired in accordance with its previously disclosed terms, the 15% rate would have applied to purchase balances as of August 1, 2013 even if the rate increase had not occurred on September 1, 2012.

B. Same facts as above except that the review conducted on July 1, 2013 indicates that a reduction to the original temporary rate of 10% is appropriate. Section 1026.59(a)(2)(i) requires that the rate be reduced no later than 45 days after completion of the review, or no later than August 15, 2013. Because the temporary rate would have expired prior to the date on which the rate decrease is required to take effect, the card issuer may, at its option, reduce the rate to 10% for any portion of the period from July 1, 2013, to August 1, 2013, or may continue to impose the 15% rate for that entire period. The card issuer is not required to conduct further reviews of the 15% rate on purchases.

C. Same facts as above except that on September 1, 2012 the card issuer increases the rate applicable to new purchases to the penalty rate on the consumer's account, which is 25%. The card issuer conducts reviews of the increased rate in accordance with § 1026.59 on January 1, 2013 and July 1, 2013. Based on those reviews, the rate applicable to purchases remains at 25%. The card issuer's obligation to review the rate increase continues to apply after August 1, 2013, because the 25% penalty rate exceeds the 15% rate that would have applied if the temporary rate expired in accordance with its previously disclosed terms. The card issuer's obligation to review the rate terminates if and when the annual percentage rate applicable to purchases is reduced to the 15% rate.

2. *Example—relationship to § 1026.59(a).* Assume that on January 1, 2011, a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan. The annual percentage rate applicable to purchases is 15%. Upon providing 45 days' advance notice and to the extent permitted under § 1026.55, the card issuer increases the rate applicable to new purchases to 18%, effective on September 1, 2012. The card issuer conducts reviews of the increased rate in accordance with § 1026.59 on January 1, 2013 and July 1, 2013, based on the factors described in § 1026.59(d)(1)(ii). Based on the January 1, 2013 review, the rate applicable to purchases remains at 18%. In the review conducted on July 1, 2013, the card issuer determines that, based on the relevant factors, the rate it would offer on a comparable new account would be 14%. Consistent with § 1026.59(f), § 1026.59(a) requires that the card issuer reduce the rate on the existing account to the 15% rate that

was in effect prior to the September 1, 2012 rate increase.

59(g) Acquired Accounts

59(g)(1) General

1. *Relationship to § 1026.59(d)(2) for rate increases imposed between January 1, 2009 and February 21, 2010.* Section 1026.59(d)(2) applies to acquired accounts. Accordingly, if a card issuer acquires accounts on which a rate increase was imposed between January 1, 2009 and February 21, 2010 that was not based solely upon consumer-specific factors, that acquiring card issuer must consider the factors that it currently considers when determining the annual percentage rates applicable to similar new credit card accounts, if it conducts either or both of the first two reviews of such accounts that are required after August 22, 2010 under § 1026.59(a).

59(g)(2) Review of Acquired Portfolio

1. *Example—general.* A card issuer acquires a portfolio of accounts that currently are subject to annual percentage rates of 12%, 15%, and 18%. Not later than six months after the acquisition of such accounts, the card issuer reviews all of these accounts in accordance with the factors that it currently uses in determining the rates applicable to similar new credit card accounts. As a result of that review, the card issuer decreases the rate on the accounts that are currently subject to a 12% annual percentage rate to 10%, leaves the rate applicable to the accounts currently subject to a 15% annual percentage rate at 15%, and increases the rate applicable to the accounts currently subject to a rate of 18% to 20%. Section 1026.59(g)(2) requires the card issuer to review, no less frequently than once every six months, the accounts for which the rate has been increased to 20%. The card issuer is not required to review the accounts subject to 10% and 15% rates pursuant to § 1026.59(a), unless and until the card issuer makes a subsequent rate increase applicable to those accounts.

2. *Example—penalty rates.* A card issuer acquires a portfolio of accounts that currently are subject to standard annual percentage rates of 12% and 15%. In addition, several acquired accounts are subject to a penalty rate of 24%. Not later than six months after the acquisition of such accounts, the card issuer reviews all of these accounts in accordance with the factors that it currently uses in determining the rates applicable to similar new credit card accounts. As a result of that review, the card issuer leaves the standard rates applicable to the accounts at 12% and 15%, respectively. The card issuer decreases the rate applicable to the accounts currently at 24% to its penalty rate of 23%. Section 1026.59(g)(2) requires the card issuer to review, no less frequently than once every six months, the accounts that are subject to a penalty rate of 23%. The card issuer is not required to review the accounts subject to 12% and 15% rates pursuant to § 1026.59(a), unless and until the card issuer makes a subsequent rate increase applicable to those accounts.

Section 1026.60—Credit and Charge Card Applications and Solicitations

1. *General.* Section 1026.60 generally requires that credit disclosures be contained in application forms and solicitations initiated by a card issuer to open a credit or charge card account. (See § 1026.60(a)(5) and (e)(2) for exceptions; see § 1026.60(a)(1) and accompanying commentary for the definition of solicitation; see also § 1026.2(a)(15) and accompanying commentary for the definition of charge card.)

2. *Substitution of account-opening summary table for the disclosures required by § 1026.60.* In complying with § 1026.60(c), (e)(1) or (f), a card issuer may provide the account-opening summary table described in § 1026.6(b)(1) in lieu of the disclosures required by § 1026.60, if the issuer provides the disclosures required by § 1026.6 on or with the application or solicitation.

3. *Clear and conspicuous standard.* See comment 5(a)(1)–1 for the clear and conspicuous standard applicable to § 1026.60 disclosures.

60(a) General Rules

60(a)(1) Definition of Solicitation

1. *Invitations to apply.* A card issuer may contact a consumer who has not been preapproved for a card account about opening an account (whether by direct mail, telephone, or other means) and invite the consumer to complete an application. Such a contact does not meet the definition of *solicitation,* nor is it covered by this section, unless the contact itself includes an application form in a direct mailing, electronic communication or ''take-one''; an oral application in a telephone contact initiated by the card issuer; or an application in an in-person contact initiated by the card issuer.

60(a)(2) Form of Disclosures; Tabular Format

1. *Location of table.* i. *General.* Except for disclosures given electronically, disclosures in § 1026.60(b) that are required to be provided in a table must be prominently located on or with the application or solicitation. Disclosures are deemed to be prominently located, for example, if the disclosures are on the same page as an application or solicitation reply form. If the disclosures appear elsewhere, they are deemed to be prominently located if the application or solicitation reply form contains a clear and conspicuous reference to the location of the disclosures and indicates that they contain rate, fee, and other cost information, as applicable.

ii. *Electronic disclosures.* If the table is provided electronically, the table must be provided in close proximity to the application or solicitation. Card issuers have flexibility in satisfying this requirement. Methods card issuers could use to satisfy the requirement include, but are not limited to, the following examples (whatever method is used, a card issuer need not confirm that the consumer has read the disclosures):

A. The disclosures could automatically appear on the screen when the application or reply form appears;

B. The disclosures could be located on the same Web page as the application or reply form (whether or not they appear on the initial screen), if the application or reply form contains a clear and conspicuous reference to the location of the disclosures and indicates that the disclosures contain rate, fee, and other cost information, as applicable;

C. Card issuers could provide a link to the electronic disclosures on or with the application (or reply form) as long as consumers cannot bypass the disclosures before submitting the application or reply form. The link would take the consumer to the disclosures, but the consumer need not be required to scroll completely through the disclosures; or

D. The disclosures could be located on the same Web page as the application or reply form without necessarily appearing on the initial screen, immediately preceding the button that the consumer will click to submit the application or reply.

2. *Multiple accounts.* If a tabular format is required to be used, card issuers offering several types of accounts may disclose the various terms for the accounts in a single table or may provide a separate table for each account.

3. *Information permitted in the table. See* the commentary to § 1026.60(b), (d), and (e)(1) for guidance on additional information permitted in the table.

4. *Deletion of inapplicable disclosures.* Generally, disclosures need only be given as applicable. Card issuers may, therefore, omit inapplicable headings and their corresponding boxes in the table. For example, if no foreign transaction fee is imposed on the account, the heading *Foreign transaction* and disclosure may be deleted from the table or the disclosure form may contain the heading *Foreign transaction* and a disclosure showing *none.* There is an exception for the grace period disclosure; even if no grace period exists, that fact must be stated.

5. *Highlighting of annual percentage rates and fee amounts.* i. *In general.* See Samples G–10(B) and G–10(C) for guidance on providing the disclosures described in § 1026.60(a)(2)(iv) in bold text. Other annual percentage rates or fee amounts disclosed in the table may not be in bold text. Samples G–10(B) and G–10(C) also provide guidance to issuers on how to disclose the rates and fees described in § 1026.60(a)(2)(iv) in a clear and conspicuous manner, by including these rates and fees generally as the first text in the applicable rows of the table so that the highlighted rates and fees generally are aligned vertically in the table.

ii. *Maximum limits on fees.* Section 1026.60(a)(2)(iv) provides that any maximum limits on fee amounts must be disclosed in bold text. For example, assume that, consistent with § 1026.52(b)(1)(ii), a card issuer's late payment fee will not exceed $35. The maximum limit of $35 for the late payment fee must be highlighted in bold. Similarly, assume an issuer will charge a cash advance fee of $5 or 3 percent of the cash advance transaction amount, whichever is greater, but the fee will not exceed $100. The maximum limit of $100 for the cash advance fee must be highlighted in bold.

iii. *Periodic fees.* Section 1026.60(a)(2)(iv) provides that any periodic fee disclosed

pursuant to § 1026.60(b)(2) that is not an annualized amount must not be disclosed in bold. For example, if an issuer imposes a $10 monthly maintenance fee for a card account, the issuer must disclose in the table that there is a $10 monthly maintenance fee, and that the fee is $120 on an annual basis. In this example, the $10 fee disclosure would not be disclosed in bold, but the $120 annualized amount must be disclosed in bold. In addition, if an issuer must disclose any annual fee in the table, the amount of the annual fee must be disclosed in bold.

6. *Form of disclosures.* Whether disclosures must be in electronic form depends upon the following:

i. If a consumer accesses a credit card application or solicitation electronically (other than as described under ii. below), such as online at a home computer, the card issuer must provide the disclosures in electronic form (such as with the application or solicitation on its Web site) in order to meet the requirement to provide disclosures in a timely manner on or with the application or solicitation. If the issuer instead mailed paper disclosures to the consumer, this requirement would not be met.

ii. In contrast, if a consumer is physically present in the card issuer's office, and accesses a credit card application or solicitation electronically, such as via a terminal or kiosk (or if the consumer uses a terminal or kiosk located on the premises of an affiliate or third party that has arranged with the card issuer to provide applications or solicitations to consumers), the issuer may provide disclosures in either electronic or paper form, provided the issuer complies with the timing and delivery (''on or with'') requirements of the regulation.

7. *Terminology.* Section 1026.60(a)(2)(i) generally requires that the headings, content and format of the tabular disclosures be substantially similar, but need not be identical, to the applicable tables in Appendix G–10 to part 1026; but *see* § 1026.5(a)(2) for terminology requirements applicable to § 1026.60 disclosures.

60(a)(4) Fees That Vary by State

1. *Manner of disclosing range.* If the card issuer discloses a range of fees instead of disclosing the amount of the specific fee applicable to the consumer's account, the range may be stated as the lowest authorized fee (zero, if there are one or more states where no fee applies) to the highest authorized fee.

60(a)(5) Exceptions

1. *Noncoverage of consumer-initiated requests.* Applications provided to a consumer upon request are not covered by § 1026.60, even if the request is made in response to the card issuer's invitation to apply for a card account. To illustrate, if a card issuer invites consumers to call a toll-free number or to return a response card to obtain an application, the application sent in response to the consumer's request need not contain the disclosures required under § 1026.60. Similarly, if the card issuer invites consumers to call and make an oral application on the telephone, § 1026.60 does not apply to the application made by the consumer. If, however, the card issuer calls a consumer or initiates a telephone discussion with a consumer about opening a card account and contemporaneously takes an oral application, such applications are subject to § 1026.60, specifically § 1026.60(d). Likewise, if the card issuer initiates an in-person discussion with a consumer about opening a card account and contemporaneously takes an application, such applications are subject to § 1026.60, specifically § 1026.60(f).

60(b) Required Disclosures

1. *Tabular format.* Provisions in § 1026.60(b) and its commentary provide that certain information must appear or is permitted to appear in a table. The tabular format is required for § 1026.60(b) disclosures given pursuant to § 1026.60(c), (d)(2), (e)(1) and (f). The tabular format does not apply to oral disclosures given pursuant to § 1026.60(d)(1). (*See* § 1026.60(a)(2).)

2. *Accuracy.* Rules concerning accuracy of the disclosures required by § 1026.60(b), including variable rate disclosures, are stated in § 1026.60(c)(2), (d)(3), and (e)(4), as applicable.

60(b)(1) Annual Percentage Rate

1. *Variable-rate accounts—definition.* For purposes of § 1026.60(b)(1), a variable-rate account exists when rate changes are part of the plan and are tied to an index or formula. (See the commentary to § 1026.6(b)(4)(ii) for examples of variable-rate plans.)

2. *Variable-rate accounts—fact that rate varies and how the rate will be determined.* In describing how the applicable rate will be determined, the card issuer must identify in the table the type of index or formula used, such as the prime rate. In describing the index, the issuer may not include in the table details about the index. For example, if the issuer uses a prime rate, the issuer must disclose the rate as a ''prime rate'' and may not disclose in the table other details about the prime rate, such as the fact that it is the highest prime rate published in the Wall Street Journal two business days before the closing date of the statement for each billing period. The issuer may not disclose in the table the current value of the index (such as that the prime rate is currently 7.5 percent) or the amount of the margin or spread added to the index or formula in setting the applicable rate. A card issuer may not disclose any applicable limitations on rate increases or decreases in the table, such as describing that the rate will not go below a certain rate or higher than a certain rate. (See Samples G–10(B) and G–10(C) for guidance on how to disclose the fact that the applicable rate varies and how it is determined.)

3. *Discounted initial rates.* i. *Immediate proximity.* If the term ''introductory'' is in the same phrase as the introductory rate, as that term is defined in § 1026.16(g)(2)(ii), it will be deemed to be in immediate proximity of the listing. For example, an issuer that uses the phrase ''introductory balance transfer APR X percent'' has used the word ''introductory'' within the same phrase as the rate. (See Sample G–10(C) for guidance on how to disclose clearly and conspicuously the expiration date of the introductory rate and the rate that will apply after the introductory rate expires, if an introductory rate is disclosed in the table.)

ii. *Subsequent changes in terms.* The fact that an issuer may reserve the right to change a rate subsequent to account opening, pursuant to the notice requirements of § 1026.9(c) and the limitations in § 1026.55, does not, by itself, make that rate an introductory rate. For example, assume an issuer discloses an annual percentage rate for purchases of 12.99% but does not specify a time period during which that rate will be in effect. Even if that issuer subsequently increases the annual percentage rate for purchases to 15.99%, pursuant to a change-in-terms notice provided under § 1026.9(c), the 12.99% is not an introductory rate.

iii. *More than one introductory rate.* If more than one introductory rate may apply to a particular balance in succeeding periods, the term ''introductory'' need only be used to describe the first introductory rate. For example, if an issuer offers a rate of 8.99% on purchases for six months, 10.99% on purchases for the following six months, and 14.99% on purchases after the first year, the term ''introductory'' need only be used to describe the 8.99% rate.

4. *Premium initial rates—subsequent changes in terms.* The fact that an issuer may reserve the right to change a rate subsequent to account opening, pursuant to the notice requirements of § 1026.9(c) and the limitations in § 1026.55 (as applicable), does not, by itself, make that rate a premium initial rate. For example, assume an issuer discloses an annual percentage rate for purchases of 18.99% but does not specify a time period during which that rate will be in effect. Even if that issuer subsequently reduces the annual percentage rate for purchases to 15.99%, the 18.99% is not a premium initial rate. If the rate decrease is the result of a change from a non-variable rate to a variable rate or from a variable rate to a non-variable rate, see comments 9(c)(2)(v)–3 and 9(c)(2)(v)–4 for guidance on the notice requirements under § 1026.9(c).

5. *Increased penalty rates.* i. *In general.* For rates that are not introductory rates or employee preferential rates, if a rate may increase as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit, the card issuer must disclose the increased rate that would apply, a brief description of the event or events that may result in the increased rate, and a brief description of how long the increased rate will remain in effect. The description of the specific event or events that may result in an increased rate should be brief. For example, if an issuer may increase a rate to the penalty rate because the consumer does not make the minimum payment by 5 p.m., Eastern Time, on its payment due date, the issuer should describe this circumstance in the table as ''make a late payment.'' Similarly, if an issuer may increase a rate that applies to a particular balance because the account is more than 60 days late, the issuer should describe this circumstance in the table as ''make a late payment.'' An issuer may not distinguish between the events that may result in an increased rate for existing balances and the events that may result in an

increased rate for new transactions. (See Samples G–10(B) and G–10(C) (in the row labeled ''Penalty APR and When it Applies'') for additional guidance on the level of detail in which the specific event or events should be described.) The description of how long the increased rate will remain in effect also should be brief. If a card issuer reserves the right to apply the increased rate to any balances indefinitely, to the extent permitted by §§ 1026.55(b)(4) and 1026.59, the issuer should disclose that the penalty rate may apply indefinitely. The card issuer may not disclose in the table any limitations imposed by §§ 1026.55(b)(4) and 1026.59 on the duration of increased rates. For example, if the issuer generally provides that the increased rate will apply until the consumer makes twelve timely consecutive required minimum periodic payments, except to the extent that §§ 1026.55(b)(4) and 1026.59 apply, the issuer should disclose that the penalty rate will apply until the consumer makes twelve consecutive timely minimum payments. (See Samples G–10(B) and G–10(C) (in the row labeled ''Penalty APR and When it Applies'') for additional guidance on the level of detail which the issuer should use to describe how long the increased rate will remain in effect.) A card issuer will be deemed to meet the standard to clearly and conspicuously disclose the information required by § 1026.60(b)(1)(iv)(A) if the issuer uses the format shown in Samples G–10(B) and G–10(C) (in the row labeled ''Penalty APR and When it Applies'') to disclose this information.

ii. *Introductory rates—general.* An issuer is required to disclose directly beneath the table the circumstances under which an introductory rate, as that term is defined in § 1026.16(g)(2)(ii), may be revoked, and the rate that will apply after the revocation. This information about revocation of an introductory rate and the rate that will apply after revocation must be provided even if the rate that will apply after the introductory rate is revoked is the rate that would have applied at the end of the promotional period. In a variable-rate account, the rate that would have applied at the end of the promotional period is a rate based on the applicable index or formula in accordance with the accuracy requirements set forth in § 1026.60(c)(2) or (e)(4). In describing the rate that will apply after revocation of the introductory rate, if the rate that will apply after revocation of the introductory rate is already disclosed in the table, the issuer is not required to repeat the rate, but may refer to that rate in a clear and conspicuous manner. For example, if the rate that will apply after revocation of an introductory rate is the standard rate that applies to that type of transaction (such as a purchase or balance transfer transaction), and the standard rates are labeled in the table as ''standard APRs,'' the issuer may refer to the ''standard APR'' when describing the rate that will apply after revocation of an introductory rate. (See Sample G–10(C) in the disclosure labeled ''Loss of Introductory APR'' directly beneath the table.) The description of the circumstances in which an introductory rate could be revoked should be brief. For example, if an issuer may increase an introductory rate because the account is more than 60 days late, the issuer should describe this circumstance directly beneath the table as ''make a late payment.'' In addition, if the circumstances in which an introductory rate could be revoked are already listed elsewhere in the table, the issuer is not required to repeat the circumstances again, but may refer to those circumstances in a clear and conspicuous manner. For example, if the circumstances in which an introductory rate could be revoked are the same as the event or events that may trigger a ''penalty rate'' as described in § 1026.60(b)(1)(iv)(A), the issuer may refer to the actions listed in the Penalty APR row, in describing the circumstances in which the introductory rate could be revoked. (See Sample G–10(C) in the disclosure labeled ''Loss of Introductory APR'' directly beneath the table for additional guidance on the level of detail in which to describe the circumstances in which an introductory rate could be revoked.) A card issuer will be deemed to meet the standard to clearly and conspicuously disclose the information required by § 1026.60(b)(1)(iv)(B) if the issuer uses the format shown in Sample G–10(C) to disclose this information.

iii. *Introductory rates—limitations on revocation.* Issuers that are disclosing an introductory rate are prohibited by § 1026.55 from increasing or revoking the introductory rate before it expires unless the consumer fails to make a required minimum periodic payment within 60 days after the due date for the payment. In making the required disclosure pursuant to § 1026.60(b)(1)(iv)(B), issuers should describe this circumstance directly beneath the table as ''make a late payment.''

iv. *Employee preferential rates.* An issuer is required to disclose directly beneath the table the circumstances under which an employee preferential rate may be revoked, and the rate that will apply after the revocation. In describing the rate that will apply after revocation of the employee preferential rate, if the rate that will apply after revocation of the employee preferential rate is already disclosed in the table, the issuer is not required to repeat the rate, but may refer to that rate in a clear and conspicuous manner. For example, if the rate that will apply after revocation of an employee preferential rate is the standard rate that applies to that type of transaction (such as a purchase or balance transfer transaction), and the standard rates are labeled in the table as ''standard APRs,'' the issuer may refer to the ''standard APR'' when describing the rate that will apply after revocation of an employee preferential rate. The description of the circumstances in which an employee preferential rate could be revoked should be brief. For example, if an issuer may increase an employee preferential rate based upon termination of the employee's employment relationship with the issuer or a third party, issuers may describe this circumstance as ''if your employment with [issuer or third party] ends.''

6. *Rates that depend on consumer's creditworthiness.* i. *In general.* The card issuer, at its option, may disclose the possible rates that may apply as either specific rates, or a range of rates. For example, if there are three possible rates that may apply (9.99, 12.99 or 17.99 percent), an issuer may disclose specific rates (9.99, 12.99 or 17.99 percent) or a range of rates (9.99 to 17.99 percent). The card issuer may not disclose only the lowest, highest or median rate that could apply. (See Samples G–10(B) and G–10(C) for guidance on how to disclose a range of rates.)

ii. *Penalty rates.* If the rate is a penalty rate, as described in § 1026.60(b)(1)(iv), the card issuer at its option may disclose the highest rate that could apply, instead of disclosing the specific rates or the range of rates that could apply. For example, if the penalty rate could be up to 28.99 percent, but the issuer may impose a penalty rate that is less than that rate depending on factors at the time the penalty rate is imposed, the issuer may disclose the penalty rate as ''up to'' 28.99 percent. The issuer also must include a statement that the penalty rate for which the consumer may qualify will depend on the consumer's creditworthiness, and other factors if applicable.

iii. *Other factors.* Section 1026.60(b)(1)(v) applies even if other factors are used in combination with a consumer's creditworthiness to determine the rate for which a consumer may qualify at account opening. For example, § 1026.60(b)(1)(v) would apply if the issuer considers the type of purchase the consumer is making at the time the consumer opens the account, in combination with the consumer's creditworthiness, to determine the rate for which the consumer may qualify at account opening. If other factors are considered, the issuer should amend the statement about creditworthiness, to indicate that the rate for which the consumer may qualify at account opening will depend on the consumer's creditworthiness and other factors. Nonetheless, § 1026.60(b)(1)(v) does not apply if a consumer's creditworthiness is not one of the factors that will determine the rate for which the consumer may qualify at account opening (for example, if the rate is based solely on the type of purchase that the consumer is making at the time the consumer opens the account, or is based solely on whether the consumer has other banking relationships with the card issuer).

7. *Rate based on another rate on the account.* In some cases, one rate may be based on another rate on the account. For example, assume that a penalty rate as described in § 1026.60(b)(1)(iv)(A) is determined by adding 5 percentage points to the current purchase rate, which is 10 percent. In this example, the card issuer in disclosing the penalty rate must disclose 15 percent as the current penalty rate. If the purchase rate is a variable rate, then the penalty rate also is a variable rate. In that case, the card issuer also must disclose the fact that the penalty rate may vary and how the rate is determined, such as ''This APR may vary with the market based on the Prime Rate.'' In describing the penalty rate, the issuer shall not disclose in the table the amount of the margin or spread added to the current purchase rate to determine the penalty rate, such as describing that the penalty rate is determined by adding 5

percentage points to the purchase rate. (See § 1026.60(b)(1)(i) and comment 60(b)(1)–2 for further guidance on describing a variable rate.)

8. *Rates.* The only rates that shall be disclosed in the table are annual percentage rates determined under § 1026.14(b). Periodic rates shall not be disclosed in the table.

9. *Deferred interest or similar transactions.* An issuer offering a deferred interest or similar plan, such as a promotional program that provides that a consumer will not be obligated to pay interest that accrues on a balance if that balance is paid in full prior to the expiration of a specified period of time, may not disclose a 0% rate as the rate applicable to deferred interest or similar transactions if there are any circumstances under which the consumer will be obligated for interest on such transactions for the deferred interest or similar period.

60(b)(2) Fees for Issuance or Availability

1. *Membership fees.* Membership fees for opening an account must be disclosed under this paragraph. A membership fee to join an organization that provides a credit or charge card as a privilege of membership must be disclosed only if the card is issued automatically upon membership. Such a fee shall not be disclosed in the table if membership results merely in eligibility to apply for an account.

2. *Enhancements.* Fees for optional services in addition to basic membership privileges in a credit or charge card account (for example, travel insurance or card-registration services) shall not be disclosed in the table if the basic account may be opened without paying such fees. Issuing a card to each primary cardholder (not authorized users) is considered a basic membership privilege and fees for additional cards, beyond the first card on the account, must be disclosed as a fee for issuance or availability. Thus, a fee to obtain an additional card on the account beyond the first card (so that each cardholder would have his or her own card) must be disclosed in the table as a fee for issuance or availability under § 1026.60(b)(2). This fee must be disclosed even if the fee is optional; that is, if the fee is charged only if the cardholder requests one or more additional cards. (See the available credit disclosure in § 1026.60(b)(14).)

3. *One-time fees.* Disclosure of non-periodic fees is limited to fees related to opening the account, such as one-time membership or participation fees, or an application fee that is excludable from the finance charge under § 1026.4(c)(1). The following are examples of fees that shall not be disclosed in the table:

i. Fees for reissuing a lost or stolen card.

ii. Statement reproduction fees.

4. *Waived or reduced fees.* If fees required to be disclosed are waived or reduced for a limited time, the introductory fees or the fact of fee waivers may be disclosed in the table in addition to the required fees if the card issuer also discloses how long the reduced fees or waivers will remain in effect in accordance with the requirements of §§ 1026.9(c)(2)(v)(B) and 1026.55(b)(1).

5. *Periodic fees and one-time fees.* A card issuer disclosing a periodic fee must disclose the amount of the fee, how frequently it will be imposed, and the annualized amount of the fee. A card issuer disclosing a non-periodic fee must disclose that the fee is a one-time fee. (See Sample G–10(C) for guidance on how to meet these requirements.)

60(b)(3) Fixed Finance Charge; Minimum Interest Charge

1. *Example of brief statement.* See Samples G–10(B) and G–10(C) for guidance on how to provide a brief description of a minimum interest charge.

2. *Adjustment of $1.00 threshold amount.* Consistent with § 1026.60(b)(3), the Bureau will publish adjustments to the $1.00 threshold amount, as appropriate.

60(b)(4) Transaction Charges

1. *Charges imposed by person other than card issuer.* Charges imposed by a third party, such as a seller of goods, shall not be disclosed in the table under this section; the third party would be responsible for disclosing the charge under § 1026.9(d)(1).

2. *Foreign transaction fees.* A transaction charge imposed by the card issuer for the use of the card for purchases includes any fee imposed by the issuer for purchases in a foreign currency or that take place outside the United States or with a foreign merchant. (See comment 4(a)–4 for guidance on when a foreign transaction fee is considered charged by the card issuer.) If an issuer charges the same foreign transaction fee for purchases and cash advances in a foreign currency, or that take place outside the United States or with a foreign merchant, the issuer may disclose this foreign transaction fee as shown in Samples G–10(B) and G–10(C). Otherwise, the issuer must revise the foreign transaction fee language shown in Samples G–10(B) and G–10(C) to disclose clearly and conspicuously the amount of the foreign transaction fee that applies to purchases and the amount of the foreign transaction fee that applies to cash advances.

60(b)(5) Grace Period

1. *How grace period disclosure is made.* The card issuer must state any conditions on the applicability of the grace period. An issuer, however, may not disclose under § 1026.60(b)(5) the limitations on the imposition of finance charges as a result of a loss of a grace period in § 1026.54, or the impact of payment allocation on whether interest is charged on purchases as a result of a loss of a grace period. Some issuers may offer a grace period on all purchases under which interest will not be charged on purchases if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement for one or more billing cycles. In these circumstances, § 1026.60(b)(5) requires that the issuer disclose the grace period and the conditions for its applicability using the following language, or substantially similar language, as applicable: ''Your due date is [at least] __ days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month.'' However, other issuers may offer a grace period on all purchases under which interest may be charged on purchases even if the consumer pays the outstanding balance shown on a periodic statement in full by the due date shown on that statement each billing cycle. In these circumstances, § 1026.60(b)(5) requires the issuer to amend the above disclosure language to describe accurately the conditions on the applicability of the grace period.

2. *No grace period.* The issuer may use the following language to describe that no grace period on any purchases is offered, as applicable: ''We will begin charging interest on purchases on the transaction date.''

3. *Grace period on some purchases.* If the issuer provides a grace period on some types of purchases but no grace period on others, the issuer may combine and revise the language in comments 60(b)(5)–1 and –2 as appropriate to describe to which types of purchases a grace period applies and to which types of purchases no grace period is offered.

60(b)(6) Balance Computation Method

1. *Form of disclosure.* In cases where the card issuer uses a balance computation method that is identified by name in § 1026.60(g), the card issuer must disclose below the table only the name of the method. In cases where the card issuer uses a balance computation method that is not identified by name in § 1026.60(g), the disclosure below the table must clearly explain the method in as much detail as set forth in the descriptions of balance methods in § 1026.60(g). The explanation need not be as detailed as that required for the disclosures under § 1026.6(b)(4)(i)(D).

2. *Determining the method.* In determining which balance computation method to disclose for purchases, the card issuer must assume that a purchase balance will exist at the end of any grace period. Thus, for example, if the average daily balance method will include new purchases only if purchase balances are not paid within the grace period, the card issuer would disclose the name of the average daily balance method that includes new purchases. The card issuer must not assume the existence of a purchase balance, however, in making other disclosures under § 1026.60(b).

60(b)(7) Statement on Charge Card Payments

1. *Applicability and content.* The disclosure that charges are payable upon receipt of the periodic statement is applicable only to charge card accounts. In making this disclosure, the card issuer may make such modifications as are necessary to more accurately reflect the circumstances of repayment under the account. For example, the disclosure might read, ''Charges are due and payable upon receipt of the periodic statement and must be paid no later than 15 days after receipt of such statement.''

60(b)(8) Cash Advance Fee

1. *Content.* See Samples G–10(B) and G–10(C) for guidance on how to disclose clearly and conspicuously the cash advance fee.

2. *Foreign cash advances.* Cash advance fees required to be disclosed under § 1026.60(b)(8) include any charge imposed by the card issuer for cash advances in a foreign currency or that take place outside the United States or with a foreign merchant.

(See comment 4(a)–4 for guidance on when a foreign transaction fee is considered charged by the card issuer.) If an issuer charges the same foreign transaction fee for purchases and cash advances in a foreign currency or that take place outside the United States or with a foreign merchant, the issuer may disclose this foreign transaction fee as shown in Samples G–10(B) and (C). Otherwise, the issuer must revise the foreign transaction fee language shown in Samples G–10(B) and (C) to disclose clearly and conspicuously the amount of the foreign transaction fee that applies to purchases and the amount of the foreign transaction fee that applies to cash advances.

3. *ATM fees.* An issuer is not required to disclose pursuant to § 1026.60(b)(8) any charges imposed on a cardholder by an institution other than the card issuer for the use of the other institution's ATM in a shared or interchange system.

60(b)(9) Late Payment Fee

1. *Applicability.* The disclosure of the fee for a late payment includes only those fees that will be imposed for actual, unanticipated late payments. (See the commentary to § 1026.4(c)(2) for additional guidance on late payment fees. See Samples G–10(B) and G–10(C) for guidance on how to disclose clearly and conspicuously the late payment fee.)

60(b)(10) Over-the-Limit Fee

1. *Applicability.* The disclosure of fees for exceeding a credit limit does not include fees for other types of default or for services related to exceeding the limit. For example, no disclosure is required of fees for reinstating credit privileges or fees for the dishonor of checks on an account that, if paid, would cause the credit limit to be exceeded. (See Samples G–10(B) and G–10(C) for guidance on how to disclose clearly and conspicuously the over-the-limit fee.)

60(b)(13) Required Insurance, Debt Cancellation or Debt Suspension Coverage

1. *Content.* See Sample G–10(B) for guidance on how to comply with the requirements in § 1026.60(b)(13).

60(b)(14) Available Credit

1. *Calculating available credit.* If the 15 percent threshold test is met, the issuer must disclose the available credit excluding optional fees, and the available credit including optional fees. In calculating the available credit to disclose in the table, the issuer must consider all fees for the issuance or availability of credit described in § 1026.60(b)(2), and any security deposit, that will be imposed and charged to the account when the account is opened, such as one-time issuance and set-up fees. For example, in calculating the available credit, issuers must consider the first year's annual fee and the first month's maintenance fee (as applicable) if they are charged to the account on the first billing statement. In calculating the amount of the available credit including optional fees, if optional fees could be charged multiple times, the issuer shall assume that the optional fee is only imposed once. For example, if an issuer charges a fee for each additional card issued on the account, the issuer in calculating the amount of the available credit including optional fees may assume that the cardholder requests only one additional card. In disclosing the available credit, the issuer shall round down the available credit amount to the nearest whole dollar.

2. *Content.* See Sample G–10(C) for guidance on how to provide the disclosure required by § 1026.60(b)(14) clearly and conspicuously.

60(b)(15) Web Site Reference

1. *Content.* See Samples G–10(B) and G–10(C) for guidance on disclosing a reference to the Web site established by the Bureau and a statement that consumers may obtain on the Web site information about shopping for and using credit card accounts.

60(c) Direct Mail and Electronic Applications and Solicitations

1. *Mailed publications.* Applications or solicitations contained in generally available publications mailed to consumers (such as subscription magazines) are subject to the requirements applicable to *take-ones* in § 1026.60(e), rather than the direct mail requirements of § 1026.60(c). However, if a primary purpose of a card issuer's mailing is to offer credit or charge card accounts—for example, where a card issuer ''prescreens'' a list of potential cardholders using credit criteria, and then mails to the targeted group its catalog containing an application or a solicitation for a card account—the direct mail rules apply. In addition, a card issuer may use a single application form as a *take-one* (in racks in public locations, for example) and for direct mailings, if the card issuer complies with the requirements of § 1026.60(c) even when the form is used as a *take-one*—that is, by presenting the required § 1026.60 disclosures in a tabular format. When used in a direct mailing, the credit term disclosures must be accurate as of the mailing date whether or not the § 1026.60(e)(1)(ii) and (e)(1)(iii) disclosures are included; when used in a *take-one,* the disclosures must be accurate for as long as the *take-one* forms remain available to the public if the § 1026.60(e)(1)(ii) and (e)(1)(iii) disclosures are omitted. (If those disclosures are included in the take-one, the credit term disclosures need only be accurate as of the printing date.)

60(d) Telephone Applications and Solicitations

1. *Coverage.* i. This paragraph applies if:

A. A telephone conversation between a card issuer and consumer may result in the issuance of a card as a consequence of an issuer-initiated offer to open an account for which the issuer does not require any application (that is, a *prescreened* telephone solicitation).

B. The card issuer initiates the contact and at the same time takes application information over the telephone.

ii. This paragraph does not apply to:

A. Telephone applications initiated by the consumer.

B. Situations where no card will be issued—because, for example, the consumer indicates that he or she does not want the card, or the card issuer decides either during the telephone conversation or later not to issue the card.

2. *Right to reject the plan.* The right to reject the plan referenced in this paragraph is the same as the right to reject the plan described in § 1026.5(b)(1)(iv). If an issuer substitutes the account-opening summary table described in § 1026.6(b)(1) in lieu of the disclosures specified in § 1026.60(d)(2)(ii), the disclosure specified in § 1026.60(d)(2)(ii)(B) must appear in the table, if the issuer is required to do so pursuant to § 1026.6(b)(2)(xiii). Otherwise, the disclosure specified in § 1026.60(d)(2)(ii)(B) may appear either in or outside the table containing the required credit disclosures.

3. *Substituting account-opening table for alternative written disclosures.* An issuer may substitute the account-opening summary table described in § 1026.6(b)(1) in lieu of the disclosures specified in § 1026.60(d)(2)(ii).

60(e) Applications and Solicitations Made Available to General Public

1. *Coverage.* Applications and solicitations made available to the general public include what are commonly referred to as *take-one* applications typically found at counters in banks and retail establishments, as well as applications contained in catalogs, magazines and other generally available publications. In the case of credit unions, this paragraph applies to applications and solicitations to open card accounts made available to those in the general field of membership.

2. *In-person applications and solicitations.* In-person applications and solicitations initiated by a card issuer are subject to § 1026.60(f), not § 1026.60(e). (*See* § 1026.60(f) and accompanying commentary for rules relating to in-person applications and solicitations.)

3. *Toll-free telephone number.* If a card issuer, in complying with any of the disclosure options of § 1026.60(e), provides a telephone number for consumers to call to obtain credit information, the number must be toll-free for nonlocal calls made from an area code other than the one used in the card issuer's dialing area. Alternatively, a card issuer may provide any telephone number that allows a consumer to call for information and reverse the telephone charges.

60(e)(1) Disclosure of Required Credit Information

1. *Date of printing.* Disclosure of the month and year fulfills the requirement to disclose the date an application was printed.

2. *Form of disclosures.* The disclosures specified in § 1026.60(e)(1)(ii) and (e)(1)(iii) may appear either in or outside the table containing the required credit disclosures.

60(e)(2) No Disclosure of Credit Information

1. *When disclosure option available.* A card issuer may use this option only if the issuer does not include on or with the application or solicitation any statement that refers to the credit disclosures required by § 1026.60(b). Statements such as *no annual fee, low interest rate, favorable rates,* and *low costs* are deemed to refer to the required credit disclosures and, therefore, may not be included on or with the solicitation or application, if the card issuer chooses to use this option.

60(e)(3) Prompt Response to Requests for Information

1. *Prompt disclosure.* Information is promptly disclosed if it is given within 30 days of a consumer's request for information but in no event later than delivery of the credit or charge card.

2. *Information disclosed.* When a consumer requests credit information, card issuers need not provide all the required credit disclosures in all instances. For example, if disclosures have been provided in accordance with § 1026.60(e)(1) and a consumer calls or writes a card issuer to obtain information about changes in the disclosures, the issuer need only provide the items of information that have changed from those previously disclosed on or with the application or solicitation. If a consumer requests information about particular items, the card issuer need only provide the requested information. If, however, the card issuer has made disclosures in accordance with the option in § 1026.60(e)(2) and a consumer calls or writes the card issuer requesting information about costs, all the required disclosure information must be given.

3. *Manner of response.* A card issuer's response to a consumer's request for credit information may be provided orally or in writing, regardless of the manner in which the consumer's request is received by the issuer. Furthermore, the card issuer must provide the information listed in § 1026.60(e)(1). Information provided in writing need not be in a tabular format.

60(f) In-Person Applications and Solicitations

1. *Coverage.* i. This paragraph applies if:

A. An in-person conversation between a card issuer and a consumer may result in the issuance of a card as a consequence of an issuer-initiated offer to open an account for which the issuer does not require any application (that is, a *preapproved* in-person solicitation).

B. The card issuer initiates the contact and at the same time takes application information in person. For example, the following are covered:

1. A consumer applies in person for a car loan at a financial institution and the loan officer invites the consumer to apply for a credit or charge card account; the consumer accepts the invitation and submits an application.

2. An employee of a retail establishment, in the course of processing a sales transaction using a bank credit card, asks a customer if he or she would like to apply for the retailer's credit or charge card; the customer responds affirmatively and submits an application.

ii. This paragraph does not apply to:

A. In-person applications initiated by the consumer.

B. Situations where no card will be issued—because, for example, the consumer indicates that he or she does not want the card, or the card issuer decides during the in-person conversation not to issue the card.

Appendix A—Effect on State Laws

1. *Who may make requests.* Appendix A sets forth the procedures for preemption determinations. As discussed in § 1026.28, which contains the standards for preemption, a request for a determination of whether a state law is inconsistent with the requirements of chapters 1, 2, or 3 may be made by creditors, states, or any interested party. However, only states may request and receive determinations in connection with the fair credit billing provisions of chapter 4.

Appendix B—State Exemptions

1. *General.* Appendix B sets forth the procedures for exemption applications. The exemption standards are found in § 1026.29 and are discussed in the commentary to that section.

Appendix C—Issuance of Official Interpretations

1. *General.* This commentary is the vehicle for providing official interpretations. Individual interpretations generally will not be issued separately from the commentary.

Appendix D—Multiple-Advance Construction Loans

1. *General rule.* Appendix D provides a special procedure that creditors may use, at their option, to estimate and disclose the terms of multiple-advance construction loans when the amounts or timing of advances is unknown at consummation of the transaction. This appendix reflects the approach taken in § 1026.17(c)(6)(ii), which permits creditors to provide separate or combined disclosures for the construction period and for the permanent financing, if any; *i.e.,* the construction phase and the permanent phase may be treated as one transaction or more than one transaction. Appendix D may also be used in multiple-advance transactions other than construction loans, when the amounts or timing of advances is unknown at consummation.

2. *Variable-rate multiple-advance loans.* The hypothetical disclosure required in variable-rate transactions by § 1026.18(f)(1)(iv) is not required for multiple-advance loans disclosed pursuant to Appendix D, part I.

3. *Calculation of the total of payments.* When disclosures are made pursuant to Appendix D, the total of payments may reflect either the sum of the payments or the sum of the amount financed and the finance charge.

4. *Annual percentage rate.* Appendix D does not require the use of Volume I of the Bureau's Annual Percentage Rate Tables for calculation of the annual percentage rate. Creditors utilizing Appendix D in making calculations and disclosures may use other computation tools to determine the estimated annual percentage rate, based on the finance charge and payment schedule obtained by use of the appendix.

5. *Interest reserves.* In a multiple-advance construction loan, a creditor may establish an ''interest reserve'' to ensure that interest is paid as it accrues by designating a portion of the loan to be used for paying the interest that accrues on the loan. An interest reserve is not treated as a prepaid finance charge, whether the interest reserve is the same as or different from the estimated interest figure calculated under Appendix D.

i. If a creditor permits a consumer to make interest payments as they become due, the interest reserve should be disregarded in the disclosures and calculations under Appendix D.

ii. If a creditor requires the establishment of an interest reserve and automatically deducts interest payments from the reserve amount rather than allow the consumer to make interest payments as they become due, the fact that interest will accrue on those interest payments as well as the other loan proceeds must be reflected in the calculations and disclosures. To reflect the effects of such compounding, a creditor should first calculate interest on the commitment amount (exclusive of the interest reserve) and then add the figure obtained by assuming that one-half of that interest is outstanding at the contract interest rate for the entire construction period. For example, using the example shown under paragraph A, part I of Appendix D, the estimated interest would be $1,117.68 ($1093.75 plus an additional $23.93 calculated by assuming half of $1093.75 is outstanding at the contract interest rate for the entire construction period), and the estimated annual percentage rate would be 21.18%.

6. *Relation to § 1026.18(s).* A creditor must disclose an interest rate and payment summary table for transactions secured by real property or a dwelling, pursuant to § 1026.18(s), instead of the general payment schedule required by § 1026.18(g). Accordingly, home construction loans that are secured by real property or a dwelling are subject to § 1026.18(s) and not § 1026.18(g). Under § 1026.176(c)(6)(ii), when a multiple-advance construction loan may be permanently financed by the same creditor, the construction phase and the permanent phase may be treated as either one transaction or more than one transaction.

i. If a creditor uses Appendix D and elects pursuant to § 1026.17(c)(6)(ii) to disclose the construction and permanent phases as separate transactions, the construction phase must be disclosed according to the rules in § 1026.18(s). Under § 1026.18(s), the creditor must disclose the applicable interest rates and corresponding periodic payments during the construction phase in an interest rate and payment summary table. The provision in Appendix D, Part I.A.3, which allows the creditor to omit the number and amounts of any interest payments ''in disclosing the payment schedule under § 1026.18(g)'' does not apply because the transaction is governed by § 1026.18(s) rather than § 1026.18(g). Also, because the construction phase is being disclosed as a separate transaction and its terms do not repay all principal, the creditor must disclose a balloon payment, pursuant to § 1026.18(s)(5).

ii. On the other hand, if the creditor elects to disclose the construction and permanent phases as a single transaction, the construction phase must be disclosed pursuant to Appendix D, Part II.C, which provides that the creditor shall disclose the repayment schedule without reflecting the number or amounts of payments of interest only that are made during the construction phase. Appendix D also provides, however,

that creditors must disclose (outside of the table) the fact that interest payments must be made and the timing of such payments. The rate and payment summary table disclosed under § 1026.18(s) must reflect only the permanent phase of the transaction. Therefore, in determining the rates and payments that must be disclosed in the columns of the table, creditors should apply the requirements of § 1026.18(s) to the permanent phase only. For example, under § 1026.18(s)(2)(i)(A) or § 1026.18(s)(2)(i)(B)(*1*), as applicable, the creditor should disclose the interest rate corresponding to the first installment due under the permanent phase and not any rate applicable during the construction phase.

Appendix F—Optional Annual Percentage Rate Computations for Creditors Offering Open-End Credit Plans Secured by a Consumer's Dwelling

1. *Daily rate with specific transaction charge.* If the finance charge results from a charge relating to a specific transaction and the application of a daily periodic rate, see comment 14(c)(3)–2 for guidance on an appropriate calculation method.

Appendices G and H—Open-End and Closed-End Model Forms and Clauses

1. *Permissible changes.* Although use of the model forms and clauses is not required, creditors using them properly will be deemed to be in compliance with the regulation with regard to those disclosures. Creditors may make certain changes in the format or content of the forms and clauses and may delete any disclosures that are inapplicable to a transaction or a plan without losing the Act's protection from liability, except formatting changes may not be made to model forms and samples in H–18, H–19, H–20, H–21, H–22, H–23, G–2(A), G–3(A), G–4(A), G–10(A)–(E), G–17(A)–(D), G–18(A) (except as permitted pursuant to § 1026.7(b)(2)), G–18(B)–(C), G–19, G–20, and G–21, or to the model clauses in H–4(E), H–4(F), H–4(G), and H–4(H). Creditors may modify the heading of the second column shown in Model Clause H–4(H) to read ''first adjustment'' or ''first increase,'' as applicable, pursuant to § 1026.18(s)(2)(i)(C). The rearrangement of the model forms and clauses may not be so extensive as to affect the substance, clarity, or meaningful sequence of the forms and clauses. Creditors making revisions with that effect will lose their protection from civil liability. Except as otherwise specifically required, acceptable changes include, for example:

i. Using the first person, instead of the second person, in referring to the borrower.

ii. Using ''borrower'' and ''creditor'' instead of pronouns.

iii. Rearranging the sequences of the disclosures.

iv. Not using bold type for headings.

v. Incorporating certain state ''plain English'' requirements.

vi. Deleting inapplicable disclosures by whiting out, blocking out, filling in ''N/A'' (not applicable) or ''0,'' crossing out, leaving blanks, checking a box for applicable items, or circling applicable items. (This should permit use of multipurpose standard forms.)

vii. Using a vertical, rather than a horizontal, format for the boxes in the closed-end disclosures.

2. *Debt-cancellation coverage.* This part does not authorize creditors to characterize debt-cancellation fees as insurance premiums for purposes of this part. Creditors may provide a disclosure that refers to debt cancellation or debt suspension coverage whether or not the coverage is considered insurance. Creditors may use the model credit insurance disclosures only if the debt cancellation coverage constitutes insurance under state law.

Appendix G—Open-End Model Forms and Clauses

1. *Models G–1 and G–1(A).* The model disclosures in G–1 and G–1(A) (different balance computation methods) may be used in both the account-opening disclosures under § 1026.6 and the periodic disclosures under § 1026.7. As is clear from the models given, ''shorthand'' descriptions of the balance computation methods are not sufficient, except where § 1026.7(b)(5) applies. For creditors using model G–1, the phrase ''a portion of'' the finance charge should be included if the total finance charge includes other amounts, such as transaction charges, that are not due to the application of a periodic rate. If unpaid interest or finance charges are subtracted in calculating the balance, that fact must be stated so that the disclosure of the computation method is accurate. Only model G–1(b) contains a final sentence appearing in brackets, which reflects the total dollar amount of payments and credits received during the billing cycle. The other models do not contain this language because they reflect plans in which payments and credits received during the billing cycle are subtracted. If this is not the case, however, the language relating to payments and credits should be changed, and the creditor should add either the disclosure of the dollar amount as in model G–1(b) or an indication of which credits (disclosed elsewhere on the periodic statement) will not be deducted in determining the balance. (Such an indication may also substitute for the bracketed sentence in model G–1(b).) (See the commentary to § 1026.7(a)(5) and (b)(5).) For open-end plans subject to the requirements of § 1026.40, creditors may, at their option, use the clauses in G–1 or G–1(A).

2. *Models G–2 and G–2(A).* These models contain the notice of liability for unauthorized use of a credit card. For home-equity plans subject to the requirements of § 1026.40, at the creditor's option, a creditor either may use G–2 or G–2(A). For open-end plans not subject to the requirements of § 1026.40, creditors properly use G–2(A).

3. *Models G–3, G–3(A), G–4 and G–4(A).*

i. These set out models for the long-form billing-error rights statement (for use with the account-opening disclosures and as an annual disclosure or, at the creditor's option, with each periodic statement) and the alternative billing-error rights statement (for use with each periodic statement), respectively. For home-equity plans subject to the requirements of § 1026.40, at the creditor's option, a creditor either may use G–3 or G–3(A), and for creditors that use the short form, G–4 or G–4(A). For open-end (not home-secured) plans that are not subject to the requirements of § 1026.40, creditors properly use G–3(A) and G–4(A). Creditors must provide the billing-error rights statements in a form substantially similar to the models in order to comply with the regulation. The model billing-rights statements may be modified in any of the ways set forth in the first paragraph to the commentary on Appendices G and H. The models may, furthermore, be modified by deleting inapplicable information, such as:

A. The paragraph concerning stopping a debit in relation to a disputed amount, if the creditor does not have the ability to debit automatically the consumer's savings or checking account for payment.

B. The rights stated in the special rule for credit card purchases and any limitations on those rights.

ii. The model billing rights statements also contain optional language that creditors may use. For example, the creditor may:

A. Include a statement to the effect that notice of a billing error must be submitted on something other than the payment ticket or other material accompanying the periodic disclosures.

B. Insert its address or refer to the address that appears elsewhere on the bill.

C. Include instructions for consumers, at the consumer's option, to communicate with the creditor electronically or in writing.

iii. Additional information may be included on the statements as long as it does not detract from the required disclosures. For instance, information concerning the reporting of errors in connection with a checking account may be included on a combined statement as long as the disclosures required by the regulation remain clear and conspicuous.

4. *Models G–5 through G–9.* These models set out notices of the right to rescind that would be used at different times in an open-end plan. The last paragraph of each of the rescission model forms contains a blank for the date by which the consumer's notice of cancellation must be sent or delivered. A parenthetical is included to address the situation in which the consumer's right to rescind the transaction exists beyond 3 business days following the date of the transaction, for example, when the notice or material disclosures are delivered late or when the date of the transaction in paragraph 1 of the notice is an estimate. The language of the parenthetical is not optional. See the commentary to § 1026.2(a)(25) regarding the specificity of the security interest disclosure for model form G–7.

5. *Model G–10(A), samples G–10(B) and G–10(C), model G–10(D), sample G–10(E), model G–17(A), and samples G–17(B), 17(C) and 17(D).* i. Model G–10(A) and Samples G–10(B) and G–10(C) illustrate, in the tabular format, the disclosures required under § 1026.60 for applications and solicitations for credit cards other than charge cards. Model G–10(D) and Sample G–10(E) illustrate the tabular format disclosure for charge card applications and solicitations

and reflect the disclosures in the table. Model G–17(A) and Samples G–17(B), G–17(C) and G–17(D) illustrate, in the tabular format, the disclosures required under § 1026.6(b)(2) for account-opening disclosures.

ii. Except as otherwise permitted, disclosures must be substantially similar in sequence and format to Models G–10(A), G–10(D) and G–17(A). While proper use of the model forms will be deemed in compliance with the regulation, card issuers and other creditors offering open-end (not home-secured) plans are permitted to disclose the annual percentage rates for purchases, cash advances, or balance transfers in the same row in the table for any transaction types for which the issuer or creditor charges the same annual percentage rate. Similarly, card issuer and other creditors offering open-end (not home-secured) plans are permitted to disclose fees of the same amount in the same row if the fees are in the same category. Fees in different categories may not be disclosed in the same row. For example, a transaction fee and a penalty fee that are of the same amount may not be disclosed in the same row. Card issuers and other creditors offering open-end (not home-secured) plans are also permitted to use headings other than those in the forms if they are clear and concise and are substantially similar to the headings contained in model forms, with the following exceptions. The heading ''penalty APR'' must be used when describing rates that may increase due to default or delinquency or as a penalty, and in relation to required insurance, or debt cancellation or suspension coverage, the term ''required'' and the name of the product must be used. (See also §§ 1026.60(b)(5) and 1026.6(b)(2)(v) for guidance on headings that must be used to describe the grace period, or lack of grace period, in the disclosures required under § 1026.60 for applications and solicitations for credit cards other than charge cards, and the disclosures required under § 1026.6(b)(2) for account-opening disclosures, respectively.)

iii. Models G–10(A) and G–17(A) contain two alternative headings (''Minimum Interest Charge'' and ''Minimum Charge'') for disclosing a minimum interest or fixed finance charge under §§ 1026.60(b)(3) and 1026.6(b)(2)(iii). If a creditor imposes a minimum charge in lieu of interest in those months where a consumer would otherwise incur an interest charge but that interest charge is less than the minimum charge, the creditor should disclose this charge under the heading ''Minimum Interest Charge'' or a substantially similar heading. Other minimum or fixed finance charges should be disclosed under the heading ''Minimum Charge'' or a substantially similar heading.

iv. Models G–10(A), G–10(D) and G–17(A) contain two alternative headings (''Annual Fees'' and ''Set-up and Maintenance Fees'') for disclosing fees for issuance or availability of credit under § 1026.60(b)(2) or § 1026.6(b)(2)(ii). If the only fee for issuance or availability of credit disclosed under § 1026.60(b)(2) or § 1026.6(b)(2)(ii) is an annual fee, a creditor should use the heading ''Annual Fee'' or a substantially similar heading to disclose this fee. If a creditor imposes fees for issuance or availability of credit disclosed under § 1026.60(b)(2) or § 1026.6(b)(2)(ii) other than, or in addition to, an annual fee, the creditor should use the heading ''Set-up and Maintenance Fees'' or a substantially similar heading to disclose fees for issuance or availability of credit, including the annual fee.

v. Although creditors are not required to use a certain paper size in disclosing the §§ 1026.60 or 1026.6(b)(1) and (2) disclosures, samples G–10(B), G–10(C), G–17(B), G–17(C) and G–17(D) are designed to be printed on an 8½ x 14 inch sheet of paper. A creditor may use a smaller sheet of paper, such as 8½ x 11 inch sheet of paper. If the table is not provided on a single side of a sheet of paper, the creditor must include a reference or references, such as ''SEE BACK OF PAGE for more important information about your account.'' at the bottom of each page indicating that the table continues onto an additional page or pages. A creditor that splits the table onto two or more pages must disclose the table on consecutive pages and may not include any intervening information between portions of the table. In addition, the following formatting techniques were used in presenting the information in the sample tables to ensure that the information is readable:

A. A readable font style and font size (10-point Arial font style, except for the purchase annual percentage rate which is shown in 16-point type).

B. Sufficient spacing between lines of the text.

C. Adequate spacing between paragraphs when several pieces of information were included in the same row of the table, as appropriate. For example, in the samples in the row of the tables with the heading ''APR for Balance Transfers,'' the forms disclose two components: The applicable balance transfer rate and a cross reference to the balance transfer fee. The samples show these two components on separate lines with adequate space between each component. On the other hand, in the samples, in the disclosure of the late payment fee, the forms disclose two components: The late payment fee, and the cross reference to the penalty rate. Because the disclosure of both these components is short, these components are disclosed on the same line in the tables.

D. Standard spacing between words and characters. In other words, the text was not compressed to appear smaller than 10-point type.

E. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text.

F. Sufficient contrast between the text and the background. Generally, black text was used on white paper.

vi. While the Bureau is not requiring issuers to use the above formatting techniques in presenting information in the table (except for the 10-point and 16-point font requirement), the Bureau encourages issuers to consider these techniques when deciding how to disclose information in the table, to ensure that the information is presented in a readable format.

vii. Creditors are allowed to use color, shading and similar graphic techniques with respect to the table, so long as the table remains substantially similar to the model and sample forms in Appendix G.

viii. Models G–10(A) and G–17(A) contain rows in the table with the prescribed language, ''For Credit Card Tips from the Consumer Financial Protection Bureau'' and calling for a ''[Reference to the Bureau's Web site]'' next to that language. Until January 1, 2013, creditors may substitute ''For Credit Card Tips from the Federal Reserve Board'' for these two model forms' prescribed language and may provide a reference to the Federal Reserve Board's Web site rather than the Bureau's Web site.

6. *Model G–11.* Model G–11 contains clauses that illustrate the general disclosures required under § 1026.60(e) in applications and solicitations made available to the general public.

7. *Models G–13(A) and G–13(B).* These model forms illustrate the disclosures required under § 1026.9(f) when the card issuer changes the entity providing insurance on a credit card account. Model G–13(A) contains the items set forth in § 1026.9(f)(3) as examples of significant terms of coverage that may be affected by the change in insurance provider. The card issuer may either list all of these potential changes in coverage and place a check mark by the applicable changes, or list only the actual changes in coverage. Under either approach, the card issuer must either explain the changes or refer to an accompanying copy of the policy or group certificate for details of the new terms of coverage. Model G–13(A) also illustrates the permissible combination of the two notices required by § 1026.9(f)—the notice required for a planned change in provider and the notice required once a change has occurred. This form may be modified for use in providing only the disclosures required before the change if the card issuer chooses to send two separate notices. Thus, for example, the references to the attached policy or certificate would not be required in a separate notice prior to a change in the insurance provider since the policy or certificate need not be provided at that time. Model G–13(B) illustrates the disclosures required under § 1026.9(f)(2) when the insurance provider is changed.

8. *Samples G–18(A)–(D).* For home-equity plans subject to the requirements of § 1026.40, if a creditor chooses to comply with the requirements in § 1026.7(b), the creditor may use Samples G–18(A) through G–18(D) to comply with these requirements, as applicable.

9. *Samples G–18(D).* Sample G–18(D) illustrates how credit card issuers may comply with proximity requirements for payment information on periodic statements. Creditors that offer card accounts with a charge card feature and a revolving feature may change the disclosure to make clear to which feature the disclosures apply.

10. *Forms G–18(F)–(G).* Forms G–18(F) and G–18(G) are intended as a compliance aid to illustrate front sides of a periodic statement, and how a periodic statement for open-end (not home-secured) plans might be designed to comply with the requirements of § 1026.7. The samples contain information that is not required by Regulation Z. The samples also

present information in additional formats that are not required by Regulation Z.

i. Creditors are not required to use a certain paper size in disclosing the § 1026.7 disclosures. However, Forms G–18(F) and G–18(G) are designed to be printed on an 8 × 14 inch sheet of paper.

ii. The due date for a payment, if a late payment fee or penalty rate may be imposed, must appear on the front of the first page of the statement. See Sample G–18(D) that illustrates how a creditor may comply with proximity requirements for other disclosures. The payment information disclosures appear in the upper right-hand corner on Samples G–18(F) and G–18(G), but may be located elsewhere, as long as they appear on the front of the first page of the periodic statement. The summary of account activity presented on Samples G–18(F) and G–18(G) is not itself a required disclosure, although the previous balance and the new balance, presented in the summary, must be disclosed in a clear and conspicuous manner on periodic statements.

iii. Additional information not required by Regulation Z may be presented on the statement. The information need not be located in any particular place or be segregated from disclosures required by Regulation Z, although the effect of proximity requirements for required disclosures, such as the due date, may cause the additional information to be segregated from those disclosures required to be disclosed in close proximity to one another. Any additional information must be presented consistent with the creditor's obligation to provide required disclosures in a clear and conspicuous manner.

iv. Model Forms G–18(F) and G–18(G) demonstrate two examples of ways in which transactions could be presented on the periodic statement. Model Form G–18(G) presents transactions grouped by type and Model Form G–18(F) presents transactions in a list in chronological order. Neither of these approaches to presenting transactions is required; a creditor may present transactions differently, such as in a list grouped by authorized user or other means.

11. *Model Form G–19.* See § 1026.9(b)(3) regarding the headings required to be disclosed when describing in the tabular disclosure a grace period (or lack of a grace period) offered on check transactions that access a credit card account.

12. *Sample G–24.* Sample G–24 includes two model clauses for use in complying with § 1026.16(h)(4). Model clause (a) is for use in connection with credit card accounts under an open-end (not home-secured) consumer credit plan. Model clause (b) is for use in connection with other open-end credit plans.

Appendix H—Closed-End Model Forms and Clauses

1. *Models H–1 and H–2.* i. Creditors may make several types of changes to closed-end model forms H–1 (credit sale) and H–2 (loan) and still be deemed to be in compliance with the regulation, provided that the required disclosures are made clearly and conspicuously. Permissible changes include the addition of the information permitted by § 1026.17(a)(1) and ''directly related'' information as set forth in the commentary to § 1026.17(a).

ii. The creditor may also delete or, on multi-purpose forms, indicate inapplicable disclosures, such as:

A. The itemization of the amount financed option. (See Samples H–12 through H–15.)

B. The credit life and disability insurance disclosures. (See Samples H–11 and H–12.)

C. The property insurance disclosures. (See Samples H–10 through H–12, and H–14.)

D. The ''filing fees'' and ''non-filing insurance'' disclosures. (See Samples H–11 and H–12.)

E. The prepayment penalty or rebate disclosures. (See Samples H–12 and H–14.)

F. The total sale price. (See Samples H–11 through H–15.)

iii. Other permissible changes include:

A. Adding the creditor's address or telephone number. (See the commentary to § 1026.18(a).)

B. Combining required terms where several numerical disclosures are the same, for instance, if the ''total of payments'' equals the ''total sale price.'' (See the commentary to § 1026.18.)

C. Rearranging the sequence or location of the disclosures—for instance, by placing the descriptive phrases outside the boxes containing the corresponding disclosures, or by grouping the descriptors together as a glossary of terms in a separate section of the segregated disclosures; by placing the payment schedule at the top of the form; or by changing the order of the disclosures in the boxes, including the annual percentage rate and finance charge boxes.

D. Using brackets, instead of checkboxes, to indicate inapplicable disclosures.

E. Using a line for the consumer to initial, rather than a checkbox, to indicate an election to receive an itemization of the amount financed.

F. Deleting captions for disclosures.

G. Using a symbol, such as an asterisk, for estimated disclosures, instead of an ''e.''

H. Adding a signature line to the insurance disclosures to reflect joint policies.

I. Separately itemizing the filing fees.

J. Revising the late charge disclosure in accordance with the commentary to § 1026.18(l).

2. *Model H–3.* Creditors have considerable flexibility in filling out Model H–3 (itemization of the amount financed). Appropriate revisions, such as those set out in the commentary to § 1026.18(c), may be made to this form without loss of protection from civil liability for proper use of the model forms.

3. *Models H–4 through H–7.* The model clauses are not included in the model forms although they are mandatory for certain transactions. Creditors using the model clauses when applicable to a transaction are deemed to be in compliance with the regulation with regard to that disclosure.

4. *Model H–4(A).* This model contains the variable rate model clauses applicable to transactions subject to § 1026.18(f)(1) and is intended to give creditors considerable flexibility in structuring variable rate disclosures to fit individual plans. The information about circumstances, limitations, and effects of an increase may be given in terms of the contract interest rate or the annual percentage rate. Clauses are shown for hypothetical examples based on the specific amount of the transaction and based on a representative amount. Creditors may preprint the variable rate disclosures based on a representative amount for similar types of transactions, instead of constructing an individualized example for each transaction. In both representative examples and transaction-specific examples, creditors may refer either to the incremental change in rate, payment amount, or number of payments, or to the resulting rate, payment amount, or number of payments. For example, creditors may state that the rate will increase by 2%, with a corresponding $150 increase in the payment, or creditors may state that the rate will increase to 16%, with a corresponding payment of $850.

5. *Model H–4(B).* This model clause illustrates the variable-rate disclosure required under § 1026.18(f)(2), which would alert consumers to the fact that the transaction contains a variable-rate feature and that disclosures were provided earlier.

6. *Model H–4(C).* This model clause illustrates the early disclosures required generally under § 1026.19(b). It includes information on how the consumer's interest rate is determined and how it can change over the term of the loan, and explains changes that may occur in the borrower's monthly payment. It contains an example of how to disclose historical changes in the index or formula values used to compute interest rates for the preceding 15 years. The model clause also illustrates the disclosure of the initial and maximum interest rates and payments based on an initial interest rate (index value plus margin, adjusted by the amount of any discount or premium) in effect as of an identified month and year for the loan program disclosure and illustrates how to provide consumers with a method for calculating the monthly payment for the loan amount to be borrowed.

7. *Models H–4(D) through H–4(J).* These model clauses illustrate certain notices, statements, and other disclosures required as follows:

i. Model H–4(D) illustrates the adjustment notice required under § 1026.20(c), and provides examples of payment change notices and annual notices of interest rate changes.

ii. Model H–4(E) illustrates the interest rate and payment summary table required under § 1026.18(s) for a fixed-rate mortgage transaction.

iii. Model H–4(F) illustrates the interest rate and payment summary table required under § 1026.18(s) for an adjustable-rate or a step-rate mortgage transaction.

iv. Model H–4(G) illustrates the interest rate and payment summary table required under § 1026.18(s) for a mortgage transaction with negative amortization.

v. Model H–4(H) illustrates the interest rate and payment summary table required under § 1026.18(s) for a fixed-rate, interest-only mortgage transaction.

vi. Model H–4(I) illustrates the introductory rate disclosure required by § 1026.18(s)(2)(iii) for an adjustable-rate mortgage transaction with an introductory rate.

vii. Model H–4(J) illustrates the balloon payment disclosure required by § 1026.18(s)(5) for a mortgage transaction with a balloon payment term.

viii. Model H–4(K) illustrates the no-guarantee-to-refinance statement required by § 1026.18(t) for a mortgage transaction.

8. *Model H–5.* This contains the demand feature clause.

9. *Model H–6.* This contains the assumption clause.

10. *Model H–7.* This contains the required deposit clause.

11. *Models H–8 and H–9.* These models contain the rescission notices for a typical closed-end transaction and a refinancing, respectively. The last paragraph of each model form contains a blank for the date by which the consumer's notice of cancellation must be sent or delivered. A parenthetical is included to address the situation in which the consumer's right to rescind the transaction exists beyond 3 business days following the date of the transaction, for example, where the notice or material disclosures are delivered late or where the date of the transaction in paragraph 1 of the notice is an estimate. The language of the parenthetical is not optional. See the commentary to § 1026.2(a)(25) regarding the specificity of the security interest disclosure for model form H–9. The prior version of model form H–9 is substantially similar to the current version and creditors may continue to use it, as appropriate. Creditors are encouraged, however, to use the current version when reordering or reprinting forms.

12. *Sample forms.* The sample forms (H–10 through H–15) serve a different purpose than the model forms. The samples illustrate various ways of adapting the model forms to the individual transactions described in the commentary to Appendix H. The deletions and rearrangements shown relate only to the specific transactions described. As a result, the samples do not provide the general protection from civil liability provided by the model forms and clauses.

13. *Sample H–10.* This sample illustrates an automobile credit sale. The cash price is $7,500 with a downpayment of $1,500. There is an 8% add-on interest rate and a term of 3 years, with 36 equal monthly payments. The credit life insurance premium and the filing fees are financed by the creditor. There is a $25 credit report fee paid by the consumer before consummation, which is a prepaid finance charge.

14. *Sample H–11.* This sample illustrates an installment loan. The amount of the loan is $5,000. There is a 12% simple interest rate and a term of 2 years. The date of the transaction is expected to be April 15, 1981, with the first payment due on June 1, 1981. The first payment amount is labeled as an estimate since the transaction date is uncertain. The odd days' interest ($26.67) is collected with the first payment. The remaining 23 monthly payments are equal.

15. *Sample H–12.* This sample illustrates a refinancing and consolidation loan. The amount of the loan is $5,000. There is a 15% simple interest rate and a term of 3 years. The date of the transaction is April 1, 1981, with the first payment due on May 1, 1981. The first 35 monthly payments are equal, with an odd final payment. The credit disability insurance premium is financed. In calculating the annual percentage rate, the U.S. Rule has been used. Since an itemization of the amount financed is included with the disclosures, the statement regarding the consumer's option to receive an itemization is deleted.

16. *Samples H–13 through H–15.* These samples illustrate various mortgage transactions. They assume that the mortgages are subject to the Real Estate Settlement Procedures Act (RESPA). As a result, no option regarding the itemization of the amount financed has been included in the samples, because providing the good faith estimates of settlement costs required by RESPA satisfies Truth in Lending's amount financed itemization requirement. (*See* § 1026.18(c).)

17. *Sample H–13.* This sample illustrates a mortgage with a demand feature. The loan amount is $44,900, payable in 360 monthly installments at a simple interest rate of 14.75%. The 15 days of interim interest ($294.34) is collected as a prepaid finance charge at the time of consummation of the loan (April 15, 1981). In calculating the disclosure amounts, the minor irregularities provision in § 1026.17(c)(4) has been used. The property insurance premiums are not included in the payment schedule. This disclosure statement could be used for notes with the 7-year call option required by the Federal National Mortgage Association (FNMA) in states where due-on-sale clauses are prohibited.

18. *Sample H–14.* This sample disclosure form illustrates the disclosures under § 1026.19(b) for a variable-rate transaction secured by the consumer's principal dwelling with a term greater than one year. The sample form shows a creditor how to adapt the model clauses in Appendix H–4(C) to the creditor's own particular variable-rate program. The sample disclosure form describes the features of a specific variable-rate mortgage program and alerts the consumer to the fact that information on the creditor's other closed-end variable-rate programs is available upon request. It includes information on how the interest rate is determined and how it can change over time. Section 1026.19(b)(2)(viii) permits creditors the option to provide either a historical example or an initial and maximum interest rates and payments disclosure; both are illustrated in the sample disclosure. The historical example explains how the monthly payment can change based on a $10,000 loan amount, payable in 360 monthly installments, based on historical changes in the values for the weekly average yield on U.S. Treasury Securities adjusted to a constant maturity of one year. Index values are measured for 15 years, as of the first week ending in July. This reflects the requirement that the index history be based on values for the same date or period each year in the example. The sample disclosure also illustrates the alternative disclosure under § 1026.19(b)(2)(viii)(B) that the initial and the maximum interest rates and payments be shown for a $10,000 loan originated at an initial interest rate of 12.41 percent (which was in effect July 1996) and to have 2 percentage point annual (and 5 percentage point overall) interest rate limitations or caps. Thus, the maximum amount that the interest rate could rise under this program is 5 percentage points higher than the 12.41 percent initial rate to 17.41 percent, and the monthly payment could rise from $106.03 to a maximum of $145.34. The loan would not reach the maximum interest rate until its fourth year because of the 2 percentage point annual rate limitations, and the maximum payment disclosed reflects the amortization of the loan during that period. The sample form also illustrates how to provide consumers with a method for calculating their actual monthly payment for a loan amount other than $10,000.

19. *Sample H–15.* This sample illustrates a graduated payment mortgage with a 5-year graduation period and a 7½ percent yearly increase in payments. The loan amount is $44,900, payable in 360 monthly installments at a simple interest rate of 14.75%. Two points ($898), as well as an initial mortgage guarantee insurance premium of $225.00, are included in the prepaid finance charge. The mortgage guarantee insurance premiums are calculated on the basis of ¼ of 1% of the outstanding principal balance under an annual reduction plan. The abbreviated disclosure permitted under § 1026.18(g)(2) is used for the payment schedule for years 6 through 30. The prepayment disclosure refers to both penalties and rebates because information about penalties is required for the simple interest portion of the obligation and information about rebates is required for the mortgage insurance portion of the obligation.

20. *Sample H–16.* This sample illustrates the disclosures required under § 1026.32(c). The sample illustrates the amount borrowed and the disclosures about optional insurance that are required for mortgage refinancings under § 1026.32(c)(5). Creditors may, at their option, include these disclosures for all loans subject to § 1026.32. The sample also includes disclosures required under § 1026.32(c)(3) when the legal obligation includes a balloon payment.

21. *HRSA–500–1 9–82.* Pursuant to section 113(a) of the Truth in Lending Act, Form HRSA–500–1 9–82 issued by the U.S. Department of Health and Human Services for certain student loans has been approved for use for loans made prior to the mandatory compliance date of the disclosures required under Subpart F. The form was approved for all Health Education Assistance Loans (HEAL) with a variable interest rate that were considered interim student credit extensions as defined in Regulation Z.

22. *HRSA–500–2 9–82.* Pursuant to section 113(a) of the Truth in Lending Act, Form HRSA–500–2 9–82 issued by the U.S. Department of Health and Human Services for certain student loans has been approved for use for loans made prior to the mandatory compliance date of the disclosures required under Subpart F. The form was approved for all HEAL loans with a fixed interest rate that were considered interim student credit extensions as defined in Regulation Z.

23. *HRSA–502–1 9–82.* Pursuant to section 113(a) of the Truth in Lending Act, Form HRSA–502–1 9–82 issued by the U.S.

Department of Health and Human Services for certain student loans has been approved for use for loans made prior to the mandatory compliance date of the disclosures required under Subpart F. The form was approved for all HEAL loans with a variable interest rate in which the borrower has reached repayment status and is making payments of both interest and principal.

24. *HRSA–502–2 9–82.* Pursuant to section 113(a) of the Truth in Lending Act, Form HRSA–502–2 9–82 issued by the U.S. Department of Health and Human Services for certain student loans has been approved for use for loans made prior to the mandatory compliance date of the disclosures required under Subpart F. The form was approved for all HEAL loans with a fixed interest rate in which the borrower has reached repayment status and is making payments of both interest and principal.

25. *Models H–18, H–19, H–20.* i. These model forms illustrate disclosures required under § 1026.47 on or with an application or solicitation, at approval, and after acceptance of a private education loan. Although use of the model forms is not required, creditors using them properly will be deemed to be in compliance with the regulation with regard to private education loan disclosures. Creditors may make certain types of changes to private education loan model forms H–18 (application and solicitation), H–19 (approval), and H–20 (final) and still be deemed to be in compliance with the regulation, provided that the required disclosures are made clearly and conspicuously. The model forms aggregate disclosures into groups under specific headings. Changes may not include rearranging the sequence of disclosures, for instance, by rearranging which disclosures are provided under each heading or by rearranging the sequence of the headings and grouping of disclosures. Changes to the model forms may not be so extensive as to affect the substance or clarity of the forms. Creditors making revisions with that effect will lose their protection from civil liability.

ii. The creditor may delete inapplicable disclosures, such as:

A. The Federal student financial assistance alternatives disclosures.

B. The self-certification disclosure.

iii. Other permissible changes include, for example:

A. Adding the creditor's address, telephone number, or Web site.

B. Adding loan identification information, such as a loan identification number.

C. Adding the date on which the form was printed or produced.

D. Placing the notice of the right to cancel in the top left or top right of the disclosure to accommodate a window envelope.

E. Combining required terms where several numerical disclosures are the same. For instance, if the itemization of the amount financed is provided, the amount financed need not be separately disclosed.

F. Combining the disclosure of loan term and payment deferral options required in § 1026.47(a)(3) with the disclosure of cost estimates required in § 1026.47(a)(4) in the same chart or table (*See* comment 47(a)(3)–4.)

G. Using the first person, instead of the second person, in referring to the borrower.

H. Using ''borrower'' and ''creditor'' instead of pronouns.

I. Incorporating certain state ''plain English'' requirements.

J. Deleting inapplicable disclosures by whiting out, blocking out, filling in ''N/A'' (not applicable) or ''0,'' crossing out, leaving blanks, checking a box for applicable items, or circling applicable items.

iv. Although creditors are not required to use a certain paper size in disclosing the §§ 1026.47(a), (b) and (c) disclosures, samples H–21, H–22, and H–23 are designed to be printed on two 8½ x 11 inch sheets of paper. A creditor may use a larger sheet of paper, such as 8½ x 14 inch sheets of paper, or may use multiple pages. If the disclosures are provided on two sides of a single sheet of paper, the creditor must include a reference or references, such as ''SEE BACK OF PAGE'' at the bottom of each page indicating that the disclosures continue onto the back of the page. If the disclosures are on two or more pages, a creditor may not include any intervening information between portions of the disclosure. In addition, the following formatting techniques were used in presenting the information in the sample tables to ensure that the information is readable:

A. A readable font style and font size (10-point Helvetica font style for body text).

B. Sufficient spacing between lines of the text.

C. Standard spacing between words and characters. In other words, the body text was not compressed to appear smaller than the 10-point type size.

D. Sufficient white space around the text of the information in each row, by providing sufficient margins above, below and to the sides of the text.

E. Sufficient contrast between the text and the background. Generally, black text was used on white paper.

v. While the Bureau is not requiring issuers to use the above formatting techniques in presenting information in the disclosure, the Bureau encourages issuers to consider these techniques when deciding how to disclose information in the disclosure to ensure that the information is presented in a readable format.

vi. Creditors are allowed to use color, shading and similar graphic techniques in the disclosures, so long as the disclosures remain substantially similar to the model and sample forms in Appendix H.

26. *Sample H–21.* This sample illustrates a disclosure required under § 1026.47(a). The sample assumes a range of interest rates between 7.375% and 17.375%. The sample assumes a variable interest rate that will never exceed 25% over the life of the loan. The term of the sample loan is 20 years for an amount up to $20,000 and 30 years for an amount more than $20,000. The repayment options and sample costs have been combined into a single table, as permitted in the commentary to § 1026.47(a)(3). It demonstrates the loan amount, interest rate, and total paid when a consumer makes loan payments while in school, pays only interest while in school, and defers all payments while in school.

27. *Sample H–22.* This sample illustrates a disclosure required under § 1026.47(b). The sample assumes the consumer financed $10,000 at an 8.23% annual percentage rate. The sample assumes a variable interest rate that will never exceed 25% over the life of the loan. The payment schedule and terms assumes a 20-year loan term and that the consumer elected to defer payments while enrolled in school. This includes a sample disclosure of a total loan amount of $10,600 and prepaid finance charges totaling $600, for a total amount financed of $10,000.

28. *Sample H–22.* This sample illustrates a disclosure required under § 1026.47(c). The sample assumes the consumer financed $10,000 at an 8.23% annual percentage rate. The sample assumes a variable annual percentage rate in an instance where there is no maximum interest rate. The sample demonstrates disclosure of an assumed maximum rate, and the statement that the consumer's actual maximum rate and payment amount could be higher. The payment schedule and terms assumes a 20-year loan term, the assumed maximum interest rate, and that the consumer elected to defer payments while enrolled in school. This includes a sample disclosure of a total loan amount of $10,600 and prepaid finance charges totaling $600, for a total amount financed of $10,000.

Appendix J—Annual Percentage Rate Computations for Closed-End Credit Transactions

1. *Use of Appendix J.* Appendix J sets forth the actuarial equations and instructions for calculating the annual percentage rate in closed-end credit transactions. While the formulas contained in this appendix may be directly applied to calculate the annual percentage rate for an individual transaction, they may also be utilized to program calculators and computers to perform the calculations.

2. *Relation to Bureau tables.* The Bureau's Annual Percentage Rate Tables also provide creditors with a calculation tool that applies the technical information in Appendix J. An annual percentage rate computed in accordance with the instructions in the tables is deemed to comply with the regulation. Volume I of the tables may be used for credit transactions involving equal payment amounts and periods, as well as for transactions involving any of the following irregularities: odd first period, odd first payment and odd last payment. Volume II of the tables may be used for transactions that involve any type of irregularities. These tables may be obtained from the Bureau, 1700 G Street, NW., Washington, DC 20006, upon request.

Appendix K—Total Annual Loan Cost Rate Computations for Reverse Mortgage Transactions

1. *General.* The calculation of total annual loan cost rates under Appendix K is based on the principles set forth and the estimation or ''iteration'' procedure used to compute annual percentage rates under Appendix J. Rather than restate this iteration process in full, the regulation cross-references the

procedures found in Appendix J. In other aspects the appendix reflects the special nature of reverse mortgage transactions. Special definitions and instructions are included where appropriate.

(b) Instructions and equations for the total annual loan cost rate

(b)(5) Number of unit-periods between two given dates

1. *Assumption as to when transaction begins.* The computation of the total annual loan cost rate is based on the assumption that the reverse mortgage transaction begins on the first day of the month in which consummation is estimated to occur. Therefore, fractional unit-periods (used under Appendix J for calculating annual percentage rates) are not used.

(b)(9) Assumption for discretionary cash advances

1. *Amount of credit.* Creditors should compute the total annual loan cost rates for transactions involving discretionary cash advances by assuming that 50 percent of the initial amount of the credit available under the transaction is advanced at closing or, in an open-end transaction, when the consumer becomes obligated under the plan. (For the purposes of this assumption, the initial amount of the credit is the principal loan amount less any costs to the consumer under § 1026.33(c)(1).)

(b)(10) Assumption for variable-rate reverse mortgage transactions

1. *Initial discount or premium rate.* Where a variable-rate reverse mortgage transaction includes an initial discount or premium rate, the creditor should apply the same rules for calculating the total annual loan cost rate as are applied when calculating the annual percentage rate for a loan with an initial discount or premium rate (see the commentary to § 1026.17(c)).

(d) Reverse mortgage model form and sample form

(d)(2) Sample form

1. *General.* The ''clear and conspicuous'' standard for reverse mortgage disclosures does not require disclosures to be printed in any particular type size. Disclosures may be made on more than one page, and use both the front and the reverse sides, as long as the pages constitute an integrated document and the table disclosing the total annual loan cost rates is on a single page.

Appendix L—Assumed Loan Periods for Computations of Total Annual Loan Cost Rates

1. *General.* The life expectancy figures used in Appendix L are those found in the U.S. Decennial Life Tables for women, as rounded to the nearest whole year and as published by the U.S. Department of Health and Human Services. The figures contained in Appendix L must be used by creditors for all consumers (men and women). Appendix L will be revised periodically by the Bureau to incorporate revisions to the figures made in the Decennial Tables.

Dated: November 29, 2011.

Alastair M. Fitzpayne,

Deputy Chief of Staff and Executive Secretary, Department of the Treasury.

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Part III

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1, 301, and 602

Section 482: Methods To Determine Taxable Income in Connection With a Cost Sharing Arrangement; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 301, and 602

[TD 9568]

RIN 1545–BI47

Section 482: Methods To Determine Taxable Income in Connection With a Cost Sharing Arrangement

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations regarding methods to determine taxable income in connection with a cost sharing arrangement under section 482 of the Internal Revenue Code (Code). The final regulations address issues that have arisen in administering the current cost sharing regulations. The final regulations affect domestic and foreign entities that enter into cost sharing arrangements described in the final regulations.

DATES: *Effective Date:* These regulations are effective on December 16, 2011.

Applicability Date: For dates of applicability, see §§ 1.482–1(j)(6)(i), 1.482–2(f), 1.482–4(h), 1.482–7(l), 1.482–8(c), 1.482–9(n)(3), and 1.301–7701–1(f).

FOR FURTHER INFORMATION CONTACT: Joseph L. Tobin, (202) 435–5265 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–1364. The collections of information in these final regulations are in § 1.482–7(b)(2) and (k). Responses to the collections of information are required by the IRS to monitor compliance of controlled taxpayers with the provisions applicable to cost sharing arrangements.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103 of the Code.

Background

A notice of proposed rulemaking and notice of public hearing regarding additional guidance to improve compliance with, and administration of, the rules in connection with a cost sharing arrangement (CSA) were published in the **Federal Register** (70 FR 51116) (REG–144615–02) on August 29, 2005 (2005 proposed regulations). A correction to the notice of proposed rulemaking and notice of public hearing was published in the **Federal Register** (70 FR 56611) on September 28, 2005. A public hearing was held on December 16, 2005.

The Treasury Department and the IRS received numerous comments on a wide range of issues addressed in the 2005 proposed regulations. In response to these comments, temporary and proposed regulations were published in the **Federal Register** (74 FR 340–01 and 74 FR 236–01) (REG–144615–02) on January 5, 2009 (2008 temporary regulations). Corrections to the 2008 temporary regulations were published in the **Federal Register** on February 27, 2009 (74 FR 8863–01), March 5, 2009 (74 FR 9570–01, 74 FR 9570–02, and 74 FR 9577–01), and March 19, 2009 (74 FR 11644–01). A public hearing was held on April 21, 2009.

The Treasury Department and the IRS received comments on a range of issues addressed in the 2008 temporary regulations. These final regulations make several changes to the 2008 temporary regulations in response to these comments. In addition, a number of editorial clarifications have been made. These regulations adopt the effective date and transition rules under the 2008 temporary regulations so that they are generally applicable for all CSAs, with transition rules for certain preexisting arrangements in existence prior to January 5, 2009.

Explanation of Provisions

A. Overview—Economic Contributions and Their Arm's Length Compensation in a CSA

These final regulations provide guidance on the determination of and compensation for all economic contributions by all controlled participants in connection with a CSA in accordance with the arm's length standard.

The arm's length analysis under section 482 begins with the factual and functional analysis of the actual transaction or transactions among the controlled taxpayers. In a CSA, the controlled participants make economic contributions of two types, namely, mutual commitments to prospectively share intangible development costs in proportion to their reasonably anticipated benefits from exploitation of the cost shared intangibles (cost contributions) and to provide any existing resources, capabilities, or rights that are reasonably anticipated to contribute to developing cost shared intangibles (platform contributions). CSAs may also involve economic contributions by the controlled participants of other existing resources, capabilities, or rights related to the exploitation of cost shared intangibles (operating contributions). The concepts of platform and operating contributions are intended to encompass any existing inputs that are reasonably anticipated to facilitate developing or exploiting cost shared intangibles at any time, including resources, capabilities, or rights, such as expertise in decision-making concerning research and product development, manufacturing or marketing intangibles or services, and management oversight and direction. Other prospective economic contributions consist of costs incurred to develop or acquire resources, capabilities, and rights that facilitate the exploitation of cost shared intangibles (operating cost contributions). These regulations provide guidance for determining the arm's length charge for all such contributions to clearly reflect the incomes of the controlled participants.

The valuation guidance in the regulations applies to determine the most reliable measure of arm's length results for these economic contributions over the duration of the activity of developing and exploiting cost shared intangibles (CSA Activity). The combined effect of multiple contributions, potentially including controlled transactions outside of the CSA (for example, make-or-sell licenses, or intangible transfers governed by section 367(d)), may need to be evaluated on an aggregate basis, where that approach provides the most reliable measure of an arm's length result. So, for example, if a taxpayer transfers intangibles in a transaction governed by section 367(d) in connection with contributions related to those same intangibles in connection with a CSA, then the pricing of the intangibles under section 367(d) may need to be evaluated along with the pricing of all contributions in connection with the CSA on an aggregate basis, where that approach provides the most reliable measure of an arm's length result. Under

the principles of the investor model, the relative reliability of the analysis will depend on the degree of consistency of the valuation with the expectation that each controlled participant's net investment attributable to cost contributions, platform contributions, operating contributions, and operating cost contributions, is reasonably anticipated to earn a rate of return (which might be reflected in a discount rate used in applying a method) appropriate to the riskiness of the controlled participant's CSA Activity over the entire period of the CSA Activity. The duration of the CSA Activity may, or may not, correspond to the conventional concept of useful life with respect to any of the underlying economic contributions; it represents the period over which the controlled participants reasonably anticipate returns from the CSA Activity.

For purposes of determining the best method of measuring the arm's length results of a CSA, and any related controlled transactions, these regulations adopt the guidance included in the 2008 temporary regulations on assessing the potential applicability of the comparable uncontrolled transaction (CUT) method. The arm's length standard seeks to determine the results that would obtain had uncontrolled taxpayers engaged in the same transaction under the same circumstances. It is immaterial whether the arrangement among uncontrolled taxpayers is denominated as a ''cost sharing arrangement,'' so long as the arrangement involves the same circumstances (or similar circumstances, assuming that reliable adjustments can be made to account for any differences). Thus, long-term licenses or research and development services contracts may provide CUTs, provided and to the extent they involve the same or similar scope and contractual terms, uncertainty of outcomes, profit potential, allocation of intangible development and exploitation risks, including allocation of the risks of existing contributions and the risks of developing future contributions, consistent with the actual allocation of risks under the CSA and through related controlled transactions.

A CSA may benefit from, and contribute to, a controlled group's unique competitive advantages. Therefore, there may be no uncontrolled transactions that reliably reflect the same contributions by the parties, over a similar period of commitment, and with the same risk profile and profit potential. The arm's length standard requires application of the method that most reliably reflects the results that would have been realized had uncontrolled taxpayers engaged in the same transaction. Where comparable uncontrolled transactions are unavailable, these regulations, like other regulations under section 482, allow for reference to the results the controlled taxpayers could have realized by choosing a realistic alternative. These regulations adopt a specified income method included in the 2008 temporary regulations that represents an application of the realistic alternatives principle. These regulations adopt the 2008 temporary regulations' provision of a licensing alternative to the CSA that closely aligns with the economics of the CSA, but takes account of the licensor's commitment to bear the entire risk of the intangible development that would otherwise have been shared. The realistic alternatives analysis effectively constructs a comparable uncontrolled transaction that, depending on the facts and circumstances, may more reliably reflect the economics of the actual contributions to the CSA than can be derived from third party transactions. For cases where more than one controlled participant makes significant contributions to residual profits (including platform or operating contributions), these regulations adopt the guidance included in the 2008 temporary regulations on a specified residual profit split method (RPSM), which is also an application of the realistic alternatives principle.

These regulations also adopt guidance on the application of two other specified methods included in the 2008 temporary regulations—the acquisition price method and the market capitalization method. The guidance regarding unspecified methods adopted from the 2008 temporary regulations reemphasizes that any such method should take into account the general principle that uncontrolled taxpayers evaluate the terms of a transaction by considering the realistic alternatives to that transaction, and enter into a particular transaction only if none of the alternatives is clearly preferable to it.

These regulations resolve issues that have been raised under the 1995 regulations. No inference is intended regarding the appropriate resolution of those issues under the 1995 regulations. These regulations do not turn on whether a given transaction in connection with a CSA involves intangible property within the meaning of section 936(h)(3)(B), or whether such item has been transferred, licensed, or retained. Rather, if a controlled participant devotes, in whole or part, any existing resource, capability, or right to intangible development for the benefit of another controlled participant, whether by transfer or license to the other controlled participant, or by leveraging such resource, capability, or right within the context of the CSA, then the regulations require an arm's length charge for such platform contribution, in addition to the funding of intangible development costs.

For example, the regulations require an arm's length charge for one controlled participant's platform contribution commitment of a particular research team's experience and expertise to intangible development under a CSA, in addition to the controlled participants' sharing of the ongoing intangible development costs of the salaries of such researchers. To limit the arm's length charge in these circumstances to sharing the ongoing salary costs would ignore the value of having the particular research team already in place to undertake the intangible development with the benefit of its particular knowhow. See § 1.482–7(c)(5), *Example 2.* As another example, the contribution of core entrepreneurial functions such as product selection, market positioning, research strategy, and risk determinations and management requires an arm's length charge under these regulations. To omit charges for these or any other significant economic contributions one controlled taxpayer makes for another's benefit would fail to clearly reflect the incomes of such controlled taxpayers.

A unifying underpinning of the section 482 regulations is that controlled transactions reflecting similar economics, regardless of the type of transaction (such as transfer of intangibles or provision of services), should be valued in accordance with similar principles and methods. See, for example, § 1.482–1(b)(2)(iii). In conjunction with finalizing § 1.482–7, parallel rules are also finalized in §§ 1.482–4(g) and 1.482–9(m)(3). Under these provisions, the principles and methods for valuing platform and operating contributions under a CSA may also apply for purposes of determining the best method, which may be an unspecified method, for valuing similar contributions in connection with controlled transfers of intangibles or provisions of services.

B. Platform Contributions, Make-or-Sell Rights Excluded—§ 1.482–7(c)(4)

A comment requested clarification of the treatment of an item—e.g., a program or tool to facilitate research (research tools)—used under a CSA to further the development of intangibles targeted by the CSA, as within, or

outside, the definition of make-or-sell rights. The Treasury Department and the IRS intend research tools to be treated as platform contributions, and not as excluded make-or-sell rights. Accordingly, § 1.482–7(c)(4)(i) has been modified and a new example added to illustrate this concept.

C. Intangible Development Activity and Costs—§ 1.482–7(d)(3)

The Treasury Department and the IRS requested comments in Notice 2005–99, 2005–52 CB 1214, regarding the valuation of stock options and other stock-based compensation. Several comments were received. The Treasury Department and the IRS continue to consider the matters described in Notice 2005–99, and intend to address these issues in a subsequent regulations project.

D. Reasonably Anticipated Benefit Shares—§ 1.482–7(e)(1)(i)

Several comments requested clarification concerning how and when to update reasonably anticipated benefit (RAB) shares, and whether such updates may be made retroactively or only prospectively. In response to these comments, the Treasury Department and the IRS added several sentences to § 1.482–7(e)(1)(i) to clarify that RAB shares determined for a particular purpose should not be further updated for that purpose based on information not available at the time that determination needed to be made. For example, RAB shares determined in order to determine intangible development cost shares for a particular taxable year should not be recomputed based on information not available during that particular taxable year, and RAB shares determined for the purpose of using a particular transfer pricing method to evaluate the arm's length amount charged in a PCT should not be recomputed based on information not available on the date of that PCT. An example is added to illustrate this clarification. See § 1.482–7(e)(1)(iii), *Example 2.* For readability, a portion of the text of § 1.482–7T(e)(1)(i) was redesignated as § 1.482–7(e)(1)(ii), and § 1.482–7T(e)(1)(ii) was redesignated as § 1.482–7(e)(1)(iii). The Treasury Department and the IRS also observe in these clarifications that nothing in § 1.482–7(e)(1) limits the Commissioner's use of subsequently available information for purposes of its allocation determinations in accordance with the provisions of § 1.482–7(i) (Allocations by the Commissioner in connection with a CSA).

E. Transfer Pricing Methods—§ 1.482–7(g)

1. Supplemental Guidance on Methods Applicable to PCTs—§ 1.482–7(g)(1)

One method for determining the arm's length charge for a contribution is to calculate the total present value of the stream of future economic benefits one can expect in connection with such contribution. In a CSA, the stream of anticipated economic benefits to be discounted will reflect the economic benefits expected to arise from cost shared intangibles to be developed under the CSA. Consequently, the arm's length charge for a PCT can appropriately be determined by taking into account the economic benefits anticipated to be produced in the future by cost shared intangibles developed under the CSA. Accordingly, a sentence has been added to paragraph (g)(1) to clarify that each method used for evaluating the arm's length amount charged in a PCT must yield results consistent with measuring the value of a platform contribution by reference to the future income anticipated to be generated by the resulting cost shared intangibles.

2. Best Method Analysis Considerations and the Income Method—§ 1.482–7(g)(2) and (4)

a. Discounting Operating Income—§ 1.482–7(g)(2)(v)

The preamble to the 2008 temporary regulations solicited comments on whether and how the cost sharing rules could reliably be administered on the basis of cash flows instead of operating income, and whether such a basis is consistent with the second sentence of section 482. No comments were received that addressed this request, though some comments did object to the use of operating income, rather than cash flows, in the cost sharing rules.

The Treasury Department and the IRS believe that, while the use of cash flow projections is permitted under the regulations, detailed guidance on the specific applications of the methods should be based on discounting operating income rather than cash flows for a number of practical and administrative reasons and, accordingly, no changes were adopted to address this issue.

b. Financial Projections and Discount Rates—§ 1.482–7(g)(2)(v) and (vi)

Under the temporary regulations, the specific applications of the income method discussed in § 1.482–7(g)(4) require a number of input parameters, including financial projections and the associated discount rate under the licensing alternative, and financial projections and the associated discount rate under the cost sharing alternative. These regulations modify the 2008 temporary regulations in several respects to clarify the interaction of these input parameters in applying the income method.

i. Financial Projections for the Licensing and Cost Sharing Alternatives Are Interrelated

These regulations provide that, under the specific applications of the income method, the financial projections associated with the licensing and cost sharing alternatives are the same except for the licensing payments to be made under the licensing alternative, and the cost contributions and PCT Payments to be made under the cost sharing alternative. Thus, for example, if the PCT Payor anticipates sales associated with the cost shared intangibles to third parties of $100 in the cost sharing alternative, then it must anticipate sales associated with the licensed intangible to third parties of this same $100 under the licensing alternative. Similarly, if the PCT Payor's anticipated selling costs associated with those sales are $60 in the cost sharing alternative, then its anticipated selling costs are the same $60 in the licensing alternative. The financial projections associated with the licensing alternative to the CSA are closely associated with the financial projections associated with the cost sharing alternative, differing only in the treatment of licensing payments, cost contributions, and PCT Payments. As a result, the income method, as in the case of the more traditional discounted cash flow methods, builds off of the (single) probability-weighted financial projections associated with the CSA Activity.

ii. Discount Rates for the Licensing and Cost Sharing Alternatives Are Interrelated

The Treasury Department and the IRS received several comments requesting further guidance on the relationship between the discount rate that is appropriate for discounting the operating income associated with the cost sharing alternative and the discount rate that is appropriate for discounting the operating income associated with the licensing alternative. In response to these comments, and as a corollary to the interrelationship of the financial projections for the licensing and cost sharing alternatives discussed in the preceding paragraph, these regulations provide further guidance on the discount rates appropriate for these two alternatives. Specifically, the difference,

if any, in market-correlated risks between the licensing and cost sharing alternatives is due solely to the different effects on risks of the PCT Payor making licensing payments under the licensing alternative, and the PCT Payor making cost contributions and PCT Payments under the cost sharing alternative. That is, the difference in risk between the two scenarios solely reflects (1) the incremental risk, if any, associated with the cost contributions taken on by the PCT Payor in developing the cost shared intangible under the cost sharing alternative, and (2) the difference in risk, if any, associated with the particular payment forms of the licensing payments and the PCT Payments, in light of the fact that the licensing payments in the licensing alternative are partially replaced by cost contributions and partially replaced by PCT Payments in the cost sharing alternative, each with its own payment form.

c. Valuation Undertaken on a Pre-Tax Basis—§ 1.482–7(g)(2)(x)

Several comments requested that the final regulations clarify the term ''tax rate'' for purposes of determining amounts on a pre-tax basis. In response, that term has been clarified in § 1.482–7(j)(1) to mean the reasonably anticipated effective tax rate with respect to the pre-tax income to which the rate of tax is being applied. For example, under the income method, this rate would be the reasonably anticipated effective tax rate of the PCT Payor or PCT Payee under the cost sharing alternative or licensing alternative, as appropriate. See § 1.482–7(g)(4)(i)(G).

Several comments also requested clarification on the guidance concerning the determination of pre-tax PCT Payments under the income method. While PCT Payments must be determined on a pre-tax basis, in general, the financial projections and discount rates used to apply the income method are post-tax measures. Comments suggested that this discrepancy makes such a determination difficult and raises concerns about valuation principles to derive a pre-tax PCT Payment based on post-tax data.

The Treasury Department and the IRS believe that the requirement that PCT Payments be determined on a pre-tax basis is fundamental to the determination of an arm's length result, and, while no changes were made to the regulations in this regard, examples were added to illustrate this concept. Under the income method, the operative rule in all cases is to derive the pre-tax PCT Payments that set the post-tax present value of the cost sharing alternative equal to the post-tax present value of the licensing alternative. The operative rule can be satisfied in a number of ways. For example, annual pre-tax PCT Payments can be directly determined such that, when incorporated into the PCT Payor's financial projections (which should reflect the deductibility of the pre-tax PCT Payments), the post-tax net present values of the licensing and cost sharing alternatives are equated. See § 1.482–7(g)(4)(viii), *Example 4.* Alternatively, the present value of post-tax PCT Payments can be directly determined by subtracting the present value of the post-tax income associated with the licensing alternative from the present value of the post-tax income associated with the cost sharing alternative (exclusive of the PCT Payment). This difference, which reflects the post-tax present value of the PCT Payment, must be grossed up to derive the pre-tax PCT Payment. See § 1.482–7(g)(4)(viii), *Example 5.* Another alternative, in certain situations (for example, when financial projections are based on income, rather than cash flows, and when a controlled participant's tax rate is not materially affected by whether it enters into the cost sharing or licensing alternative), is for the present value of pre-tax PCT Payments to be directly determined by subtracting the present value of the pre-tax income associated with the licensing alternative from the present value of the pre-tax income associated with the cost sharing alternative (exclusive of the PCT Payment), both discounted at post-tax discount rates. That is, under certain conditions the pre-tax PCT Payments that equate the pre-tax present values of the two alternatives will also equate the post-tax present values of the two alternatives (which satisfies the operative rule). This last method does not reflect a violation of valuation theory, but merely a method that applies under certain conditions to derive the pre-tax PCT Payment more directly, rather than deriving the post-tax PCT Payment under the operative rule and grossing it up. Discounting pre-tax income with post-tax discount rates conceptually provides a measure of pre-tax income. Discounting pre-tax income with pre-tax discount rates, on the other hand, conceptually provides a measure of post-tax income. See § 1.482–7(g)(4)(viii), *Example 6.* The specific applications of the income method described in paragraphs (g)(4)(ii) through (iv) and the examples set forth in paragraph (g)(4)(viii) of these final regulations assume that such circumstances apply, but the regulations do not exclude other applications.

3. Acquisition Price and Market Capitalization Methods—§ 1.482–7(g)(5) and (6)

The acquisition price method as specified in § 1.482–7(g)(5) typically may be considered for determining PCT Payments with respect to platform contributions as a result of asset or stock acquisitions. Comments were received that, with some acquisitions, there may be benefits to the controlled group whose scope extends beyond the development of cost shared intangibles. The Treasury Department and the IRS agree that these facts and circumstances should be taken into account in the appropriate application of the acquisition price method and any other methods for purposes of determining the best method, but believe that this is adequately addressed by other provisions of the section 482 regulations. See, for example, §§ 1.482–1(c) (Best method rule) and (d) (Comparability), and 1.482–7(g)(2)(iv) (Aggregation of transactions).

Several comments requested that the final regulations provide more guidance on what types of tax adjustments may be needed with respect to PCT Payments determined under the acquisition price or market capitalization method. The Treasury Department and the IRS believe that the determination as to whether to make such adjustments should be based on facts and circumstances of each case and thus are best addressed under the general comparability guidance in Treas. Reg. § 1.482–1(d) (Comparability). Therefore, the specific references to tax adjustments under those methods were removed.

4. Residual Profit Split Method—§ 1.482–7(g)(7)

The residual profit split method under § 1.482–7(g)(7) allocates a PCT Payor's nonroutine residual divisional profit or loss according to the controlled participants' relative nonroutine contributions. The calculation of nonroutine residual divisional profit or loss includes a subtraction of market returns for routine contributions. See § 1.482–7(g)(7)(iii)(B). These regulations clarify that market returns for operating cost contributions are included in, and market returns for cost contributions are excluded from, that subtraction. Market returns are not assigned to cost contributions because, under this method, resources, capabilities, and rights that benefit the development of cost shared intangibles (and thus make such development more valuable than

its cost) are compensated as platform contributions.

F. Form of Payment—§ 1.482–7(h)

1. Consistency of Form of Payment With Arm's Length Charge

Under the section 482 regulations, controlled taxpayers have flexibility to choose a form of payment with respect to an arm's length charge, provided that the form of payment may be reasonably expected to yield a value consistent with such arm's length charge determined as of the date of the PCT. Thus, a taxpayer must not only determine an arm's length charge correctly under § 1.482–7(g) but also designate a form of payment that is consistent with that arm's length charge determined as of the date of the PCT. This dual concept of the flexibility in selecting the form of payment as well as the obligation to preserve the arm's length charge through determining the form of payment as of the date of the PCT is clarified by a new sentence added to § 1.482–7(h)(2)(i).

2. Services Markup Form of Payment

Several comments suggested that the final regulations should expressly permit the use of methods in § 1.482–9, particularly the cost of services plus method, for valuing and determining the form of payment of PCT Payments for services provided as, for example, by a research team. As noted in the preceding paragraph, these regulations clarify the flexibility taxpayers enjoy to adopt a form of payment consistent with the arm's length charge determined for a PCT. In theory, therefore, the arm's length charge for a platform contribution of services of a research team might be converted into a cost-of-services-plus form of payment, provided that, among other conditions, the method and form of payment treating the platform value of such research team separately from the arm's length charge for any other platform contributions provide the most reliable measures of the arm's length charges. The experience of the IRS, however, is that the arm's length charges for platform contributions of the services of a research team along with other platform contributions (e.g., of a base technology) are most often most reliably determined in the aggregate.

G. Periodic Adjustments—§ 1.482–7(i)

1. Determination of Periodic Adjustments—§ 1.482–7(i)(6)(v) and (vi)

a. In General—§ 1.482–7(i)(6)(i)

The temporary regulations provided detailed guidance for the calculation of periodic adjustments in situations where there is a single adjustment with respect to a single controlled participant. The Treasury Department and the IRS intended that the principles of that detailed guidance should also be applied in cases involving multiple periodic adjustments (whether with respect to one or multiple controlled participants, or with respect to one or multiple PCT Payments) and, accordingly, § 1.482–7T(i)(6)(i) provided that the Commissioner may make periodic adjustments with respect to all PCT Payments between all PCT Payors and PCT Payees for the Adjustment Year and all subsequent years for the duration of the CSA Activity. In response to these comments, a new example in § 1.482–7(i)(6)(vii) illustrates the application of § 1.482–7(i)(6)(i) when more than one periodic adjustment is required.

b. Adjusted RPSM—§ 1.482–7(i)(6)(v)(B)

One comment suggested that the requirement that an adjusted RPSM be used for determining periodic adjustments is inconsistent with the arm's length standard because the arm's length standard requires that the best method rule be applied in all circumstances, and the adjusted RPSM will not be the best method in every circumstance. The Treasury Department and the IRS believe that this is sufficiently addressed by the 2008 temporary regulations, which provide for periodic adjustments to be administered consistent with the arm's length standard. Specifically, § 1.482–7(i)(6)(i) provides that, in determining whether to make periodic adjustments, the Commissioner may consider whether the outcome as adjusted more reliably reflects an arm's length result under all the relevant facts and circumstances.

c. Exceptions to Periodic Adjustments—§ 1.482–7(i)(6)(vi)

Several comments suggested that the definition of ''divisional profits or losses'' is too broad and includes too much value in the concept of the actually experienced return ratio (AERR), thereby making the numerator in the Periodic Trigger too large relative to the denominator, and thus too easily triggered. In response to this comment, the exception to periodic adjustments in § 1.482–7T(i)(6)(vi)(A)(*3*) is expanded to take into account the PCT Payor's routine platform contributions. The language is further clarified to provide that, in addition to the exclusion of certain profits or losses, the PCT Payor's divisional profits or losses are calculated by taking into account the expenses on account of operating cost contributions and routine platform contributions.

d. Contractual CWI Provisions—§ 1.482–1(d)(3)(ii)(C), Examples 3 Through 7

The IRS has encountered a number of contracts that contain price terms for transactions that are subject to section 482, including buy-ins and PCTs, that provide for contingent terms based on subsequent actual income experience. Some such terms specify a charge for the transaction and then further provide for adjustments to that charge based generally on the actual income results. Certain of these terms are specifically tied to the mechanics of the CWI regulations (for example, a price adjustment is required if the income is less than 80 percent or greater than 120 percent of the price charged). See §§ 1.482–4(f)(2)(ii)(B)(*6*) and (C)(*4*) and 1.482–7T(i)(6)(i) and (ii).

Controlled participants have flexibility in agreeing to contingent payment terms and, thus, in allocating upside or downside risk among the parties. In so doing, the parties can tie their prices to the income actually earned with respect to the subject of the buy-in or PCT. Such price terms must be determined on an upfront basis and must be coordinated and consistent with the arm's length charge. The IRS has experience, however, with taxpayers failing to provide for arm's length compensation for the allocation of risk, as well as failing to provide price terms that are sufficiently clear so as to constitute an upfront allocation of risk that has economic substance. Accordingly, several examples have been added to § 1.482–7(h)(2)(iii)(C) to illustrate the treatment of certain types of contingent price terms under these regulations, and apply the principles set forth in §§ 1.482–7(h)(2)(iii)(B) and (k)(1)(iv) and 1.482–1(d)(3)(ii)(B)(*1*) and (iii)(B).

2. Advance Pricing Agreement

As stated in the Preamble to the 2008 temporary regulations, the Treasury Department and the IRS are considering issuing a revenue procedure providing an exception to periodic adjustments, similar to exceptions provided in § 1.482–7(i)(6)(vi), in the context of an advance pricing agreement (APA) entered into pursuant to Rev. Proc. 2006–9, 2006–1 CB 278. Accordingly, no periodic adjustments would be made in any year based on a Trigger PCT that is a covered transaction under the APA. See § 601.601(d)(2)(ii)(*b*).

H. Administrative Requirements—§ 1.482–7(k)

1. CSA Statements, mailing to Ogden Campus—§ 1.482–7(k)(4)(iii)

A number of comments requested that the regulations provide a specific address for mailing CSA Statements to the Ogden Campus. In response to these comments, a specific mailing address for CSA Statements has been added to the regulations.

2. Advance Pricing Agreements

One comment requested that taxpayers with CSAs covered by APAs be relieved from the administrative requirements in § 1.482–7(k)(2) through (4). The Treasury Department and the IRS are considering guidance addressing this issue, and solicit further comments concerning the extent to which compliance with the APA procedures should be deemed to satisfy any of the administrative requirements under § 1.482–7(k)(2) through (4). These comments should address the impact of any such change on the ability of the IRS to properly examine CSA-related transactions.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collections of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that this rule applies to U.S. businesses and foreign affiliates that enter into cost sharing arrangements. Few small entities are expected to enter into cost sharing agreements, as defined by these regulations. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration (CCASBA) for comment on their impact on small businesses. CCASBA did not have any comments.

Drafting Information

The principal author of these regulations is Joseph L. Tobin of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Amendment to the Regulations

Accordingly, 26 CFR parts 1, 301, and 602 are amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *
Section 1.482–7 also issued under 26 U.S.C. 482. * * *

■ **Par 2.** Section 1.367(a)–1 is amended by revising paragraph (d)(3) to read as follows:

§ 1.367(a)–1 Transfers to foreign corporations subject to section 367(a): In general.

* * * * *

(d) * * *

(3) *Transfer.* For purposes of section 367 and regulations thereunder, the term ''transfer'' means any transaction that constitutes a transfer for purposes of section 332, 351, 354, 355, 356, or 361, as applicable. A person's entering into a cost sharing arrangement under § 1.482–7 or acquiring rights to intangible property under such an arrangement shall not be considered a transfer of property described in section 367(a)(1). See § 1.6038B–1T(b)(4) for the date on which the transfer is considered to be made.

* * * * *

■ **Par. 3.** Section 1.367(a)–1T is amended by revising paragraph (d)(3) to read as follows:

§ 1.367(a)–1T Transfers to foreign corporations subject to section 367(a): In general (temporary).

* * * * *

(d) * * *

(3) [Reserved]. For further guidance, see § 1.367(a)–1(d)(3).

* * * * *

Par. 4. Section 1.482–0 is amended as follows:

■ 1. The entries for § 1.482–1(b)(2)(i) and (iii) are revised.
■ 2. The entries for § 1.482–2(e) and (f) are revised.
■ 3. The entries for § 1.482–4(f)(3)(i)(B), (g) and (h) are revised.
■ 4. The entry for § 1.482–7 is revised.
■ 5. The entries for § 1.482–9(m)(3) and (n) are revised.

The additions and revisions read as follows:

§ 1.482–0 Outline of regulations under section 482.

* * * * *

§ 1.482–1 Allocation of income and deductions among taxpayers.

* * * * *

(b) * * *

(2) * * *

(i) Methods.

* * * * *

(iii) Coordination of methods applicable to certain intangible development arrangements.

* * * * *

§ 1.482–2 Determination of taxable income in specific situations.

* * * * *

(e) Cost sharing arrangement.

(f) Effective/applicability Date.

(1) In general.

(2) Election to apply paragraph (b) to earlier taxable years.

* * * * *

§ 1.482–4 Methods to determine taxable income in connection with a transfer of intangible property.

* * * * *

(f) * * *

(3) * * *

(i) * * *

(B) Cost sharing arrangements.

* * * * *

(g) Coordination with rules governing cost sharing arrangements.

(h) Effective/applicability date.

(1) In general.

(2) Election to apply regulation to earlier taxable years.

* * * * *

§ 1.482–7 Methods to determine taxable income in connection with a cost sharing arrangement.

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(i) In general.
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* * * * *

§ 1.482–9 Methods to determine taxable income in connection with a controlled services transaction.

* * * * *

(m) * * *

(3) Coordination with rules governing cost sharing arrangements.

* * * * *

(n) Effective/applicability dates.

§ 1.482–0T [Removed]

■ **Par. 5.** Section 1.482–0T is removed.

■ **Par. 6.** Section 1.482–1 is amended by:

■ 1. Revising paragraph (b)(2)(i) and the last sentence in paragraph (c)(1).

■ 2. Adding a new paragraph (b)(2)(iii).

■ 3. Adding a new sentence to the end of paragraph (j)(6)(i).

The additions and revisions read as follows:

§ 1.482–1 Allocation of income and deductions among taxpayers.

* * * * *

(b) * * *

(2) *Arm's length methods*—(i) *Methods.* Sections 1.482–2 through 1.482–6, 1.482–7, and 1.482–9 provide specific methods to be used to evaluate whether transactions between or among members of the controlled group satisfy the arm's length standard, and if they do not, to determine the arm's length result. Section 1.482–1 and this section provide general principles applicable in determining arm's length results of such controlled transactions, but do not provide methods, for which reference must be made to those other sections in accordance with paragraphs (b)(2)(ii) and (iii) of this section. Section 1.482–7 provides the specific methods to be used to evaluate whether a cost sharing arrangement as defined in § 1.482–7 produces results consistent with an arm's length result.

* * * * *

(iii) *Coordination of methods applicable to certain intangible development arrangements.* Section 1.482–7 provides the specific methods to be used to determine arm's length

results of controlled transactions in connection with a cost sharing arrangement as defined in § 1.482–7. Sections 1.482–4 and 1.482–9, as appropriate, provide the specific methods to be used to determine arm's length results of arrangements, including partnerships, for sharing the costs and risks of developing intangibles, other than a cost sharing arrangement covered by § 1.482–7. See also §§ 1.482–4(g) (Coordination with rules governing cost sharing arrangements) and 1.482–9(m)(3) (Coordination with rules governing cost sharing arrangements).

* * * * *

(c) * * *

(1) * * * See § 1.482–7 for the applicable methods in the case of a cost sharing arrangement.

* * * * *

(j) * * *

(6) * * *

(i) * * * The provision of paragraph (b)(2)(iii) of this section is generally applicable on January 5, 2009.

* * * * *

§ 1.482–1T [Removed]

■ **Par. 7.** Section 1.482–1T is removed.

■ **Par. 8.** Section 1.482–2 is amended by revising paragraphs (e) and (f) to read as follows:

§ 1.482–2 Determination of taxable income in specific situations.

* * * * *

(e) *Cost sharing arrangement.* For rules governing allocations under section 482 to reflect an arm's length consideration for controlled transactions involving a cost sharing arrangement, see § 1.482–7.

(f) *Effective/applicability date*—(1) *In general.* The provision of paragraph (b) of this section is generally applicable for taxable years beginning after December 31, 2006. The provision of paragraph (e) of this section is generally applicable on January 5, 2009.

(2) *Election to apply paragraph (b) to earlier taxable years.* A person may elect to apply the provisions of paragraph (b) of this section to earlier taxable years in accordance with the rules set forth in § 1.482–9(n)(2).

§ 1.482–2T [Removed]

■ **Par. 9.** Section 1.482–2T is removed.

■ **Par. 10.** Section 1.482–4 is amended as follows

■ 1. Paragraphs (f)(3)(i)(B), (g) and (h) are revised.

■ 2. Paragraph (f)(7) is removed.

The revisions read as follows:

§ 1.482–4 Methods to determine taxable income in connection with a transfer of intangible property.

* * * * *

(f) * * *

(3) * * *

(i) * * *

(B) *Cost sharing arrangements.* The rules in this paragraph (f)(3) regarding ownership with respect to cost shared intangibles and cost sharing arrangements will apply only as provided in § 1.482–7.

* * * * *

(g) *Coordination with rules governing cost sharing arrangements.* Section 1.482–7 provides the specific methods to be used to determine arm's length results of controlled transactions in connection with a cost sharing arrangement. This section provides the specific methods to be used to determine arm's length results of a transfer of intangible property, including in an arrangement for sharing the costs and risks of developing intangibles other than a cost sharing arrangement covered by § 1.482–7. In the case of such an arrangement, consideration of the principles, methods, comparability, and reliability considerations set forth in § 1.482–7 is relevant in determining the best method, including an unspecified method, under this section, as appropriately adjusted in light of the differences in the facts and circumstances between such arrangement and a cost sharing arrangement.

(h) *Effective/applicability date*—(1) *In general.* Except as provided in the succeeding sentence, the provisions of paragraphs (f)(3) and (4) of this section are generally applicable for taxable years beginning after December 31, 2006. The provisions of paragraphs (f)(3)(i)(B) and (g) of this section are generally applicable on January 5, 2009.

(2) *Election to apply regulation to earlier taxable years.* A person may elect to apply the provisions of paragraphs (f)(3) and (4) of this section to earlier taxable years in accordance with the rules set forth in § 1.482–9(n)(2).

§ 1.482–4T [Removed].

■ **Par. 11.** Section 1.482–4T is removed.

■ **Par. 12.** Section 1.482–5 is amended by revising the last sentence of paragraph (c)(2)(iv) to read as follows:

§ 1.482–5 Comparable profits method.

* * * * *

(c) * * *

(2) * * *

(iv) * * * As another example, it may be appropriate to adjust the operating profit of a party to account for material differences in the utilization of or accounting for stock-based compensation (as defined by § 1.482–7(d)(3)(i)) among the tested party and comparable parties.

* * * * *

■ **Par. 13.** Section 1.482–7 is added to read as follows:

§ 1.482–7 Methods to determine taxable income in connection with a cost sharing arrangement.

(a) *In general.* The arm's length amount charged in a controlled transaction reasonably anticipated to contribute to developing intangibles pursuant to a cost sharing arrangement (CSA), as described in paragraph (b) of this section, must be determined under a method described in this section. Each method must be applied in accordance with the provisions of § 1.482–1, except as those provisions are modified in this section.

(1) *RAB share method for cost sharing transactions (CSTs).* See paragraph (b)(1)(i) of this section regarding the requirement that controlled participants, as defined in section (j)(1)(i) of this section, share intangible development costs (IDCs) in proportion to their shares of reasonably anticipated benefits (RAB shares) by entering into cost sharing transactions (CSTs).

(2) *Methods for platform contribution transactions (PCTs).* The arm's length amount charged in a platform contribution transaction (PCT) described in paragraph (b)(1)(ii) of this section must be determined under the method or methods applicable under the other section or sections of the section 482 regulations, as supplemented by paragraph (g) of this section. See § 1.482–1(b)(2)(ii) (Selection of category of method applicable to transaction), § 1.482–1(b)(2)(iii) (Coordination of methods applicable to certain intangible development arrangements), and paragraph (g) of this section (Supplemental guidance on methods applicable to PCTs).

(3) *Methods for other controlled transactions*—(i) *Contribution to a CSA by a controlled taxpayer that is not a controlled participant.* If a controlled taxpayer that is not a controlled participant contributes to developing a cost shared intangible, as defined in section (j)(1)(i) of this section, it must receive consideration from the controlled participants under the rules of § 1.482–4(f)(4) (Contribution to the value of an intangible owned by another). Such consideration will be treated as an intangible development cost for purposes of paragraph (d) of this section.

(ii) *Transfer of interest in a cost shared intangible.* If at any time (during the term, or upon or after the termination, of a CSA) a controlled participant transfers an interest in a cost shared intangible to another controlled taxpayer, the controlled participant must receive an arm's length amount of consideration from the transferee under the rules of §§ 1.482–4 through 1.482–6 as supplemented by paragraph (f)(4) of this section regarding arm's length consideration for a change in participation. For this purpose, a capability variation described in paragraph (f)(3) of this section is considered to be a controlled transfer of interests in cost shared intangibles.

(iii) *Other controlled transactions in connection with a CSA.* Controlled transactions between controlled participants that are not PCTs or CSTs and are not described in paragraph (a)(3)(ii) of this section (for example, provision of a cross operating contribution, as defined in paragraph (j)(1)(i) of this section, or make-or-sell rights, as defined in paragraph (c)(4) of this section) require arm's length consideration under the rules of §§ 1.482–1 through 1.482–6, and 1.482–9 as supplemented by paragraph (g)(2)(iv) of this section.

(iv) *Controlled transactions in the absence of a CSA.* If a controlled transaction is reasonably anticipated to contribute to developing intangibles pursuant to an arrangement that is not a CSA described in paragraph (b)(1) or (5) of this section, whether the results of any such controlled transaction are consistent with an arm's length result must be determined under the applicable rules of the other sections of the regulations under section 482. For example, an arrangement for developing intangibles in which one controlled taxpayer's costs of developing the intangibles significantly exceeds its share of reasonably anticipated benefits from exploiting the developed intangibles would not in substance be a CSA, as described in paragraphs (b)(1)(i) through (iii) of this section or paragraph (b)(5)(i) of this section. In such a case, unless the rules of this section are applicable by reason of paragraph (b)(5) of this section, the arrangement must be analyzed under other applicable sections of regulations under section 482 to determine whether it achieves arm's length results, and if not, to determine any allocations by the Commissioner that are consistent with such other regulations under section 482. See § 1.482–1(b)(2)(ii) (Selection of category of method applicable to transaction) and (iii) (Coordination of methods applicable to certain intangible development arrangements).

(4) *Coordination with the arm's length standard.* A CSA produces results that are consistent with an arm's length result within the meaning of § 1.482–1(b)(1) if, and only if, each controlled participant's IDC share (as determined under paragraph (d)(4) of this section) equals its RAB share, each controlled participant compensates its RAB share of the value of all platform contributions by other controlled participants, and all other requirements of this section are satisfied.

(b) *Cost sharing arrangement.* A cost sharing arrangement is an arrangement by which controlled participants share the costs and risks of developing cost shared intangibles in proportion to their RAB shares. An arrangement is a CSA if and only if the requirements of paragraphs (b)(1) through (4) of this section are met.

(1) *Substantive requirements*–(i) *CSTs.* All controlled participants must commit to, and in fact, engage in cost sharing transactions. In CSTs, the controlled participants make payments to each other (CST Payments) as appropriate, so that in each taxable year each controlled participant's IDC share is in proportion to its respective RAB share.

(ii) *PCTs.* All controlled participants must commit to, and in fact, engage in platform contributions transactions to the extent that there are platform contributions pursuant to paragraph (c) of this section. In a PCT, each other controlled participant (PCT Payor) is obligated to, and must in fact, make arm's length payments (PCT Payments) to each controlled participant (PCT Payee) that provides a platform contribution. For guidance on determining such arm's length obligation, see paragraph (g) of this section.

(iii) *Divisional interests.* Each controlled participant must receive a non-overlapping interest in the cost shared intangibles without further obligation to compensate another controlled participant for such interest.

(iv) *Examples.* The following examples illustrate the principles of this paragraph (b)(1):

Example 1. Company A and Company B, who are members of the same controlled group, execute an agreement to jointly develop vaccine X and own the exclusive rights to commercially exploit vaccine X in their respective territories, which together comprise the whole world. The agreement provides that they will share some, but not all, of the costs for developing Vaccine X in proportion to RAB share. Such agreement is not a CSA because Company A and Company B have not agreed to share all of the IDCs in proportion to their respective RAB shares.

Example 2. Company A and Company B agree to share all the costs of developing Vaccine X. The agreement also provides for employing certain resources and capabilities of Company A in this program including a skilled research team and certain research facilities, and provides for Company B to make payments to Company A in this respect. However, the agreement expressly provides that the program will not employ, and so Company B is expressly relieved of the payments in regard to, certain software developed by Company A as a medical research tool to model certain cellular processes expected to be implicated in the operation of Vaccine X even though such software would reasonably be anticipated to be relevant to developing Vaccine X and, thus, would be a platform contribution. See paragraph (c) of this section. Such agreement is not a CSA because Company A and Company B have not engaged in a necessary PCT for purposes of developing Vaccine X.

Example 3. Companies C and D, who are members of the same controlled group, enter into a CSA. In the first year of the CSA, C and D conduct the intangible development activity, as described in paragraph (d)(1) of this section. The total IDCs in regard to such activity are $3,000,000 of which C and D pay $2,000,000 and $1,000,000, respectively, directly to third parties. As between C and D, however, their CSA specifies that they will share all IDCs in accordance with their RAB shares (as described in paragraph (e)(1) of this section), which are 60% for C and 40% for D. It follows that C should bear $1,800,000 of the total IDCs (60% of total IDCs of $3,000,000) and D should bear $1,200,000 of the total IDCs (40% of total IDCs of $3,000,000). D makes a CST payment to C of $200,000, that is, the amount by which D's share of IDCs in accordance with its RAB share exceeds the amount of IDCs initially borne by D ($1,200,000–$1,000,000), and which also equals the amount by which the total IDCs initially borne by C exceeds its share of IDCS in accordance with its RAB share ($2,000,000—$1,800,000). As a result of D's CST payment to C, the IDC shares of C and D are in proportion to their respective RAB shares.

(2) *Administrative requirements.* The CSA must meet the requirements of paragraph (k) of this section.

(3) *Date of a PCT.* The controlled participants must enter into a PCT as of the earliest date on or after the CSA is entered into on which a platform contribution is reasonably anticipated to contribute to developing cost shared intangibles.

(4) *Divisional interests*—(i) *In general.* Pursuant to paragraph (b)(1)(iii) of this section, each controlled participant must receive a non-overlapping interest in the cost shared intangibles without further obligation to compensate another controlled participant for such interest. Each controlled participant must be entitled to the perpetual and exclusive right to the profits from

transactions of any member of the controlled group that includes the controlled participant with uncontrolled taxpayers to the extent that such profits are attributable to such interest in the cost shared intangibles.

(ii) *Territorial based divisional interests.* The CSA may divide all interests in cost shared intangibles on a territorial basis as follows. The entire world must be divided into two or more non-overlapping geographic territories. Each controlled participant must receive at least one such territory, and in the aggregate all the participants must receive all such territories. Each controlled participant will be assigned the perpetual and exclusive right to exploit the cost shared intangibles through the use, consumption, or disposition of property or services in its territories. Thus, compensation will be required if other members of the controlled group exploit the cost shared intangibles in such territory.

(iii) *Field of use based divisional interests.* The CSA may divide all interests in cost shared intangibles on the basis of all uses (whether or not known at the time of the division) to which cost shared intangibles are to be put as follows. All anticipated uses of cost shared intangibles must be identified. Each controlled participant must be assigned at least one such anticipated use, and in the aggregate all the participants must be assigned all such anticipated uses. Each controlled participant will be assigned the perpetual and exclusive right to exploit the cost shared intangibles through the use or uses assigned to it and one controlled participant must be assigned the exclusive and perpetual right to exploit cost shared intangibles through any unanticipated uses.

(iv) *Other divisional bases.* (A) In the event that the CSA does not divide interests in the cost shared intangibles on the basis of exclusive territories or fields of use as described in paragraphs (b)(4)(ii) and (iii) of this section, the CSA may adopt some other basis on which to divide all interests in the cost shared intangibles among the controlled participants, provided that each of the following criteria is met:

(*1*) The basis clearly and unambiguously divides all interests in cost shared intangibles among the controlled participants.

(*2*) The consistent use of such basis for the division of all interests in the cost shared intangibles can be dependably verified from the records maintained by the controlled participants.

(*3*) The rights of the controlled participants to exploit cost shared intangibles are non-overlapping, exclusive, and perpetual.

(*4*) The resulting benefits associated with each controlled participant's interest in cost shared intangibles are predictable with reasonable reliability.

(B) See paragraph (f)(3) of this section for rules regarding the requirement of arm's length consideration for changes in participation in CSAs involving divisions of interest described in this paragraph (b)(4)(iv).

(v) *Examples.* The following examples illustrate the principles of this paragraph (b)(4):

Example 1. Companies P and S, both members of the same controlled group, enter into a CSA to develop product Z. Under the CSA, P receives the interest in product Z in the United States and S receives the interest in product Z in the rest of the world, as described in paragraph (b)(4)(ii) of this section. Both P and S have plants for manufacturing product Z located in their respective geographic territories. However, for commercial reasons, product Z is nevertheless manufactured by P in the United States for sale to customers in certain locations just outside the United States in close proximity to P's U.S. manufacturing plant. Because S owns the territorial rights outside the United States, P must compensate S to ensure that S realizes all the cost shared intangible profits from P's sales of product Z in S's territory. The pricing of such compensation must also ensure that P realizes an appropriate return for its manufacturing efforts. Benefits projected with respect to such sales will be included for purposes of estimating S's, but not P's, RAB share.

Example 2. The facts are the same as in *Example 1* except that P and S agree to divide their interest in product Z based on site of manufacturing. P will have exclusive and perpetual rights in product Z manufactured in facilities owned by P. S will have exclusive and perpetual rights to product Z manufactured in facilities owned by S. P and S agree that neither will license manufacturing rights in product Z to any related or unrelated party. Both P and S maintain books and records that allow production at all sites to be verified. Both own facilities that will manufacture product Z and the relative capacities of these sites are known. All facilities are currently operating at near capacity and are expected to continue to operate at near capacity when product Z enters production so that it will not be feasible to shift production between P's and S's facilities. P and S have no plans to build new facilities and the lead time required to plan and build a manufacturing facility precludes the possibility that P or S will build a new facility during the period for which sales of Product Z are expected. Based on these facts, this basis for the division of interests in Product Z is a division described in paragraph (b)(4)(iv) of this section. The basis for the division of interest is unambiguous and clearly defined and its use can be dependably verified. P and S both have non-overlapping, exclusive and perpetual rights in Product Z. The division of interest results in the participant's relative benefits being predictable with reasonable reliability.

Example 3. The facts are the same as in *Example 2* except that P's and S's manufacturing facilities are not expected to operate at full capacity when product Z enters production. Production of Product Z can be shifted at any time between sites owned by P and sites owned by S, although neither P nor S intends to shift production as a result of the agreement. The division of interests in Product Z between P and S based on manufacturing site is not a division described in paragraph (b)(4)(iv) of this section because their relative shares of benefits are not predictable with reasonable reliability. The fact that neither P nor S intends to shift production is irrelevant.

(5) *Treatment of certain arrangements as CSAs*—(i) *Situation in which Commissioner must treat arrangement as a CSA.* The Commissioner must apply the rules of this section to an arrangement among controlled taxpayers if the administrative requirements of paragraph (b)(2) of this section are met with respect to such arrangement and the controlled taxpayers reasonably concluded that such arrangement was a CSA meeting the requirements of paragraphs (b)(1), (3), and (4) of this section.

(ii) *Situation in which Commissioner may treat arrangement as a CSA.* For arrangements among controlled taxpayers not described in paragraph (b)(5)(i) of this section, the Commissioner may apply the provisions of this section if the Commissioner concludes that the administrative requirements of paragraph (b)(2) of this section are met, and, notwithstanding technical failure to meet the substantive requirements of paragraph (b)(1), (3), or (4) of this section, the rules of this section will provide the most reliable measure of an arm's length result. See § 1.482–1(c)(1) (the best method rule). For purposes of applying this paragraph (b)(5)(ii), any such arrangement shall be interpreted by reference to paragraph (k)(1)(iv) of this section.

(iii) *Examples.* The following examples illustrate the principles of this paragraph (b)(5). In the examples, assume that Companies P and S are both members of the same controlled group.

Example 1. (i) P owns the patent on a formula for a capsulated pain reliever, P-Cap. P reasonably anticipates, pending further research and experimentation, that the P-Cap formula could form the platform for a formula for P-Ves, an effervescent version of P-Cap. P also owns proprietary software that it reasonably anticipates to be critical to the research efforts. P and S execute a contract that purports to be a CSA by which they agree to proportionally share the costs and risks of developing a formula for P-Ves. The

agreement reflects the various contractual requirements described in paragraph (k)(1) of this section and P and S comply with the documentation, accounting, and reporting requirements of paragraphs (k)(2) through (4) of this section. Both the patent rights for P-Cap and the software are reasonably anticipated to contribute to the development of P-Ves and therefore are platform contributions for which compensation is due from S as part of PCTs. Though P and S enter into and implement a PCT for the P-Cap patent rights that satisfies the arm's length standard, they fail to enter into a PCT for the software.

(ii) In this case, P and S have substantially complied with the contractual requirements of paragraph (k)(1) of this section and the documentation, accounting, and reporting requirements of paragraphs (k)(2) through (4) of this section and therefore have met the administrative requirements of paragraph (b)(2) of this section. However, because they did not enter into a PCT, as required under paragraphs (b)(1)(ii) and (b)(3) of this section, for the software that was reasonably anticipated to contribute to the development of P-Ves (see paragraph (c) of this section), they cannot reasonably conclude that their arrangement was a CSA. Accordingly, the Commissioner is not required under paragraph (b)(5)(i) of this section to apply the rules of this section to their arrangement.

(iii) Nevertheless, the arrangement between P and S closely resembles a CSA. If the Commissioner concludes that the rules of this section provide the most reliable measure of an arm's length result for such arrangement, then pursuant to paragraph (b)(5)(ii) of this section, the Commissioner may apply the rules of this section and treat P and S as entering into a PCT for the software in accordance with the requirements of paragraph (b)(1)(ii) of this section, and make any appropriate allocations under paragraph (i) of this section. Alternatively, the Commissioner may conclude that the rules of this section do not provide the most reliable measure of an arm's length result. In such case, the arrangement would be analyzed under the methods under other sections of the 482 regulations to determine whether the arrangement reaches an arm's length result.

Example 2. The facts are the same as in *Example 1* except that P and S do enter into and implement a PCT for the software as required under this paragraph (b). The Commissioner determines that the PCT Payments for the software were not arm's length; nevertheless, under the facts and circumstances at the time they entered into the CSA and PCTs, P and S reasonably concluded their arrangement to be a CSA. Because P and S have met the requirements of paragraph (b)(2) of this section and reasonably concluded their arrangement is a CSA, pursuant to paragraph (b)(5)(i) of this section, the Commissioner must apply the rules of this section to their arrangement. Accordingly, the Commissioner treats the arrangement as a CSA and makes adjustments to the PCT Payments as appropriate under this section to achieve an arm's length result for the PCT for the software.

Example 3. (i) The facts are the same as in *Example 1* except that P and S do enter into a PCT for the software as required under this paragraph (b). The agreement entered into by P and S provides for a fixed consideration of $50 million per year for four years, payable at the end of each year. This agreement satisfies the arm's length standard. However, S actually pays P consideration at the end of each year in the form of four annual royalties equal to two percent of sales. While such royalties at the time of the PCT were expected to be $50 million per year, actual sales during the first year were less than anticipated and the first royalty payment was only $25 million.

(ii) In this case, P and S failed to implement the terms of their agreement. Under these circumstances, P and S could not reasonably conclude that their arrangement was a CSA, as described in paragraph (b)(1) of this section. Accordingly, the Commissioner is not required under paragraph (b)(5)(i) of this section to apply the rules of this section to their arrangement.

(iii) Nevertheless, the arrangement between P and S closely resembles a CSA. If the Commissioner concludes that the rules of this section provide the most reliable measure of an arm's length result for such arrangement, then pursuant to paragraph (b)(5)(ii) of this section, the Commissioner may apply the rules of this section and make any appropriate allocations under paragraph (i) of this section. Alternatively, the Commissioner may conclude that the rules of this section do not provide the most reliable measure of an arm's length result. In such case, the arrangement would be analyzed under the methods under other sections of the 482 regulations to determine whether the arrangement reaches an arm's length result.

Example 4. (i) The facts are the same as in *Example 1* except that P does not own proprietary software and P and S use a method for determining the arm's length amount of the PCT Payment for the P-Cap patent rights different from the method used in *Example 1.*

(ii) P and S determine that the arm's length amount of the PCT Payments for the P-Cap patent is $10 million. However, the Commissioner determines the best method for determining the arm's length amount of the PCT Payments for the P-Cap patent rights and under such method the arm's length amount is $100 million. To determine this $10 million present value, P and S assumed a useful life of eight years for the platform contribution, because the P-Cap patent rights will expire after eight years. However, the P-Cap patent rights are expected to lead to benefits attributable to exploitation of the cost shared intangibles extending many years beyond the expiration of the P-Cap patent, because use of the P-Cap patent rights will let P and S bring P-Ves to market before the competition, and because P and S expect to apply for additional patents covering P-Ves, which would bar competitors from selling that product for many future years. The assumption by P and S of a useful life for the platform contribution that is less than the anticipated period of exploitation of the cost shared intangibles is contrary to paragraph (g)(2)(ii) of this section, and reduces the reliability of the method used by P and S.

(iii) The method used by P and S employs a declining royalty. The royalty starts at 8% of sales, based on an application of the CUT method in which the purported CUTs all involve licenses to manufacture and sell the current generation of P-Cap, and declines to 0% over eight years, declining by 1% each year. Such make-or-sell rights are fundamentally different from use of the P-Cap patent rights to generate a new product. This difference raises the issue of whether the make-or-sell rights are sufficiently comparable to the rights that are the subject of the PCT Payment. See § 1.482–4(c). While a royalty rate for make-or-sell rights can form the basis for a reliable determination of an arm's length PCT Payment in the CUT-based implementation of the income method described in paragraph (g)(4) of this section, under that method such royalty rate does not decline to zero. Therefore, the use of a declining royalty rate based on an initial rate for make-or-sell rights further reduces the reliability of the method used by P and S.

(iv) Sales of the next-generation product are not anticipated until after seven years, at which point the royalty rate will have declined to 1%. The temporal mismatch between the period of the royalty rate decline and the period of exploitation raises further concerns about the method's reliability.

(v) For the reasons given in paragraphs (ii) through (iv) of this *Example 4,* the method used by P and S is so unreliable and so contrary to provisions of this section that P and S could not reasonably conclude that they had contracted to make arm's length PCT Payments as required by paragraphs (b)(1)(ii) and (b)(3) of this section, and thus could not reasonably conclude that their arrangement was a CSA. Accordingly, the Commissioner is not required under paragraph (b)(5)(i) of this section to apply the rules of this section to their arrangement.

(vi) Nevertheless, the arrangement between P and S closely resembles a CSA. If the Commissioner concludes that the rules of this section provide the most reliable measure of an arm's length result for such arrangement, then pursuant to paragraph (b)(5)(ii) of this section, the Commissioner may apply the rules of this section and make any appropriate allocations under paragraph (i) of this section. Alternatively, the Commissioner may conclude that the rules of this section do not provide the most reliable measure of an arm's length result. In such case, the arrangement would be analyzed under the methods under other section 482 regulations to determine whether the arrangement reaches an arm's length result.

(6) *Entity classification of CSAs.* See § 301.7701–1(c) of this chapter for the classification of CSAs for purposes of the Internal Revenue Code.

(c) *Platform contributions*—(1) *In general.* A platform contribution is any resource, capability, or right that a controlled participant has developed, maintained, or acquired externally to the intangible development activity (whether prior to or during the course of the CSA) that is reasonably anticipated to contribute to developing

cost shared intangibles. The determination whether a resource, capability, or right is reasonably anticipated to contribute to developing cost shared intangibles is ongoing and based on the best available information. Therefore, a resource, capability, or right reasonably determined not to be a platform contribution as of an earlier point in time, may be reasonably determined to be a platform contribution at a later point in time. The PCT obligation regarding a resource or capability or right once determined to be a platform contribution does not terminate merely because it may later be determined that such resource or capability or right has not contributed, and no longer is reasonably anticipated to contribute, to developing cost shared intangibles. Notwithstanding the other provisions of this paragraph (c), platform contributions do not include rights in land or depreciable tangible property, and do not include rights in other resources acquired by IDCs. See paragraph (d)(1) of this section.

(2) *Terms of platform contributions*—(i) *Presumed to be exclusive.* For purposes of a PCT, the PCT Payee's provision of a platform contribution is presumed to be exclusive. Thus, it is presumed that the platform resource, capability, or right is not reasonably anticipated to be committed to any business activities other than the CSA Activity, as defined in paragraph (j)(1)(i) of this section, whether carried out by the controlled participants, other controlled taxpayers, or uncontrolled taxpayers.

(ii) *Rebuttal of exclusivity.* The controlled participants may rebut the presumption set forth in paragraph (c)(2)(i) of this section to the satisfaction of the Commissioner. For example, if the platform resource is a research tool, then the controlled participants could rebut the presumption by establishing to the satisfaction of the Commissioner that, as of the date of the PCT, the tool is reasonably anticipated not only to contribute to the CSA Activity but also to be licensed to an uncontrolled taxpayer. In such case, the PCT Payments may need to be prorated as described in paragraph (c)(2)(iii) of this section.

(iii) *Proration of PCT Payments to the extent allocable to other business activities*—(A) *In general.* Some transfer pricing methods employed to determine the arm's length amount of the PCT Payments do so by considering the overall value of the platform contributions as opposed to, for example, the value of the anticipated use of the platform contributions in the CSA Activity. Such a transfer pricing method is consistent with the presumption that the platform contribution is exclusive (that is, that the resources, capabilities or rights that are the subject of a platform contribution are reasonably anticipated to contribute only to the CSA Activity). See paragraph (c)(2)(i) (Terms of platform contributions—Presumed to be exclusive) of this section. The PCT Payments determined under such transfer pricing method may have to be prorated if the controlled participants can rebut the presumption that the platform contribution is exclusive to the satisfaction of the Commissioner as provided in paragraph (c)(2)(ii) of this section. In the case of a platform contribution that also contributes to lines of business of a PCT Payor that are not reasonably anticipated to involve exploitation of the cost shared intangibles, the need for explicit proration may in some cases be avoided through aggregation of transactions. See paragraph (g)(2)(iv) of this section (Aggregation of transactions).

(B) *Determining the proration of PCT Payments.* Proration will be done on a reasonable basis in proportion to the relative economic value, as of the date of the PCT, reasonably anticipated to be derived from the platform contribution by the CSA Activity as compared to the value reasonably anticipated to be derived from the platform contribution by other business activities. In the case of an aggregate valuation done under the principles of paragraph (g)(2)(iv) of this section that addresses payment for resources, capabilities, or rights used for business activities other than the CSA Activity (for example, the right to exploit an existing intangible without further development), the proration of the aggregate payments may have to reflect the economic value attributable to such resources, capabilities, or rights as well. For purposes of the best method rule under § 1.482–1(c), the reliability of the analysis under a method that requires proration pursuant to this paragraph is reduced relative to the reliability of an analysis under a method that does not require proration.

(3) *Categorization of the PCT.* For purposes of § 1.482–1(b)(2)(ii) and paragraph (a)(2) of this section, a PCT must be identified by the controlled participants as a particular type of transaction (for example, a license for royalty payments). See paragraph (k)(2)(ii)(H) of this section. Such designation must be consistent with the actual conduct of the controlled participants. If the conduct is consistent with different, economically equivalent types of transaction, then the controlled participants may designate the PCT as being any of such types of transaction. If the controlled participants fail to make such designation in their documentation, the Commissioner may make a designation consistent with the principles of paragraph (k)(1)(iv) of this section.

(4) *Certain make-or-sell rights excluded*—(i) *In general.* Any right to exploit an existing resource, capability, or right without further development of such item, such as the right to make, replicate, license, or sell existing products, does not constitute a platform contribution to a CSA (and the arm's length compensation for such rights (make-or-sell rights) does not satisfy the compensation obligation under a PCT) unless exploitation without further development of such item is reasonably anticipated to contribute to developing or further developing a cost shared intangible.

(ii) *Examples.* The following examples illustrate the principles of this paragraph (c)(4):

Example 1. P and S, which are members of the same controlled group, execute a CSA. Under the CSA, P and S will bear their RAB shares of IDCs for developing the second generation of ABC, a computer software program. Prior to that arrangement, P had incurred substantial costs and risks to develop ABC. Concurrent with entering into the arrangement, P (as the licensor) executes a license with S (as the licensee) by which S may make and sell copies of the existing ABC. Such make-or-sell rights do not constitute a platform contribution to the CSA. The rules of §§ 1.482–1 and 1.482–4 through 1.482–6 must be applied to determine the arm's length consideration in connection with the make-or-sell licensing arrangement. In certain circumstances, this determination of the arm's length consideration may be done on an aggregate basis with the evaluation of compensation obligations pursuant to the PCTs entered into by P and S in connection with the CSA. See paragraph (g)(2)(iv) of this section.

Example 2. (i) P, a software company, has developed and currently exploits software program ABC. P and S enter into a CSA to develop future generations of ABC. The ABC source code is the platform on which future generations of ABC will be built and is therefore a platform contribution of P for which compensation is due from S pursuant to a PCT. Concurrent with entering into the CSA, P licenses to S the make-or-sell rights for the current version of ABC. P has entered into similar licenses with uncontrolled parties calling for sales-based royalty payments at a rate of 20%. The current version of ABC has an expected product life of three years. P and S enter into a contingent payment agreement to cover both the PCT Payments due from S for P's platform contribution and payments due from S for the make-or-sell license. Based on the uncontrolled make-or-sell licenses, P and S agree on a sales-based royalty rate of 20% in

Year 1 that declines on a straight line basis to 0% over the 3 year product life of ABC.

(ii) The make-or-sell rights for the current version of ABC are not platform contributions, though paragraph (g)(2)(iv) of this section provides for the possibility that the most reliable determination of an arm's length charge for the platform contribution and the make-or-sell license may be one that values the two transactions in the aggregate. A contingent payment schedule based on the uncontrolled make-or-sell licenses may provide an arm's length charge for the separate make-or-sell license between P and S, provided the royalty rates in the uncontrolled licenses similarly decline, but as a measure of the aggregate PCT and licensing payments it does not account for the arm's length value of P's platform contributions which include the rights in the source code and future development rights in ABC.

Example 3. S is a controlled participant that owns Patent Q, which protects S's use of a research tool that is helpful in developing and testing new pharmaceutical compounds. The research tool, which is not itself such a compound, is used in the CSA Activity to develop such compounds. However, the CSA Activity is not anticipated to result in the further development of the research tool or in patents based on Patent Q. Although the right to use Patent Q is not anticipated to result in the further development of Patent Q or the technology that it protects, that right constitutes a platform contribution (as opposed to make-or-sell rights) because it is anticipated to contribute to the research activity to develop cost shared intangibles relating to pharmaceutical compounds covered by the CSA.

(5) *Examples.* The following examples illustrate the principles of this paragraph (c). In each example, Companies P and S are members of the same controlled group, and execute a CSA providing that each will have the exclusive right to exploit cost shared intangibles in its own territory. See paragraph (b)(4)(ii) of this section (Territorial based divisional interests).

Example 1. Company P has developed and currently markets version 1.0 of a new software application XYZ. Company P and Company S execute a CSA under which they will share the IDCs for developing future versions of XYZ. Version 1.0 is reasonably anticipated to contribute to the development of future versions of XYZ and therefore Company P's rights in version 1.0 constitute a platform contribution from Company P that must be compensated by Company S pursuant to a PCT. Pursuant to paragraph (c)(3) of this section, the controlled participants designate the platform contribution as a transfer of intangibles that would otherwise be governed by § 1.482–4, if entered into by controlled parties. Accordingly, pursuant to paragraph (a)(2) of this section, the applicable method for determining the arm's length value of the compensation obligation under the PCT between Company P and Company S will be governed by § 1.482–4 as supplemented by paragraph (g) of this section. Absent a showing to the contrary by P and S, the platform contribution in this case is presumed to be the exclusive provision of the benefit of all rights in version 1.0, other than the rights described in paragraph (c)(4) of this section (Certain make-or-sell rights excluded). This includes the right to use version 1.0 for purposes of research and the exclusive right in S's territory to exploit any future products that incorporated the technology of version 1.0, and would cover a term extending as long as the controlled participants were to exploit future versions of XYZ or any other product based on the version 1.0 platform. The compensation obligation of Company S pursuant to the PCT will reflect the full value of the platform contribution, as limited by Company S's RAB share.

Example 2. Company P and Company S execute a CSA under which they will share the IDCs for developing Vaccine Z. Company P will commit to the project its research team that has successfully developed a number of other vaccines. The expertise and existing integration of the research team is a unique resource or capability of Company P which is reasonably anticipated to contribute to the development of Vaccine Z. Therefore, P's provision of the capabilities of the research team constitute a platform contribution for which compensation is due from Company S as part of a PCT. Pursuant to paragraph (c)(3) of this section, the controlled parties designate the platform contribution as a provision of services that would otherwise be governed by § 1.482–9(a) if entered into by controlled parties. Accordingly, pursuant to paragraph (a)(2) of this section, the applicable method for determining the arm's length value of the compensation obligation under the PCT between Company P and Company S will be governed by § 1.482–9(a) as supplemented by paragraph (g) of this section. Absent a showing to the contrary by P and S, the platform contribution in this case is presumed to be the exclusive provision of the benefits by Company P of its research team to the development of Vaccine Z. Because the IDCs include the ongoing compensation of the researchers, the compensation obligation under the PCT is only for the value of the commitment of the research team by Company P to the CSA's development efforts net of such researcher compensation. The value of the compensation obligation of Company S for the PCT will reflect the full value of the provision of services, as limited by Company S's RAB share.

(d) *Intangible development costs*—(1) *Determining whether costs are IDCs.* Costs included in IDCs are determined by reference to the scope of the intangible development activity (IDA).

(i) *Definition and scope of the IDA.* For purposes of this section, the IDA means the activity under the CSA of developing or attempting to develop reasonably anticipated cost shared intangibles. The scope of the IDA includes all of the controlled participants' activities that could reasonably be anticipated to contribute to developing the reasonably anticipated cost shared intangibles. The IDA cannot be described merely by a list of particular resources, capabilities, or rights that will be used in the CSA, because such a list would not identify reasonably anticipated cost shared intangibles. Also, the scope of the IDA may change as the nature or identity of the reasonably anticipated cost shared intangibles changes or the nature of the activities necessary for their development become clearer. For example, the relevance of certain ongoing work to developing reasonably anticipated cost shared intangibles or the need for additional work may only become clear over time.

(ii) *Reasonably anticipated cost shared intangible.* For purposes of this section, *reasonably anticipated cost shared intangible* means any intangible, within the meaning of § 1.482–4(b), that, at the applicable point in time, the controlled participants intend to develop under the CSA. Reasonably anticipated cost shared intangibles may change over the course of the CSA. The controlled participants may at any time change the reasonably anticipated cost shared intangibles but must document any such change pursuant to paragraph (k)(2)(ii)(A)(*1*) of this section. Removal of reasonably anticipated cost shared intangibles does not affect the controlled participants' interests in cost shared intangibles already developed under the CSA. In addition, the reasonably anticipated cost shared intangibles automatically expand to include the intended result of any further development of a cost shared intangible already developed under the CSA, or applications of such an intangible. However, the controlled participants may override this automatic expansion in a particular case if they separately remove specified further development of such intangible (or specified applications of such intangible) from the IDA, and document such separate removal pursuant to paragraph (k)(2)(ii)(A)(*3*) of this section.

(iii) *Costs included in IDCs.* For purposes of this section, *IDCs* mean all costs, in cash or in kind (including stock-based compensation, as described in paragraph (d)(3) of this section), but excluding acquisition costs for land or depreciable property, in the ordinary course of business after the formation of a CSA that, based on analysis of the facts and circumstances, are directly identified with, or are reasonably allocable to, the IDA. Thus, IDCs include costs incurred in attempting to develop reasonably anticipated cost

shared intangibles regardless of whether such costs ultimately lead to development of those intangibles, other intangibles developed unexpectedly, or no intangibles. IDCs shall also include the arm's length rental charge for the use of any land or depreciable tangible property (as determined under § 1.482–2(c) (Use of tangible property)) directly identified with, or reasonably allocable to, the IDA. Reference to generally accepted accounting principles or Federal income tax accounting rules may provide a useful starting point but will not be conclusive regarding inclusion of costs in IDCs. IDCs do not include interest expense, foreign income taxes (as defined in § 1.901–2(a)), or domestic income taxes.

(iv) *Examples.* The following examples illustrate the principles of this paragraph (d)(1):

Example 1. A contract that purports to be a CSA provides that the IDA to which the agreement applies consists of all research and development activity conducted at laboratories A, B, and C but not at other facilities maintained by the controlled participants. The contract does not describe the reasonably anticipated cost shared intangibles with respect to which research and development is to be undertaken. The contract fails to meet the requirements set forth in paragraph (k)(1)(ii)(B) of this section because it fails to adequately describe the scope of the IDA to be undertaken.

Example 2. A contract that purports to be a CSA provides that the IDA to which the agreement applies consists of all research and development activity conducted by any of the controlled participants with the goal of developing a cure for a particular disease. Such a cure is thus a reasonably anticipated cost shared intangible. The contract also contains a provision that the IDA will exclude any activity that builds on the results of the controlled participants' prior research concerning Enzyme X even though such activity could reasonably be anticipated to contribute to developing such cure. The contract fails to meet the requirement set forth in paragraph (d)(1)(i) of this section that the scope of the IDA include all of the controlled participants' activities that could reasonably be anticipated to contribute to developing reasonably anticipated cost shared intangibles.

(2) *Allocation of costs.* If a particular cost is directly identified with, or reasonably allocable to, a function the results of which will benefit both the IDA and other business activities, the cost must be allocated on a reasonable basis between the IDA and such other business activities in proportion to the relative economic value that the IDA and such other business activities are anticipated to derive from such results.

(3) *Stock-based compensation*—(i) *In general.* As used in this section, the term *stock-based compensation* means any compensation provided by a controlled participant to an employee or independent contractor in the form of equity instruments, options to acquire stock (stock options), or rights with respect to (or determined by reference to) equity instruments or stock options, including but not limited to property to which section 83 applies and stock options to which section 421 applies, regardless of whether ultimately settled in the form of cash, stock, or other property.

(ii) *Identification of stock-based compensation with the IDA.* The determination of whether stock-based compensation is directly identified with, or reasonably allocable to, the IDA is made as of the date that the stock-based compensation is granted. Accordingly, all stock-based compensation that is granted during the term of the CSA and, at date of grant, is directly identified with, or reasonably allocable to, the IDA is included as an IDC under paragraph (d)(1) of this section. In the case of a repricing or other modification of a stock option, the determination of whether the repricing or other modification constitutes the grant of a new stock option for purposes of this paragraph (d)(3)(ii) will be made in accordance with the rules of section 424(h) and related regulations.

(iii) *Measurement and timing of stock-based compensation IDC*—(A) *In general.* Except as otherwise provided in this paragraph (d)(3)(iii), the cost attributable to stock-based compensation is equal to the amount allowable to the controlled participant as a deduction for federal income tax purposes with respect to that stock-based compensation (for example, under section 83(h)) and is taken into account as an IDC under this section for the taxable year for which the deduction is allowable.

(*1*) *Transfers to which section 421 applies.* Solely for purposes of this paragraph (d)(3)(iii)(A), section 421 does not apply to the transfer of stock pursuant to the exercise of an option that meets the requirements of section 422(a) or 423(a).

(*2*) *Deductions of foreign controlled participants.* Solely for purposes of this paragraph (d)(3)(iii)(A), an amount is treated as an allowable deduction of a foreign controlled participant to the extent that a deduction would be allowable to a United States taxpayer.

(*3*) *Modification of stock option.* Solely for purposes of this paragraph (d)(3)(iii)(A), if the repricing or other modification of a stock option is determined, under paragraph (d)(3)(ii) of this section, to constitute the grant of a new stock option not identified with, or reasonably allocable to, the IDA, the stock option that is repriced or otherwise modified will be treated as being exercised immediately before the modification, provided that the stock option is then exercisable and the fair market value of the underlying stock then exceeds the price at which the stock option is exercisable. Accordingly, the amount of the deduction that would be allowable (or treated as allowable under this paragraph (d)(3)(iii)(A)) to the controlled participant upon exercise of the stock option immediately before the modification must be taken into account as an IDC as of the date of the modification.

(*4*) *Expiration or termination of CSA.* Solely for purposes of this paragraph (d)(3)(iii)(A), if an item of stock-based compensation identified with, or reasonably allocable to, the IDA is not exercised during the term of a CSA, that item of stock-based compensation will be treated as being exercised immediately before the expiration or termination of the CSA, provided that the stock-based compensation is then exercisable and the fair market value of the underlying stock then exceeds the price at which the stock-based compensation is exercisable. Accordingly, the amount of the deduction that would be allowable (or treated as allowable under this paragraph (d)(3)(iii)(A)) to the controlled participant upon exercise of the stock-based compensation must be taken into account as an IDC as of the date of the expiration or termination of the CSA.

(B) *Election with respect to options on publicly traded stock*—(*1*) *In general.* With respect to stock-based compensation in the form of options on publicly traded stock, the controlled participants in a CSA may elect to take into account all IDCs attributable to those stock options in the same amount, and as of the same time, as the fair value of the stock options reflected as a charge against income in audited financial statements or disclosed in footnotes to such financial statements, provided that such statements are prepared in accordance with United States generally accepted accounting principles by or on behalf of the company issuing the publicly traded stock.

(*2*) *Publicly traded stock.* As used in this paragraph (d)(3)(iii)(B), the term *publicly traded stock* means stock that is regularly traded on an established United States securities market and is issued by a company whose financial statements are prepared in accordance with United States generally accepted accounting principles for the taxable year.

(*3*) *Generally accepted accounting principles.* For purposes of this paragraph (d)(3)(iii)(B), a financial statement prepared in accordance with a comprehensive body of generally accepted accounting principles other than United States generally accepted accounting principles is considered to be prepared in accordance with United States generally accepted accounting principles provided that either—

(*i*) The fair value of the stock options under consideration is reflected in the reconciliation between such other accounting principles and United States generally accepted accounting principles required to be incorporated into the financial statement by the securities laws governing companies whose stock is regularly traded on United States securities markets; or

(*ii*) In the absence of a reconciliation between such other accounting principles and United States generally accepted accounting principles that reflects the fair value of the stock options under consideration, such other accounting principles require that the fair value of the stock options under consideration be reflected as a charge against income in audited financial statements or disclosed in footnotes to such statements.

(*4*) *Time and manner of making the election.* The election described in this paragraph (d)(3)(iii)(B) is made by an explicit reference to the election in the written contract required by paragraph (k)(1) of this section or in a written amendment to the CSA entered into with the consent of the Commissioner pursuant to paragraph (d)(3)(iii)(C) of this section. In the case of a CSA in existence on August 26, 2003, the election by written amendment to the CSA may be made without the consent of the Commissioner if such amendment is entered into not later than the latest due date (with regard to extensions) of a federal income tax return of any controlled participant for the first taxable year beginning after August 26, 2003.

(C) *Consistency.* Generally, all controlled participants in a CSA taking options on publicly traded stock into account under paragraph (d)(3)(ii), (d)(3)(iii)(A), or (d)(3)(iii)(B) of this section must use that same method of identification, measurement and timing for all options on publicly traded stock with respect to that CSA. Controlled participants may change their method only with the consent of the Commissioner and only with respect to stock options granted during taxable years subsequent to the taxable year in which the Commissioner's consent is obtained. All controlled participants in the CSA must join in requests for the Commissioner's consent under this paragraph (d)(3)(iii)(C). Thus, for example, if the controlled participants make the election described in paragraph (d)(3)(iii)(B) of this section upon the formation of the CSA, the election may be revoked only with the consent of the Commissioner, and the consent will apply only to stock options granted in taxable years subsequent to the taxable year in which consent is obtained. Similarly, if controlled participants already have granted stock options that have been or will be taken into account under the general rule of paragraph (d)(3)(iii)(A) of this section, then except in cases specified in the last sentence of paragraph (d)(3)(iii)(B)(*4*) of this section, the controlled participants may make the election described in paragraph (d)(3)(iii)(B) of this section only with the consent of the Commissioner, and the consent will apply only to stock options granted in taxable years subsequent to the taxable year in which consent is obtained.

(4) *IDC share.* A controlled participant's IDC share for a taxable year is equal to the controlled participant's cost contribution for the taxable year, divided by the sum of all IDCs for the taxable year. A controlled participant's cost contribution for a taxable year means all of the IDCs initially borne by the controlled participant, plus all of the CST Payments that the participant makes to other controlled participants, minus all of the CST Payments that the participant receives from other controlled participants.

(5) *Examples.* The following examples illustrate this paragraph (d):

Example 1. Foreign parent (FP) and its U.S. subsidiary (USS) enter into a CSA to develop a better mousetrap. USS and FP share the costs of FP's R&D facility that will be exclusively dedicated to this research, the salaries of the researchers at the facility, and overhead costs attributable to the project. They also share the cost of a conference facility that is at the disposal of the senior executive management of each company. Based on the facts and circumstances, the cost of the conference facility cannot be directly identified with, and is not reasonably allocable to, the IDA. In this case, the cost of the conference facility must be excluded from the amount of IDCs.

Example 2. U.S. parent (USP) and its foreign subsidiary (FS) enter into a CSA to develop intangibles for producing a new device. USP and FS share the costs of an R&D facility, the salaries of the facility's researchers, and overhead costs attributable to the project. Although USP also incurs costs related to field testing of the device, USP does not include those costs in the IDCs that USP and FS will share under the CSA. The Commissioner may determine, based on the facts and circumstances, that the costs of field testing are IDCs that the controlled participants must share.

Example 3. U.S. parent (USP) and its foreign subsidiary (FS) enter into a CSA to develop a new process patent. USP assigns certain employees to perform solely R&D to develop a new mathematical algorithm to perform certain calculations. That algorithm will be used both to develop the new process patent and to develop a new design patent the development of which is outside the scope of the CSA. During years covered by the CSA, USP compensates such employees with cash salaries, stock-based compensation, or a combination of both. USP and FS anticipate that the economic value attributable to the R&D will be derived from the process patent and the design patent in a relative proportion of 75% and 25%, respectively. Applying the principles of paragraph (d)(2) of this section, 75% of the compensation of such employees must be allocated to the development of the new process patent and, thus, treated as IDCs. With respect to the cash salary compensation, the IDC is 75% of the face value of the cash. With respect to the stock-based compensation, the IDC is 75% of the value of the stock-based compensation as determined under paragraph (d)(3)(iii) of this section.

Example 4. Foreign parent (FP) and its U.S. subsidiary (USS) enter into a CSA to develop a new computer source code. FP has an executive officer who oversees a research facility and employees dedicated solely to the IDA. The executive officer also oversees other research facilities and employees unrelated to the IDA, and performs certain corporate overhead functions. The full amount of the costs of the research facility and employees dedicated solely to the IDA can be directly identified with the IDA and, therefore, are IDCs. In addition, based on the executive officer's records of time worked on various matters, the controlled participants reasonably allocate 20% of the executive officer's compensation to supervision of the facility and employees dedicated to the IDA, 50% of the executive officer's compensation to supervision of the facilities and employees unrelated to the IDA, and 30% of the executive officer's compensation to corporate overhead functions. The controlled participants also reasonably determine that the results of the executive officer's corporate overhead functions yield equal economic benefit to the IDA and the other business activities of FP. Applying the principles of paragraph (d)(1) of this section, the executive officer's compensation allocated to supervising the facility and employees dedicated to the IDA (amounting to 20% of the executive officer's total compensation) must be treated as IDCs. Applying the principles of paragraph (d)(2) of this section, half of the executive officer's compensation allocated to corporate overhead functions (that is, half of 30% of the executive officer's total compensation), must be treated as IDCs. Therefore, a total of 35% (20% plus 15%) of the executive officer's total compensation must be treated as IDCs.

(e) *Reasonably anticipated benefits share*—(1) *Definition*—(i) *In general.* A controlled participant's share of

reasonably anticipated benefits is equal to its reasonably anticipated benefits divided by the sum of the reasonably anticipated benefits, as defined in paragraph (j)(1)(i) of this section, of all the controlled participants. RAB shares must be updated to account for changes in economic conditions, the business operations and practices of the participants, and the ongoing development of intangibles under the CSA. For purposes of determining RAB shares at any given time, reasonably anticipated benefits must be estimated over the entire period, past and future, of exploitation of the cost shared intangibles, and must reflect appropriate updates to take into account the most reliable data regarding past and projected future results available at such time. RAB shares determined for a particular purpose shall not be further updated for that purpose based on information not available at the time that determination needed to be made. For example, RAB shares determined in order to determine IDC shares for a particular taxable year (as set forth in paragraphs (b)(1)(i) and (d)(4) of this section) shall not be recomputed based on information not available at that time. Similarly, RAB shares determined for the purpose of using a particular method such as the acquisition price method (as set forth in paragraph (g)(5)(ii) of this section) to evaluate the arm's length amount charged in a PCT shall not be recomputed based on information not available at the date of that PCT. However, nothing in this paragraph (e)(1)(i) shall limit the Commissioner's use of subsequently available information for purposes of its allocation determinations in accordance with the provisions of paragraph (i) (Allocations by the Commissioner in connection with a CSA) of this section.

(ii) *Reliability.* A controlled participant's RAB share must be determined by using the most reliable estimate. In determining which of two or more available estimates is most reliable, the quality of the data and assumptions used in the analysis must be taken into account, consistent with § 1.482–1(c)(2)(ii) (Data and assumptions). Thus, the reliability of an estimate will depend largely on the completeness and accuracy of the data, the soundness of the assumptions, and the relative effects of particular deficiencies in data or assumptions on different estimates. If two estimates are equally reliable, no adjustment should be made based on differences between the estimates. The following factors will be particularly relevant in determining the reliability of an estimate of RAB shares:

(A) The basis used for measuring benefits, as described in paragraph (e)(2)(ii) of this section.

(B) The projections used to estimate benefits, as described in paragraph (e)(2)(iii) of this section.

(iii) *Examples.* The following examples illustrate the principles of this paragraph (e)(1):

Example 1. (i) USP and FS plan to conduct research to develop Product Lines A and B. USP and FS reasonably anticipate respective benefits from Product Line A of 100X and 200X and respective benefits from Product Line B, respectively, of 300X and 400X. USP and FS thus reasonably anticipate combined benefits from Product Lines A and B of 400X and 600X, respectively.

(ii) USP and FS could enter into a separate CSA to develop Product Line A with respective RAB shares of 33⅓ percent and 66⅔ percent (reflecting a ratio of 100X to 200X), and into a separate CSA to develop Product Line B with respective RAB shares of 42⁶⁄₇ percent and 57¹⁄₇ percent (reflecting a ratio of 300X to 400X). Alternatively, USP and FS could enter into a single CSA to develop both Product Lines A and B with respective RAB shares of 40 percent and 60 percent (in the ratio of 400X to 600X). If the separate CSAs are chosen, then any costs for activities that contribute to developing both Product Line A and Product Line B will constitute IDCs of the respective CSAs as required by paragraphs (d)(1) and (2) of this section.

Example 2. (i) USP, a US company, wholly owns foreign subsidiary, FS. USP and FS enter into a CSA at the start of Year 1. The CSA's total IDCs are $100,000 in each year for Years 1 through 4. In Year 1, USP correctly estimates its RAB share as 50%, based on information available at the time, and therefore correctly computes $50,000 as its cost contribution for Year 1.

(ii) In Year 4, USP correctly estimates its RAB share to be 70%, based on information available at the time and, therefore, correctly computes $70,000 as its cost contribution for Year 4.

(iii) In Year 4, USP also files an amended return for Year 1 in which USP deducts a cost contribution of $70,000, asserting that, for this purpose, it should revise its Year 1 estimated RAB share to 70% based on the information that is now available to it in Year 4. The Commissioner determines that USP is incorrect for two reasons. First, a RAB share determined for a particular purpose (here, to determine USP's IDC shares and thus USP's cost contributions in Year 1) should not be revised based on information not available to USP until Year 4. See paragraph (e)(1)(i) of this section. Second, more generally, USP is not permitted to file an amended return for this purpose under § 1.482–1(a)(3). Therefore, for both of these reasons, Commissioner adjusts USP's amended return for Year 1 by disallowing $20,000 of the $70,000 deduction.

(2) *Measure of benefits*—(i) *In general.* In order to estimate a controlled participant's RAB share, the amount of each controlled participant's reasonably anticipated benefits must be measured on a basis that is consistent for all such participants. See paragraph (e)(2)(ii)(E) *Example 9* of this section. If a controlled participant transfers a cost shared intangible to another controlled taxpayer, other than by way of a transfer described in paragraph (f) of this section, that controlled participant's benefits from the transferred intangible must be measured by reference to the transferee's benefits, disregarding any consideration paid by the transferee to the controlled participant (such as a royalty pursuant to a license agreement). Reasonably anticipated benefits are measured either on a direct basis, by reference to estimated benefits to be generated by the use of cost shared intangibles (generally based on additional revenues plus cost savings less any additional costs incurred), or on an indirect basis, by reference to certain measurements that reasonably can be assumed to relate to benefits to be generated. Such indirect bases of measurement of anticipated benefits are described in paragraph (e)(2)(ii) of this section. A controlled participant's reasonably anticipated benefits must be measured on the basis, whether direct or indirect, that most reliably determines RAB shares. In determining which of two bases of measurement is most reliable, the factors set forth in § 1.482–1(c)(2)(ii) (Data and assumptions) must be taken into account. It normally will be expected that the basis that provided the most reliable estimate for a particular year will continue to provide the most reliable estimate in subsequent years, absent a material change in the factors that affect the reliability of the estimate. Regardless of whether a direct or indirect basis of measurement is used, adjustments may be required to account for material differences in the activities that controlled participants undertake to exploit their interests in cost shared intangibles. See *Examples 4* and *7* of paragraph (e)(2)(ii)(E) of this section.

(ii) *Indirect bases for measuring anticipated benefits.* Indirect bases for measuring anticipated benefits from participation in a CSA include the following:

(A) *Units used, produced, or sold.* Units of items used, produced, or sold by each controlled participant in the business activities in which cost shared intangibles are exploited may be used as an indirect basis for measuring its anticipated benefits. This basis of measurement will more reliably determine RAB shares to the extent that each controlled participant is expected

to have a similar increase in net profit or decrease in net loss attributable to the cost shared intangibles per unit of the item or items used, produced, or sold. This circumstance is most likely to arise when the cost shared intangibles are exploited by the controlled participants in the use, production, or sale of substantially uniform items under similar economic conditions.

(B) *Sales.* Sales by each controlled participant in the business activities in which cost shared intangibles are exploited may be used as an indirect basis for measuring its anticipated benefits. This basis of measurement will more reliably determine RAB shares to the extent that each controlled participant is expected to have a similar increase in net profit or decrease in net loss attributable to cost shared intangibles per dollar of sales. This circumstance is most likely to arise if the costs of exploiting cost shared intangibles are not substantial relative to the revenues generated, or if the principal effect of using cost shared intangibles is to increase the controlled participants' revenues (for example, through a price premium on the products they sell) without affecting their costs substantially. Sales by each controlled participant are unlikely to provide a reliable basis for measuring RAB shares unless each controlled participant operates at the same market level (for example, manufacturing, distribution, etc.).

(C) *Operating profit.* Operating profit of each controlled participant from the activities in which cost shared intangibles are exploited, as determined before any expense (including amortization) on account of IDCs, may be used as an indirect basis for measuring anticipated benefits. This basis of measurement will more reliably determine RAB shares to the extent that such profit is largely attributable to the use of cost shared intangibles, or if the share of profits attributable to the use of cost shared intangibles is expected to be similar for each controlled participant. This circumstance is most likely to arise when cost shared intangibles are closely associated with the activity that generates the profit and the activity could not be carried on or would generate little profit without use of those intangibles.

(D) *Other bases for measuring anticipated benefits.* Other bases for measuring anticipated benefits may in some circumstances be appropriate, but only to the extent that there is expected to be a reasonably identifiable relationship between the basis of measurement used and additional revenue generated or net costs saved by the use of cost shared intangibles. For example, a division of costs based on employee compensation would be considered unreliable unless there were a relationship between the amount of compensation and the expected additional revenue generated or net costs saved by the controlled participants from using the cost shared intangibles.

(E) *Examples.* The following examples illustrates this paragraph (e)(2)(ii):

Example 1. Controlled parties A and B enter into a CSA to develop product and process intangibles for already existing Product P. Without such intangibles, A and B would each reasonably anticipate revenue, in present value terms, of $100M from sales of Product P until it becomes obsolete. With the intangibles, A and B each reasonably anticipate selling the same number of units each year, but reasonably anticipate that the price will be higher. Because the particular product intangible is more highly regarded in A's market, A reasonably anticipates an increase of $20M in present value revenue from the product intangible, while B reasonably anticipates an increase of only $10M in present value from the product intangible. Further, A and B each reasonably anticipate spending an additional amount equal to $5M in present value in production costs to include the feature embodying the product intangible. Finally, A and B each reasonably anticipate saving an amount equal to $2M in present value in production costs by using the process intangible. A and B reasonably anticipate no other economic effects from exploiting the cost shared intangibles. A's reasonably anticipated benefits from exploiting the cost shared intangibles equal its reasonably anticipated increase in revenue ($20M) plus its reasonably anticipated cost savings ($2M) less its reasonably anticipated increased costs ($5M), which equals $17M. Similarly, B's reasonably anticipated benefits from exploiting the cost shared intangibles equal its reasonably anticipated increase in revenue ($10M) plus its reasonably anticipated cost savings ($2M) less its reasonably anticipated increased costs ($5M), which equals $7M. Thus A's reasonably anticipated benefits are $17M and B's reasonably anticipated benefits are $7M.

Example 2. Foreign Parent (FP) and U.S. Subsidiary (USS) both produce a feedstock for the manufacture of various high-performance plastic products. Producing the feedstock requires large amounts of electricity, which accounts for a significant portion of its production cost. FP and USS enter into a CSA to develop a new process that will reduce the amount of electricity required to produce a unit of the feedstock. FP and USS currently both incur an electricity cost of $2 per unit of feedstock produced and rates for each are expected to remain similar in the future. The new process, if it is successful, will reduce the amount of electricity required by each company to produce a unit of the feedstock by 50%. Switching to the new process would not require FP or USS to incur significant investment or other costs. Therefore, the cost savings each company is expected to achieve after implementing the new process are $1 per unit of feedstock produced. Under the CSA, FP and USS divide the costs of developing the new process based on the units of the feedstock each is anticipated to produce in the future. In this case, units produced is the most reliable basis for measuring RAB shares and dividing the IDCs because each controlled participant is expected to have a similar $1 (50% of current charge of $2) decrease in costs per unit of the feedstock produced.

Example 3. The facts are the same as in *Example 2,* except that currently USS pays $3 per unit of feedstock produced for electricity while FP pays $6 per unit of feedstock produced. In this case, units produced is not the most reliable basis for measuring RAB shares and dividing the IDCs because the participants do not expect to have a similar decrease in costs per unit of the feedstock produced. The Commissioner determines that the most reliable measure of RAB shares may be based on units of the feedstock produced if FP's units are weighted relative to USS's units by a factor of 2. This reflects the fact that FP pays twice as much as USS for electricity and, therefore, FP's savings of $3 per unit of the feedstock (50% reduction of current charge of $6) would be twice USS's savings of $1.50 per unit of feedstock (50% reduction of current charge of $3) from any new process eventually developed.

Example 4. The facts are the same as in *Example 3,* except that to supply the particular needs of the U.S. market USS manufactures the feedstock with somewhat different properties than FP's feedstock. This requires USS to employ a somewhat different production process than does FP. Because of this difference, USS would incur significant construction costs in order to adopt any new process that may be developed under the cost sharing agreement. In this case, units produced is not the most reliable basis for measuring RAB shares. In order to reliably determine RAB shares, the Commissioner measures the reasonably anticipated benefits of USS and FP on a direct basis. USS's reasonably anticipated benefits are its reasonably anticipated total savings in electricity costs, less its reasonably anticipated costs of adopting the new process. FS's reasonably anticipated benefits are its reasonably anticipated total savings in electricity costs.

Example 5. U.S. Parent (USP) and Foreign Subsidiary (FS) enter into a CSA to develop new anesthetic drugs. USP obtains the right to market any resulting drugs in the United States and FS obtains the right to market any resulting drugs in the rest of the world. USP and FS determine RAB shares on the basis of their respective total anticipated operating profit from all drugs under development. USP anticipates that it will receive a much higher profit than FS per unit sold because the price of the drugs is not regulated in the United States, whereas the price of the drugs is regulated in many non-U.S. jurisdictions. In both controlled participants' territories, the anticipated operating profits are almost entirely attributable to the use of the cost

shared intangibles. In this case, the controlled participants' basis for measuring RAB shares is the most reliable.

Example 6. (i) Foreign Parent (FP) and U.S. Subsidiary (USS) manufacture and sell fertilizers. They enter into a CSA to develop a new pellet form of a common agricultural fertilizer that is currently available only in powder form. Under the CSA, USS obtains the rights to produce and sell the new form of fertilizer for the U.S. market while FP obtains the rights to produce and sell the new form of fertilizer in the rest of the world. The costs of developing the new form of fertilizer are divided on the basis of the anticipated sales of fertilizer in the controlled participants' respective markets.

(ii) If the research and development is successful, the pellet form will deliver the fertilizer more efficiently to crops and less fertilizer will be required to achieve the same effect on crop growth. The pellet form of fertilizer can be expected to sell at a price premium over the powder form of fertilizer based on the savings in the amount of fertilizer that needs to be used. This price premium will be a similar premium per dollar of sales in each territory. If the research and development is successful, the costs of producing pellet fertilizer are expected to be approximately the same as the costs of producing powder fertilizer and the same for both FP and USS. Both FP and USS operate at approximately the same market levels, selling their fertilizers largely to independent distributors.

(iii) In this case, the controlled participants' basis for measuring RAB shares is the most reliable.

Example 7. The facts are the same as in *Example 6,* except that FP distributes its fertilizers directly while USS sells to independent distributors. In this case, sales of USS and FP are not the most reliable basis for measuring RAB shares unless adjustments are made to account for the difference in market levels at which the sales occur.

Example 8. Foreign Parent (FP) and U.S. Subsidiary (USS) enter into a CSA to develop materials that will be used to train all new entry-level employees. FP and USS determine that the new materials will save approximately ten hours of training time per employee. Because their entry-level employees are paid on differing wage scales, FP and USS decide that they should not measure benefits based on the number of entry-level employees hired by each. Rather, they measure benefits based on compensation paid to the entry-level employees hired by each. In this case, the basis used for measuring RAB shares is the most reliable because there is a direct relationship between compensation paid to new entry-level employees and costs saved by FP and USS from the use of the new training materials.

Example 9. U.S. Parent (USP), Foreign Subsidiary 1 (FS1), and Foreign Subsidiary 2 (FS2) enter into a CSA to develop computer software that each will market and install on customers' computer systems. The controlled participants measure benefits on the basis of projected sales by USP, FS1, and FS2 of the software in their respective geographic areas. However, FS1 plans not only to sell but also to license the software to unrelated customers, and FS1's licensing income (which is a percentage of the licensees' sales) is not counted in the projected benefits. In this case, the basis used for measuring the benefits of each controlled participant is not the most reliable because all of the benefits received by controlled participants are not taken into account. In order to reliably determine RAB shares, FS1's projected benefits from licensing must be included in the measurement on a basis that is the same as that used to measure its own and the other controlled participants' projected benefits from sales (for example, all controlled participants might measure their benefits on the basis of operating profit).

(iii) *Projections used to estimate benefits*—(A) *In general.* The reliability of an estimate of RAB shares also depends upon the reliability of projections used in making the estimate. Projections required for this purpose generally include a determination of the time period between the inception of the research and development activities under the CSA and the receipt of benefits, a projection of the time over which benefits will be received, and a projection of the benefits anticipated for each year in which it is anticipated that the cost shared intangible will generate benefits. A projection of the relevant basis for measuring anticipated benefits may require a projection of the factors that underlie it. For example, a projection of operating profits may require a projection of sales, cost of sales, operating expenses, and other factors that affect operating profits. If it is anticipated that there will be significant variation among controlled participants in the timing of their receipt of benefits, and consequently benefit shares are expected to vary significantly over the years in which benefits will be received, it normally will be necessary to use the present value of the projected benefits to reliably determine RAB shares. See paragraph (g)(2)(v) of this section for best method considerations regarding discount rates used for this purpose. If it is not anticipated that benefit shares will significantly change over time, current annual benefit shares may provide a reliable projection of RAB shares. This circumstance is most likely to occur when the CSA is a long-term arrangement, the arrangement covers a wide variety of intangibles, the composition of the cost shared intangibles is unlikely to change, the cost shared intangibles are unlikely to generate unusual profits, and each controlled participant's share of the market is stable.

(B) *Examples.* The following examples illustrate the principles of this paragraph (e)(2)(iii):

Example 1. (i) Foreign Parent (FP) and U.S. Subsidiary (USS) enter into a CSA to develop a new car model. The controlled participants plan to spend four years developing the new model and four years producing and selling the new model. USS and FP project total sales of $4 billion and $2 billion, respectively, over the planned four years of exploitation of the new model. The controlled participants determine RAB shares for each year of 66⅔% for USS and 33⅓% for FP, based on projected total sales.

(ii) USS typically begins producing and selling new car models a year after FP begins producing and selling new car models. In order to reflect USS's one-year lag in introducing new car models, a more reliable projection of each participant's RAB share would be based on a projection of all four years of sales for each participant, discounted to present value.

Example 2. U.S. Parent (USP) and Foreign Subsidiary (FS) enter into a CSA to develop new and improved household cleaning products. Both controlled participants have sold household cleaning products for many years and have stable worldwide market shares. The products under development are unlikely to produce unusual profits for either controlled participant. The controlled participants determine RAB shares on the basis of each controlled participant's current sales of household cleaning products. In this case, the controlled participants' RAB shares are reliably projected by current sales of cleaning products.

Example 3. The facts are the same as in *Example 2,* except that FS's market share is rapidly expanding because of the business failure of a competitor in its geographic area. The controlled participants' RAB shares are not reliably projected by current sales of cleaning products. FS's benefit projections should take into account its growth in market share.

Example 4. Foreign Parent (FP) and U.S. Subsidiary (USS) enter into a CSA to develop synthetic fertilizers and insecticides. FP and USS share costs on the basis of each controlled participant's current sales of fertilizers and insecticides. The market shares of the controlled participants have been stable for fertilizers, but FP's market share for insecticides has been expanding. The controlled participants' projections of RAB shares are reliable with regard to fertilizers, but not reliable with regard to insecticides; a more reliable projection of RAB shares would take into account the expanding market share for insecticides.

(f) *Changes in participation under a CSA*—(1) *In general.* A change in participation under a CSA occurs when there is either a controlled transfer of interests or a capability variation. A change in participation requires arm's length consideration under paragraph (a)(3)(ii) of this section, and as more fully described in this paragraph (f).

(2) *Controlled transfer of interests.* A controlled transfer of interests occurs when a participant in a CSA transfers all or part of its interests in cost shared intangibles under the CSA in a

controlled transaction, and the transferee assumes the associated obligations under the CSA. For example, a change in the territorial based divisional interests or field of use based divisional interests, as described in paragraph (b)(4), is a controlled transfer of interests. After the controlled transfer of interests occurs, the CSA will still exist if at least two controlled participants still have interests in the cost shared intangibles. In such a case, the transferee will be treated as succeeding to the transferor's prior history under the CSA as pertains to the transferred interests, including the transferor's cost contributions, benefits derived, and PCT Payments attributable to such rights or obligations. A transfer that would otherwise constitute a controlled transfer of interests for purposes of this paragraph (f)(2) shall not constitute a controlled transfer of interests if it also constitutes a capability variation for purposes of paragraph (f)(3) of this section.

(3) *Capability variation.* A capability variation occurs when, in a CSA in which interests in cost shared intangibles are divided as described in paragraph (b)(4)(iv) of this section, the controlled participants' division of interests or their relative capabilities or capacities to benefit from the cost shared intangibles are materially altered. For purposes of paragraph (a)(3)(ii) of this section, a capability variation is considered to be a controlled transfer of interests in cost shared intangibles, in which any controlled participant whose RAB share decreases as a result of the capability variation is a transferor, and any controlled participant whose RAB share thus increases is the transferee of the interests in cost shared intangibles.

(4) *Arm's length consideration for a change in participation.* In the event of a change in participation, the arm's length amount of consideration from the transferee, under the rules of §§ 1.482–1 and 1.482–4 through 1.482–6 and paragraph (a)(3)(ii) of this section, will be determined consistent with the reasonably anticipated incremental change in the returns to the transferee and transferor resulting from such change in participation. Such changes in returns will themselves depend on the reasonably anticipated incremental changes in the benefits from exploiting the cost shared intangibles, IDCs borne, and PCT Payments (if any). However, any arm's length consideration required under this paragraph (f)(4) with respect to a capability variation shall be reduced as necessary to prevent duplication of an adjustment already performed under paragraph (i)(2)(ii)(A) of this section that resulted from the same capability variation. If an adjustment has been performed already under this paragraph (f)(4) with respect to a capability variation, then for purposes of any adjustment to be performed under paragraph (i)(2)(ii)(A) of this section, the controlled participants' projected benefit shares referred to in paragraph (i)(2)(ii)(A) of this section shall be considered to be the controlled participants' respective RAB shares after the capability variation occurred.

(5) *Examples.* The following examples illustrate the principles of this paragraph (f):

Example 1. X, Y, and Z are the only controlled participants in a CSA. The CSA divides interests in cost shared intangibles on a territorial basis as described in paragraph (b)(4)(ii) of this section. X is assigned the territories of the Americas, Y is assigned the territory of the UK and Australia, and Z is assigned the rest of the world. When the CSA is formed, X has a platform contribution T. Under the PCTs for T, Y and Z are each obligated to pay X royalties equal to five percent of their respective sales. Aside from T, there are no platform contributions. Two years after the formation of the CSA, Y transfers to Z its interest in cost shared intangibles relating to the UK territory, and the associated obligations, in a controlled transfer of interests described in paragraph (f)(2) of this section. At that time the reasonably anticipated benefits from exploiting cost shared intangibles in the UK have a present value of $11M, the reasonably anticipated IDCs to be borne relating to the UK territory have a present value of $3M, and the reasonably anticipated PCT Payments to be made to X relating to sales in the UK territory have a present value of $2M. As arm's length consideration for the change in participation due to the controlled transfer of interests, Z must pay Y compensation with an anticipated present value of $11M, less $3M, less $2M, which equals $6M.

Example 2. As in *Example 2* of paragraph (b)(4)(v) of this section, companies P and S, both members of the same controlled group, enter into a CSA to develop product Z. P and S agree to divide their interest in product Z based on site of manufacturing. P will have exclusive and perpetual rights in product Z manufactured in facilities owned by P. S will have exclusive and perpetual rights to product Z manufactured in facilities owned by S. P and S agree that neither will license manufacturing rights in product Z to any related or unrelated party. Both P and S maintain books and records that allow production at all sites to be verified. Both own facilities that will manufacture product Z and the relative capacities of these sites are known. All facilities are currently operating at near capacity and are expected to continue to operate at near capacity when product Z enters production so that it will not be feasible to shift production between P's and S's facilities. P and S have no plans to build new facilities and the lead time required to plan and build a manufacturing facility precludes the possibility that P or S will build a new facility during the period for which sales of Product Z are expected. When the CSA is formed, P has a platform contribution T. Under the PCT for T, S is obligated to pay P sales-based royalties according to a certain formula. Aside from T, there are no other platform contributions. Two years after the formation of the CSA, owing to a change in plans not reasonably foreseeable at the time the CSA was entered into, S acquires additional facilities F for the manufacture of Product Z. Such acquisition constitutes a capability variation described in paragraph (f)(3) of this section. Under this capability variation, S's RAB share increases from 50% to 60%. Accordingly, there is a compensable change in participation under paragraph (f)(3) of this section.

(g) *Supplemental guidance on methods applicable to PCTs*—(1) *In general.* This paragraph (g) provides supplemental guidance on applying the methods listed in this paragraph (g)(1) for purposes of evaluating the arm's length amount charged in a PCT. Each method will yield a value for the compensation obligation of each PCT Payor consistent with the product of the combined pre-tax value to all controlled participants of the platform contribution that is the subject of the PCT and the PCT Payor's RAB share. Each method must yield results consistent with measuring the value of a platform contribution by reference to the future income anticipated to be generated by the resulting cost shared intangibles. The methods are—

(i) The comparable uncontrolled transaction method described in § 1.482–4(c), or the comparable uncontrolled services price method described in § 1.482–9(c), as further described in paragraph (g)(3) of this section;

(ii) The income method, described in paragraph (g)(4) of this section;

(iii) The acquisition price method, described in paragraph (g)(5) of this section;

(iv) The market capitalization method, described in paragraph (g)(6) of this section;

(v) The residual profit split method, described in paragraph (g)(7) of this section; and

(vi) Unspecified methods, described in paragraph (g)(8) of this section.

(2) *Best method analysis applicable for evaluation of a PCT pursuant to a CSA*—(i) *In general.* Each method must be applied in accordance with the provisions of § 1.482–1, including the best method rule of § 1.482–1(c), the comparability analysis of § 1.482–1(d), and the arm's length range of § 1.482–1(e), except as those provisions are modified in this paragraph (g).

(ii) *Consistency with upfront contractual terms and risk allocation*—

the investor model—(A) *In general.* Although all of the factors entering into a best method analysis described in § 1.482–1(c) and (d) must be considered, specific factors may be particularly relevant in the context of a CSA. In particular, the relative reliability of an application of any method depends on the degree of consistency of the analysis with the applicable contractual terms and allocation of risk under the CSA and this section among the controlled participants as of the date of the PCT, unless a change in such terms or allocation has been made in return for arm's length consideration. In this regard, a CSA involves an upfront division of the risks as to both reasonably anticipated obligations and reasonably anticipated benefits over the reasonably anticipated term of the CSA Activity. Accordingly, the relative reliability of an application of a method also depends on the degree of consistency of the analysis with the assumption that, as of the date of the PCT, each controlled participant's aggregate net investment in the CSA Activity (including platform contributions, operating contributions, as such term is defined in paragraph (j)(1)(i) of this section, operating cost contributions, as such term is defined in paragraph (j)(1)(i) of this section, and cost contributions) is reasonably anticipated to earn a rate of return (which might be reflected in a discount rate used in applying a method) appropriate to the riskiness of the controlled participant's CSA Activity over the entire period of such CSA Activity. If the cost shared intangibles themselves are reasonably anticipated to contribute to developing other intangibles, then the period described in the preceding sentence includes the period, reasonably anticipated as of the date of the PCT, of developing and exploiting such indirectly benefited intangibles.

(B) *Example.* The following example illustrates the principles of this paragraph (g)(2)(ii):

Example. (i) P, a U.S. corporation, has developed a software program, DEF, which applies certain algorithms to reconstruct complete DNA sequences from partially-observed DNA sequences. S is a wholly-owned foreign subsidiary of P. On the first day of Year 1, P and S enter into a CSA to develop a new generation of genetic tests, GHI, based in part on the use of DEF. DEF is therefore a platform contribution of P for which compensation is due from S pursuant to a PCT. S makes no platform contributions to the CSA. Sales of GHI are projected to commence two years after the inception of the CSA and then to continue for eight more years. Based on industry experience, P and S are confident that GHI will be replaced by a new type of genetic testing based on technology unrelated to DEF or GHI and that, at that point, GHI will have no further value. P and S project that that replacement will occur at the end of Year 10.

(ii) For purposes of valuing the PCT for P's platform contribution of DEF to the CSA, P and S apply a type of residual profit split method that is not described in paragraph (g)(7) of this section and which, accordingly, constitutes an unspecified method. See paragraph (g)(7)(i) (last sentence) of this section. The principles of this paragraph (g)(2) apply to any method for valuing a PCT, including the unspecified method used by P and S.

(iii) Under the method employed by P and S, in each year, a portion of the income from sales of GHI in S's territory is allocated to certain routine contributions made by S. The residual of the profit or loss from GHI sales in S's territory after the routine allocation step is divided between P and S pro rata to their capital stocks allocable to S's territory. Each controlled participant's capital stock is computed by capitalizing, applying a capital growth factor to, and amortizing its historical expenditures regarding DEF allocable to S's territory (in the case of P), or its ongoing cost contributions towards developing GHI (in the case of S). The amortization of the capital stocks is effected on a straight-line basis over an assumed four-year life for the relevant expenditures. The capital stocks are grown using an assumed growth factor that P and S consider to be appropriate.

(iv) The assumption that all expenditures amortize on a straight-line basis over four years does not appropriately reflect the principle that as of the date of the PCT regarding DEF, every contribution to the development of GHI, including DEF, is reasonably anticipated to have value throughout the entire period of exploitation of GHI which is projected to continue through Year 10. Under this method as applied by P and S, the share of the residual profit in S's territory that is allocated to P as a PCT Payment from S will decrease every year. After Year 4, P's capital stock in DEF will necessarily be $0, so that P will receive none of the residual profit or loss from GHI sales in S's territory after Year 4 as a PCT Payment.

(v) As a result of this limitation of the PCT Payments to be made by S, the anticipated return to S's aggregate investment in the CSA, over the whole period of S's CSA Activity, is at a rate that is significantly higher than the appropriate rate of return for S's CSA Activity (as determined by a reliable method). This discrepancy is not consistent with the investor model principle that S should anticipate a rate of return to its aggregate investment in the CSA, over the whole period of its CSA Activity, appropriate for the riskiness of its CSA Activity. The inconsistency of the method with the investor model materially lessens its reliability for purposes of a best method analysis. See § 1.482–1(c)(2)(ii)(B).

(iii) *Consistency of evaluation with realistic alternatives*—(A) *In general.* The relative reliability of an application of a method also depends on the degree of consistency of the analysis with the assumption that uncontrolled taxpayers dealing at arm's length would have evaluated the terms of the transaction, and only entered into such transaction, if no alternative is preferable. This condition is not met, therefore, where for any controlled participant the total anticipated present value of its income attributable to its entering into the CSA, as of the date of the PCT, is less than the total anticipated present value of its income that could be achieved through an alternative arrangement realistically available to that controlled participant. In principle, this comparison is made on a post-tax basis but, in many cases, a comparison made on a pre-tax basis will yield equivalent results. See also paragraph (g)(2)(v)(B)(*1*) of this section (Discount rate variation between realistic alternatives).

(B) *Examples.* The following examples illustrate the principles of this paragraph (g)(2)(iii):

Example 1. (i) P, a corporation, and S, a wholly-owned subsidiary of P, enter into a CSA to develop a personal transportation device (the product). Under the arrangement, P will undertake all of the R&D, and manufacture and market the product in Country X. S will make CST Payments to P for its appropriate share of P's R&D costs, and manufacture and market the product in the rest of the world. P owns existing patents and trade secrets that are reasonably anticipated to contribute to the development of the product. Therefore the rights in the patents and trade secrets are platform contributions for which compensation is due from S as part of a PCT.

(ii) S's manufacturing and distribution activities under the CSA will be routine in nature, and identical to the activities it would undertake if it alternatively licensed the product from P.

(iii) Reasonably reliable estimates indicate that P could develop the product without assistance from S and license the product outside of Country X for a royalty of 20% of sales. Based on reliable financial projections that include all future development costs and licensing revenue that are allocable to the non-Country X market, and using a discount rate appropriate for the riskiness of P's role as a licensor (see paragraph (g)(2)(v) of this section), the post-tax present value of this licensing alternative to P for the non-Country X market (measured as of the date of the PCT) would be $500 million. Thus, based on this realistic alternative, the anticipated post-tax present value under the CSA to P in the non-Country X market (measured as of the date of the PCT), taking into account anticipated development costs allocable to the non-Country X market, and anticipated CST Payments and PCT Payments from S, and using a discount rate appropriate for the riskiness of P's role as a participant in the CSA, should not be less than $500 million.

Example 2. (i) The facts are the same as in *Example 1,* except that there are no reliable estimates of the value to P from the licensing

alternative to the CSA. Further, reasonably reliable estimates indicate that an arm's length return for S's routine manufacturing and distribution activities is a 10% mark-up on total costs of goods sold plus operating expenses related to those activities. Finally, the Commissioner determines that the respective activities undertaken by P and S (other than licensing payments, cost contributions, and PCT Payments) would be identical regardless of whether the arrangement was undertaken as a CSA (cost sharing alternative) or as a long-term licensing arrangement (licensing alternative). In particular, in both alternatives, P would perform all research activities and S would undertake routine manufacturing and distribution activities associated with its territory.

(ii) P undertakes an economic analysis that derives S's cost contributions under the CSA, based on reliable financial projections. Based on this and further economic analysis, P determines S's PCT Payment as a certain lump sum amount to be paid as of the date of the PCT (Date D).

(iii) Based on reliable financial projections that include S's cost contributions and that incorporate S's PCT Payment, as computed by P, and using a discount rate appropriate for the riskiness of S's role as a CSA participant (see paragraphs (g)(2)(v) and (4)(vi)(F) of this section), the anticipated post-tax net present value to S in the cost sharing alternative (measured as of Date D) is $800 million. Further, based on these same reliable projections (but incorporating S's licensing payments instead of S's cost contributions and PCT Payment), and using a discount rate appropriate for the riskiness of S's role as a long-term licensee, the anticipated post-tax net present value to S in the licensing alternative (measured as of Date D) is $100 million. Thus, S's anticipated post-tax net present value is $700 million greater in the cost sharing alternative than in the licensing alternative. This result suggests that P's anticipated post-tax present value must be significantly less under the cost sharing alternative than under the licensing alternative. This means that the reliability of P's analysis as described in paragraph (ii) of this *Example 2* is reduced, because P would not be expected to enter into a CSA if its alternative of being a long-term licensor is preferable.

Example 3. (i) The facts are the same as in paragraphs (i) and (ii) of *Example 2.* In addition, based on reliable financial projections that include S's cost contributions and S's PCT Payment, and using a discount rate appropriate for the riskiness of S's role as a CSA participant, the anticipated post-tax net present value to S under the CSA (measured as of the date of the PCT) is $50 million. Also, instead of entering the CSA, S has the realistic alternative of manufacturing and distributing product Z unrelated to the personal transportation device, with the same anticipated 10% mark-up on total costs that it would anticipate for its routine activities in *Example 2.* Under its realistic alternative, at a discount rate appropriate for the riskiness of S's role with respect to product Z, S anticipates a present value of $100 million.

(ii) Because the lump sum PCT Payment made by S results in S having a considerably lower anticipated net present value than S could achieve through an alternative arrangement realistically available to it, the reliability of P's calculation of the lump sum PCT Payment is reduced.

(iv) *Aggregation of transactions.* The combined effect of multiple contemporaneous transactions, consisting either of multiple PCTs, or of one or more PCT and one or more other transactions in connection with a CSA that are not governed by this section (such as transactions involving cross operating contributions or make-or-sell rights), may require evaluation in accordance with the principles of aggregation described in § 1.482–1(f)(2)(i). In such cases, it may be that the multiple transactions are reasonably anticipated, as of the date of the PCT(s), to be so interrelated that the method that provides the most reliable measure of an arm's length charge is a method under this section applied on an aggregate basis for the PCT(s) and other transactions. A section 482 adjustment may be made by comparing the aggregate arm's length charge so determined to the aggregate payments actually made for the multiple transactions. In such a case, it generally will not be necessary to allocate separately the aggregate arm's length charge as between various PCTs or as between PCTs and such other transactions. However, such an allocation may be necessary for other purposes, such as applying paragraph (i)(6) (Periodic adjustments) of this section. An aggregate determination of the arm's length charge for multiple transactions will often yield a payment for a controlled participant that is equal to the aggregate value of the platform contributions and other resources, capabilities, and rights covered by the multiple transactions multiplied by that controlled participant's RAB share. Because RAB shares only include benefits from cost shared intangibles, the reliability of an aggregate determination of payments for multiple transactions may be reduced to the extent that it includes transactions covering resources, capabilities, and rights for which the controlled participants' expected benefit shares differ substantially from their RAB shares.

(v) *Discount rate*—(A) *In general.* The best method analysis in connection with certain methods or forms of payment may depend on a rate or rates of return used to convert projected results of transactions to present value, or to otherwise convert monetary amounts at one or more points in time to equivalent amounts at a different point or points in time. For this purpose, a discount rate or rates should be used that most reliably reflect the market-correlated risks of activities or transactions and should be applied to the best estimates of the relevant projected results, based on all the information potentially available at the time for which the present value calculation is to be performed. Depending on the particular facts and circumstances, the market-correlated risk involved and thus, the discount rate, may differ among a company's various activities or transactions. Normally, discount rates are most reliably determined by reference to market information.

(B) *Considerations in best method analysis of discount rate*—(*1*) *Discount rate variation between realistic alternatives.* Realistic alternatives may involve varying risk exposure and, thus, may be more reliably evaluated using different discount rates. See paragraphs (g)(4)(i)(F) and (vi)(F) of this section. In some circumstances, a party may have less risk as a licensee of intangibles needed in its operations, and so require a lower discount rate, than it would have by entering into a CSA to develop such intangibles, which may involve the party's assumption of additional risk in funding its cost contributions to the IDA. Similarly, self-development of intangibles and licensing out may be riskier for the licensor, and so require a higher discount rate, than entering into a CSA to develop such intangibles, which would relieve the licensor of the obligation to fund a portion of the IDCs of the IDA.

(*2*) [Reserved].

(*3*) *Discount rate variation between forms of payment.* Certain forms of payment may involve different risks than others. For example, ordinarily a royalty computed on a profits base would be more volatile, and so require a higher discount rate to discount projected payments to present value, than a royalty computed on a sales base.

(*4*) *Post-tax rate.* In general, discount rate estimates that may be inferred from the operations of the capital markets are post-tax discount rates. Therefore, an analysis would in principle apply post-tax discount rates to income net of expense items including taxes (post-tax income). However, in certain circumstances the result of applying a post-tax discount rate to post-tax income is equivalent to the product of the result of applying a post-tax discount rate to income net of expense items other than taxes (pre-tax income), and the difference of one minus the tax rate (as defined in paragraph (j)(1)(i) of this section). Therefore, in such

circumstances, calculation of pre-tax income, rather than post-tax income, may be sufficient. See, for example, paragraph (g)(4)(i)(G) of this section.

(C) *Example.* The following example illustrates the principles of this paragraph (g)(2)(v):

Example. (i) P and S form a CSA to develop intangible X, which will be used in product Y. P will develop X, and S will make CST Payments as its cost contributions. At the start of the CSA, P has a platform contribution, for which S commits to make a PCT Payment of 5% of its sales of product Y. As part of the evaluation of whether that PCT Payment is arm's length, the Commissioner considers whether P had a more favorable realistic alternative (see paragraph (g)(2)(iii) of this section). Specifically, the Commissioner compares P's anticipated post-tax discounted present value of the financial projections under the CSA (taking into account S's PCT Payment of 5% of its sales of product Y) with P's anticipated post-tax discounted present value of the financial projections under a reasonably available alternative Licensing Arrangement that consists of developing intangible X on its own and then licensing X to S or to an uncontrolled party similar to S. In undertaking the analysis, the Commissioner determines that, because it would be funding the entire development of the intangible, P undertakes greater risks in the licensing alternative than in the cost sharing alternative (in the cost sharing alternative P would be funding only part of the development of the intangible).

(ii) The Commissioner determines that, as between the two scenarios, all of the components of P's anticipated financial flows are identical, except for the CST and PCT Payments under the CSA, compared to the licensing payments under the Licensing Alternative. Accordingly, the Commissioner concludes that the differences in market-correlated risks between the two scenarios, and therefore the differences in discount rates between the two scenarios, relate to the differences in these components of the financial projections.

(vi) *Financial projections.* The reliability of an estimate of the value of a platform or operating contribution in connection with a PCT will often depend upon the reliability of projections used in making the estimate. Such projections should reflect the best estimates of the items projected (normally reflecting a probability weighted average of possible outcomes and thus also reflecting non-market-correlated risk). Projections necessary for this purpose may include a projection of sales, IDCs, costs of developing operating contributions, routine operating expenses, and costs of sales. Some method applications directly estimate projections of items attributable to separate development and exploitation by the controlled participants within their respective divisions. Other method applications indirectly estimate projections of items from the perspective of the controlled group as a whole, rather than from the perspective of a particular participant, and then apportion the items so estimated on some assumed basis. For example, in some applications, sales might be directly projected by division, but worldwide projections of other items such as operating expenses might be apportioned among divisions in the same ratio as the divisions' respective sales. Which approach is more reliable depends on which provides the most reliable measure of an arm's length result, considering the competing perspectives under the facts and circumstances in light of the completeness and accuracy of the underlying data, the reliability of the assumptions, and the sensitivity of the results to possible deficiencies in the data and assumptions. For these purposes, projections that have been prepared for non-tax purposes are generally more reliable than projections that have been prepared solely for purposes of meeting the requirements in this paragraph (g).

(vii) *Accounting principles*—(A) *In general.* Allocations or other valuations done for accounting purposes may provide a useful starting point but will not be conclusive for purposes of the best method analysis in evaluating the arm's length charge in a PCT, particularly where the accounting treatment of an asset is inconsistent with its economic value.

(B) *Examples.* The following examples illustrate the principles of this paragraph (g)(2)(vii):

Example 1. (i) USP, a U.S. corporation and FSub, a wholly-owned foreign subsidiary of USP, enter into a CSA in Year 1 to develop software programs with application in the medical field. Company X is an uncontrolled software company located in the United States that is engaged in developing software programs that could significantly enhance the programs being developed by USP and FSub. Company X is still in a startup phase, so it has no currently exploitable products or marketing intangibles and its workforce consists of a team of software developers. Company X has negligible liabilities and tangible property. In Year 2, USP purchases Company X as part of an uncontrolled transaction in order to acquire its in-process technology and workforce for purposes of the development activities of the CSA. USP files a consolidated return that includes Company X. For accounting purposes, $50 million of the $100 million acquisition price is allocated to the in-process technology and workforce, and the residual $50 million is allocated to goodwill.

(ii) The in-process technology and workforce of Company X acquired by USP are reasonably anticipated to contribute to developing cost shared intangibles and therefore the rights in the in-process technology and workforce of Company X are platform contributions for which FSub must compensate USP as part of a PCT. In determining whether to apply the acquisition price or another method for purposes of evaluating the arm's length charge in the PCT, relevant best method analysis considerations must be weighed in light of the general principles of paragraph (g)(2) of this section. The allocation for accounting purposes raises an issue as to the reliability of using the acquisition price method in this case because it suggests that a significant portion of the value of Company X's nonroutine contributions to USP's business activities is allocable to goodwill, which is often difficult to value reliably and which, depending on the facts and circumstances, might not be attributable to platform contributions that are to be compensated by PCTs. See paragraph (g)(5)(iv)(A) of this section.

(iii) Paragraph (g)(2)(vii)(A) of this section provides that accounting treatment may be a starting point, but is not determinative for purposes of assessing or applying methods to evaluate the arm's length charge in a PCT. The facts here reveal that Company X has nothing of economic value aside from its in-process technology and assembled workforce. The $50 million of the acquisition price allocated to goodwill for accounting purposes, therefore, is economically attributable to either of, or both, the in-process technology and the workforce. That moots the potential issue under the acquisition price method of the reliability of valuation of assets not to be compensated by PCTs, since there are no such assets. Assuming the acquisition price method is otherwise the most reliable method, the aggregate value of Company X's in-process technology and workforce is the full acquisition price of $100 million. Accordingly, the aggregate value of the arm's length PCT Payments due from FSub to USP for the platform contributions consisting of the rights in Company X's in-process technology and workforce will equal $100 million multiplied by FSub's RAB share.

Example 2. (i) The facts are the same as in *Example 1,* except that Company X is a mature software business in the United States with a successful current generation of software that it markets under a recognized trademark, in addition to having the research team and new generation software in process that could significantly enhance the programs being developed under USP's and FSub's CSA. USP continues Company X's existing business and integrates the research team and the in-process technology into the efforts under its CSA with FSub. For accounting purposes, the $100 million price for acquiring Company X is allocated $50 million to existing software and trademark, $25 million to in-process technology and research workforce, and the residual $25 million to goodwill and going concern value.

(ii) In this case an analysis of the facts indicates a likelihood that, consistent with the allocation under the accounting treatment (although not necessarily in the same amount), a significant amount of the

nonroutine contributions to the USP's business activities consist of goodwill and going concern value economically attributable to the existing U.S. software business rather than to the platform contributions consisting of the rights in the in-process technology and research workforce. In addition, an analysis of the facts indicates that a significant amount of the nonroutine contributions to USP's business activities consist of the make-or-sell rights under the existing software and trademark, which are not platform contributions and might be difficult to value. Accordingly, further consideration must be given to the extent to which these circumstances reduce the relative reliability of the acquisition price method in comparison to other potentially applicable methods for evaluating the PCT Payment.

Example 3. (i) USP, a U.S. corporation, and FSub, a wholly-owned foreign subsidiary of USP, enter into a CSA in Year 1 to develop Product A. Company Y is an uncontrolled corporation that owns Technology X, which is critical to the development of Product A. Company Y currently markets Product B, which is dependent on Technology X. USP is solely interested in acquiring Technology X, but is only able to do so through the acquisition of Company Y in its entirety for $200 million in an uncontrolled transaction in Year 2. For accounting purposes, the acquisition price is allocated as follows: $120 million to Product B and the underlying Technology X, $30 million to trademark and other marketing intangibles, and the residual $50 million to goodwill and going concern value. After the acquisition of Company Y, Technology X is used to develop Product A. No other part of Company Y is used in any manner. Immediately after the acquisition, product B is discontinued, and, therefore, the accompanying marketing intangibles become worthless. None of the previous employees of Company Y is retained.

(ii) The Technology X of Company Y acquired by USP is reasonably anticipated to contribute to developing cost shared intangibles and is therefore a platform contribution for which FSub must compensate USP as part of a PCT. Although for accounting purposes a significant portion of the acquisition price of Company Y was allocated to items other than Technology X, the facts demonstrate that USP had no intention of using and therefore placed no economic value on any part of Company Y other than Technology X. If USP was willing to pay $200 million for Company Y solely for purposes of acquiring Technology X, then assuming the acquisition price method is otherwise the most reliable method, the value of Technology X is the full $200 million acquisition price. Accordingly, the value of the arm's length PCT Payment due from FSub to USP for the platform contribution consisting of the rights in Technology X will equal the product of $200 million and FSub's RAB share.

(viii) *Valuations of subsequent PCTs*—(A) *Date of subsequent PCT.* The date of a PCT may occur subsequent to the inception of the CSA. For example, an intangible initially developed outside the IDA may only subsequently become a platform contribution because that later time is the earliest date on which it is reasonably anticipated to contribute to developing cost shared intangibles within the IDA. In such case, the date of the PCT, and the analysis of the arm's length amount charged in the subsequent PCT, is as of such later time.

(B) *Best method analysis for subsequent PCT.* In cases where PCTs occur on different dates, the determination of the arm's length amount charged, respectively, in the prior and subsequent PCTs must be coordinated in a manner that provides the most reliable measure of an arm's length result. In some circumstances, a subsequent PCT may be reliably evaluated independently of other PCTs, as may be possible for example, under the acquisition price method. In other circumstances, the results of prior and subsequent PCTs may be interrelated and so a subsequent PCT may be most reliably evaluated under the residual profit split method of paragraph (g)(7) of this section. In those cases, for purposes of allocating the present value of nonroutine residual divisional profit or loss, and so determining the present value of the subsequent PCT Payments, in accordance with paragraph (g)(7)(iii)(C) of this section, the PCT Payor's interest in cost shared intangibles, both already developed and in process, are treated as additional PCT Payor operating contributions as of the date of the subsequent PCT.

(ix) *Arm's length range*–(A) *In general.* The guidance in § 1.482–1(e) regarding determination of an arm's length range, as modified by this section, applies in evaluating the arm's length amount charged in a PCT under a transfer pricing method provided in this section (applicable method). Section 1.482–1(e)(2)(i) provides that the arm's length range is ordinarily determined by applying a single pricing method selected under the best method rule to two or more uncontrolled transactions of similar comparability and reliability although use of more than one method may be appropriate for the purposes described in § 1.482–1(c)(2)(iii). The rules provided in § 1.482–1(e) and this section for determining an arm's length range shall not override the rules provided in paragraph (i)(6) of this section for periodic adjustments by the Commissioner. The provisions in paragraphs (g)(2)(ix)(C) and (D) of this section apply only to applicable methods that are based on two or more input parameters as described in paragraph (g)(2)(ix)(B) of this section. For an example of how the rules of this section for determining an arm's length range of PCT Payments are applied, see paragraph (g)(4)(viii) of this section.

(B) *Methods based on two or more input parameters.* An applicable method may determine PCT Payments based on calculations involving two or more parameters whose values depend on the facts and circumstances of the case (input parameters). For some input parameters (market-based input parameters), the value is most reliably determined by reference to data that derives from uncontrolled transactions (market data). For example, the value of the return to a controlled participant's routine contributions, as such term is defined in paragraph (j)(1)(i) of this section, to the CSA Activity (which value is used as an input parameter in the income method described in paragraph (g)(4) of this section) may in some cases be most reliably determined by reference to the profit level of a company with rights, resources, and capabilities comparable to those routine contributions. See § 1.482–5. As another example, the value for the discount rate that reflects the riskiness of a controlled participant's role in the CSA (which value is used as an input parameter in the income method described in paragraph (g)(4) of this section) may in some cases be most reliably determined by reference to the stock beta of a company whose overall risk is comparable to the riskiness of the controlled participant's role in the CSA.

(C) *Variable input parameters.* For some market-based input parameters (variable input parameters), the parameter's value is most reliably determined by considering two or more observations of market data that have, or with adjustment can be brought to, a similar reliability and comparability, as described in § 1.482–1(e)(2)(ii) (for example, profit levels or stock betas of two or more companies). See paragraph (g)(2)(ix)(B) of this section.

(D) *Determination of arm's length PCT Payment.* For purposes of applying this paragraph (g)(2)(ix), each input parameter is assigned a single most reliable value, unless it is a variable input parameter as described in paragraph (g)(2)(ix)(C) of this section. The determination of the arm's length payment depends on the number of variable input parameters.

(*1*) *No variable input parameters.* If there are no variable input parameters, the arm's length PCT Payment is a single value determined by using the single most reliable value determined for each input parameter.

(*2*) *One variable input parameter.* If there is exactly one variable input parameter, then under the applicable

method, the arm's length range of PCT Payments is the interquartile range, as described in § 1.482–1(e)(2)(iii)(C), of the set of PCT Payment values calculated by selecting—

(*i*) Iteratively, the value of the variable input parameter that is based on each observation as described in paragraph (g)(2)(ix)(C) of this section; and

(*ii*) The single most reliable values for each other input parameter.

(*3*) *More than one variable input parameter.* If there are two or more variable input parameters, then under the applicable method, the arm's length range of PCT Payments is the interquartile range, as described in § 1.482–1(e)(2)(iii)(C), of the set of PCT Payment values calculated iteratively using every possible combination of permitted choices of values for the input parameters. For input parameters other than a variable input parameter, the only such permitted choice is the single most reliable value. For variable input parameters, such permitted choices include any value that is—

(*i*) Based on one of the observations described in paragraph (g)(2)(ix)(C) of this section; and

(*ii*) Within the interquartile range (as described in § 1.482–1(e)(2)(iii)(C)) of the set of all values so based.

(E) *Adjustments.* Section 1.482–1(e)(3), applied as modified by this paragraph (g)(2)(ix), determines when the Commissioner may make an adjustment to a PCT Payment due to the taxpayer's results being outside the arm's length range. Adjustment will be to the median, as defined in § 1.482–1(e)(3). Thus, the Commissioner is not required to establish an arm's length range prior to making an allocation under section 482.

(x) *Valuation undertaken on a pre-tax basis.* PCT Payments in general may increase the PCT Payee's tax liability and decrease the PCT Payor's tax liability. The arm's length amount of a PCT Payment determined under the methods in this paragraph (g) is the value of the PCT Payment itself, without regard to such tax effects. Therefore, the methods under this section must be applied, with suitable adjustments if needed, to determine the PCT Payments on a pre-tax basis. See paragraphs (g)(2)(v)(B) and (4)(i)(G) of this section.

(3) *Comparable uncontrolled transaction method.* The comparable uncontrolled transaction (CUT) method described in § 1.482–4(c), and the comparable uncontrolled services price (CUSP) method described in § 1.482–9(c), may be applied to evaluate whether the amount charged in a PCT is arm's length by reference to the amount charged in a comparable uncontrolled transaction. Although all of the factors entering into a best method analysis described in § 1.482–1(c) and (d) must be considered, comparability and reliability under this method are particularly dependent on similarity of contractual terms, degree to which allocation of risks is proportional to reasonably anticipated benefits from exploiting the results of intangible development, similar period of commitment as to the sharing of intangible development risks, and similar scope, uncertainty, and profit potential of the subject intangible development, including a similar allocation of the risks of any existing resources, capabilities, or rights, as well as of the risks of developing other resources, capabilities, or rights that would be reasonably anticipated to contribute to exploitation within the parties' divisions, that is consistent with the actual allocation of risks between the controlled participants as provided in the CSA in accordance with this section. When applied in the manner described in § 1.482–4(c) or 1.482–9(c), the CUT or CUSP method will typically yield an arm's length total value for the platform contribution that is the subject of the PCT. That value must then be multiplied by each PCT Payor's respective RAB share in order to determine the arm's length PCT Payment due from each PCT Payor. The reliability of a CUT or CUSP that yields a value for the platform contribution only in the PCT Payor's division will be reduced to the extent that value is not consistent with the total worldwide value of the platform contribution multiplied by the PCT Payor's RAB share.

(4) *Income method*—(i) *In general*—(A) *Equating cost sharing and licensing alternatives.* The income method evaluates whether the amount charged in a PCT is arm's length by reference to a controlled participant's best realistic alternative to entering into a CSA. Under this method, the arm's length charge for a PCT Payment will be an amount such that a controlled participant's present value, as of the date of the PCT, of its cost sharing alternative of entering into a CSA equals the present value of its best realistic alternative. In general, the best realistic alternative of the PCT Payor to entering into the CSA would be to license intangibles to be developed by an uncontrolled licensor that undertakes the commitment to bear the entire risk of intangible development that would otherwise have been shared under the CSA. Similarly, the best realistic alternative of the PCT Payee to entering into the CSA would be to undertake the commitment to bear the entire risk of intangible development that would otherwise have been shared under the CSA and license the resulting intangibles to an uncontrolled licensee. Paragraphs (g)(4)(i)(B) through (vi) of this section describe specific applications of the income method, but do not exclude other possible applications of this method.

(B) *Cost sharing alternative.* The PCT Payor's cost sharing alternative corresponds to the actual CSA in accordance with this section, with the PCT Payor's obligation to make the PCT Payments to be determined and its commitment for the duration of the IDA to bear cost contributions.

(C) *Licensing alternative.* The licensing alternative is derived on the basis of a functional and risk analysis of the cost sharing alternative, but with a shift of the risk of cost contributions to the licensor. Accordingly, the PCT Payor's licensing alternative consists of entering into a license with an uncontrolled party, for a term extending for what would be the duration of the CSA Activity, to license the make-or-sell rights in to-be-developed resources, capabilities, or rights of the licensor. Under such license, the licensor would undertake the commitment to bear the entire risk of intangible development that would otherwise have been shared under the CSA. Apart from any difference in the allocation of the risks of the IDA, the licensing alternative should assume contractual provisions with regard to non-overlapping divisional intangible interests, and with regard to allocations of other risks, that are consistent with the actual CSA in accordance with this section. For example, the analysis under the licensing alternative should assume a similar allocation of the risks of any existing resources, capabilities, or rights, as well as of the risks of developing other resources, capabilities, or rights that would be reasonably anticipated to contribute to exploitation within the parties' divisions, that is consistent with the actual allocation of risks between the controlled participants as provided in the CSA in accordance with this section. Accordingly, the financial projections associated with the licensing and cost sharing alternatives are necessarily the same except for the licensing payments to be made under the licensing alternative and the cost contributions and PCT Payments to be made under the CSA.

(D) *Only one controlled participant with nonroutine platform contributions.* This method involves only one of the

controlled participants providing nonroutine platform contributions as the PCT Payee. For a method under which more than one controlled participant may be a PCT Payee, see the application of the residual profit method pursuant to paragraph (g)(7) of this section.

(E) *Income method payment forms.* The income method may be applied to determine PCT Payments in any form of payment (for example, lump sum, royalty on sales, or royalty on divisional profit). For converting to another form of payment, see generally paragraph (h) (Form of payment rules) of this section.

(F) *Discount rates appropriate to cost sharing and licensing alternatives.* The present value of the cost sharing and licensing alternatives, respectively, should be determined using the appropriate discount rates in accordance with paragraphs (g)(2)(v) and (g)(4)(vi)(F) of this section. See, for example, § 1.482–7(g)(2)(v)(B)(*1*) (Discount rate variation between realistic alternatives). In circumstances where the market-correlated risks as between the cost sharing and licensing alternatives are not materially different, a reliable analysis may be possible by using the same discount rate with respect to both alternatives.

(G) *The effect of taxation on determining the arm's length amount.* (*1*) In principle, the present values of the cost sharing and licensing alternatives should be determined by applying post-tax discount rates to post-tax income (including the post-tax value to the controlled participant of the PCT Payments). If such approach is adopted, then the post-tax value of the PCT Payments must be appropriately adjusted in order to determine the arm's length amount of the PCT Payments on a pre-tax basis. See paragraph (g)(2)(x) of this section.

(*2*) In certain circumstances, post-tax income may be derived as the product of the result of applying a post-tax discount rate to pre-tax income, and a factor equal to one minus the tax rate (as defined in (j)(1)(i)). See paragraph (g)(2)(v)(B) of this section.

(*3*) To the extent that a controlled participant's tax rate is not materially affected by whether it enters into the cost sharing or licensing alternative (or reliable adjustments may be made for varying tax rates), the factor (that is, one minus the tax rate) may be cancelled from both sides of the equation of the cost sharing and licensing alternative present values. Accordingly, in such circumstance it is sufficient to apply post-tax discount rates to projections of pre-tax income for the purpose of equating the cost sharing and licensing alternatives. The specific applications of the income method described in paragraphs (g)(4)(ii) through (iv) of this section and the examples set forth in paragraph (g)(4)(viii) of this section assume that a controlled participant's tax rate is not materially affected by whether it enters into the cost sharing or licensing alternative.

(ii) *Evaluation of PCT Payor's cost sharing alternative.* The present value of the PCT Payor's cost sharing alternative is the present value of the stream of the reasonably anticipated residuals over the duration of the CSA Activity of divisional profits or losses, minus operating cost contributions, minus cost contributions, minus PCT Payments.

(iii) *Evaluation of PCT Payor's licensing alternative*—(A) *Evaluation based on CUT.* The present value of the PCT Payor's licensing alternative may be determined using the comparable uncontrolled transaction method, as described in § 1.482–4(c)(1) and (2). In this case, the present value of the PCT Payor's licensing alternative is the present value of the stream, over what would be the duration of the CSA Activity under the cost sharing alternative, of the reasonably anticipated residuals of the divisional profits or losses that would be achieved under the cost sharing alternative, minus operating cost contributions that would be made under the cost sharing alternative, minus the licensing payments as determined under the comparable uncontrolled transaction method.

(B) *Evaluation based on CPM.* The present value of the PCT Payor's licensing alternative may be determined using the comparable profits method, as described in § 1.482–5. In this case, the present value of the licensing alternative is determined as in paragraph (g)(4)(iii)(A) of this section, except that the PCT Payor's licensing payments, as defined in paragraph (j)(1)(i) of this section, are determined in each period to equal the reasonably anticipated residuals of the divisional profits or losses that would be achieved under the cost sharing alternative, minus operating cost contributions that would be made under the cost sharing alternative, minus market returns for routine contributions, as defined in paragraph (j)(1)(i) of this section. However, treatment of net operating contributions as operating cost contributions shall be coordinated with the treatment of other routine contributions pursuant to this paragraph so as to avoid duplicative market returns to such contributions.

(iv) *Lump sum payment form.* Where the form of PCT Payment is a lump sum as of the date of the PCT, then, based on paragraphs (g)(4)(i) through (iii) of this section, the PCT Payment equals the difference between—

(A) The present value, using the discount rate appropriate for the cost sharing alternative, of the stream of the reasonably anticipated residuals over the duration of the CSA Activity of divisional profits or losses, minus cost contributions and operating cost contributions; and

(B) The present value of the licensing alternative.

(v) [Reserved].

(vi) *Best method analysis considerations.* (A) *Coordination with § 1.482–1(c).* Whether results derived from this method are the most reliable measure of an arm's length result is determined using the factors described under the best method rule in § 1.482–1(c). Thus, comparability and the quality of data, the reliability of the assumptions, and the sensitivity of the results to possible deficiencies in the data and assumptions, must be considered in determining whether this method provides the most reliable measure of an arm's length result.

(B) *Assumptions Concerning Tax Rates.* This method will be more reliable to the extent that the controlled participants' respective tax rates are not materially affected by whether they enter into the cost sharing or licensing alternative. Even if this assumption of invariant tax rates across alternatives does not hold, this method may still be reliable to the extent that reliable adjustments can be made to reflect the variation in tax rates.

(C) *Coordination with § 1.482–4(c)(2).* If the licensing alternative is evaluated using the comparable uncontrolled transactions method, as described in paragraph (g)(4)(iii)(A) of this section, any additional comparability and reliability considerations stated in § 1.482–4(c)(2) may apply.

(D) *Coordination with § 1.482–5(c).* If the licensing alternative is evaluated using the comparable profits method, as described in paragraph (g)(4)(iii)(B) of this section, any additional comparability and reliability considerations stated in § 1.482–5(c) may apply.

(E) *Certain Circumstances Concerning PCT Payor.* This method may be used even if the PCT Payor furnishes significant operating contributions, or commits to assume the risk of significant operating cost contributions, to the PCT Payor's division. However, in such a case, any comparable uncontrolled transactions described in paragraph (g)(4)(iii)(A) of this section, and any comparable transactions used

under § 1.482–5(c) as described in paragraphs (g)(4)(iii)(B) of this section, should be consistent with such contributions (or reliable adjustments must be made for material differences).

(F) *Discount rates.*

(*1*) *Reflection of similar risk profiles of cost sharing alternative and licensing alternative.* Because the financial projections associated with the licensing and cost sharing alternatives are the same, except for the licensing payments to be made under the licensing alternative and the cost contributions and PCT Payments to be made under the cost sharing alternative, the analysis of the risk profile and financial projections for a realistic alternative to the cost sharing alternative must be closely associated with the risk profile and financial projections associated with the cost sharing alternative, differing only in the treatment of licensing payments, cost contributions, and PCT Payments. When using discount rates in applying the income method, this means that even if different discount rates are warranted for the two alternatives, the risk profiles for the two discount rates are closely related to each other because the discount rate for the licensing alternative and the discount rate for the cost sharing alternative are both derived from the single probability-weighted financial projections associated with the CSA Activity. The difference, if any, in market-correlated risks between the licensing and cost sharing alternatives is due solely to the different effects on risks of the PCT Payor making licensing payments under the licensing alternative, on the one hand, and the PCT Payor making cost contributions and PCT Payments under the cost sharing alternative, on the other hand. That is, the difference in the risk profile between the two scenarios solely reflects the incremental risk, if any, associated with the cost contributions taken on by the PCT Payor in developing the cost shared intangible under the cost sharing alternative, and the difference, if any, in risk associated with the particular payment forms of the licensing payments and the PCT Payments, in light of the fact that the licensing payments in the licensing alternative are partially replaced by cost contributions and partially replaced by PCT Payments in the cost sharing alternative, each with its own payment form. An analysis under the income method that uses a different discount rate for the cost sharing alternative than for the licensing alternative will be more reliable the greater the extent to which the difference, if any, between the two discount rates reflects solely these differences in the risk profiles of these two alternatives. See, for example, paragraph (g)(2)(iii), *Example 2* of this section.

(*2*) [Reserved].

(vii) *Routine platform and operating contributions.* For purposes of this paragraph (g)(4), any routine contributions that are platform or operating contributions, the valuation and PCT Payments for which are determined and made independently of the income method, are treated similarly to cost contributions and operating cost contributions, respectively. Accordingly, wherever used in this paragraph (g)(4), the term ''routine contributions'' shall not include routine platform or operating contributions, and wherever the terms ''cost contributions'' and ''operating cost contributions'' appear in this paragraph, they shall include net routine platform contributions and net routine operating contributions, respectively. Net routine platform contributions are the value of a controlled participant's total reasonably anticipated routine platform contributions, plus its reasonably anticipated PCT Payments to other controlled participants in respect of their routine platform contributions, minus the reasonably anticipated PCT Payments it is to receive from other controlled participants in respect of its routine platform contributions. Net routine operating contributions are the value of a controlled participant's total reasonably anticipated routine operating contributions, plus its reasonably anticipated arm's length compensation to other controlled participants in respect of their routine operating contributions, minus the reasonably anticipated arm's length compensation it is to receive from other controlled participants in respect of its routine operating contributions.

(viii) *Examples.* The following examples illustrate the principles of this paragraph (g)(4):

Example 1. (i) For simplicity of calculation in this *Example 1,* all financial flows are assumed to occur at the beginning of each period. USP, a software company, has developed version 1.0 of a new software application that it is currently marketing. In Year 1 USP enters into a CSA with its wholly-owned foreign subsidiary, FS, to develop future versions of the software application. Under the CSA, USP will have the rights to exploit the future versions in the United States, and FS will have the rights to exploit them in the rest of the world. The future rights in version 1.0, and USP's development team, are reasonably anticipated to contribute to the development of future versions and therefore the rights in version 1.0 and the research and development team are platform contributions for which compensation is due from FS as part of a PCT. USP does not transfer the current exploitation rights in version 1.0 to FS. FS will not perform any research or development activities and does not furnish any platform contributions nor does it control any operating intangibles at the inception of the CSA that would be relevant to the exploitation of version 1.0 or future versions of the software.

(ii) FS undertakes financial projections in its territory of the CSA:

(1) Year	(2) Sales	(3) Operating costs	(4) Cost contributions	(5) Operating income under cost sharing alternative (excluding PCT)
1	0	0	50	−50
2	0	0	50	−50
3	200	100	50	50
4	400	200	50	150
5	600	300	60	240
6	650	325	65	260
7	700	350	70	280
8	750	375	75	300
9	750	375	75	300
10	675	338	68	269
11	608	304	61	243
12	547	273	55	219

(1) Year	(2) Sales	(3) Operating costs	(4) Cost contributions	(5) Operating income under cost sharing alternative (excluding PCT)
13	410	205	41	164
14	308	154	31	123
15	231	115	23	93

FS anticipates that activity on this application will cease after Year 15. The application was derived from software developed by Company Q, an uncontrolled party. FS has a license under Company Q's copyright, but that license expires after Year 15 and will not be renewed.

(iii) In evaluating the cost sharing alternative, FS concludes that the cost sharing alternative represents a riskier alternative for FS than the licensing alternative because, in cost sharing, FS will take on the additional risks associated with cost contributions. Taking this difference into account, FS concludes that the appropriate discount rate to apply in assessing the licensing alternative, based on discount rates of comparable uncontrolled companies undertaking comparable licensing transactions, would be 13% per year, whereas the appropriate discount rate to apply in assessing the cost sharing alternative would be 15% per year. FS determines that the arm's length rate USP would have charged an uncontrolled licensee for a license of future versions of the software (if USP had further developed version 1.0 on its own) is 35% of the sales price, as determined under the CUT method in § 1.482–4(c). FS also determines that the tax rate applicable to it will be the same in the licensing alternative as in the CSA. Accordingly, the financial projections associated with the licensing alternative are:

(6) Year	(7) Sales	(8) Operating costs	(9) Licensing payments	(10) Operating income under licensing alternative	(11) Operating income under cost sharing alternative minus operating income under licensing alternative
1	0	0	0	0	−50
2	0	0	0	0	−50
3	200	100	70	30	20
4	400	200	140	60	90
5	600	300	210	90	150
6	650	325	228	97	163
7	700	350	245	105	175
8	750	375	263	112	188
9	750	375	263	112	188
10	675	338	236	101	168
11	608	304	213	91	152
12	547	273	191	83	136
13	410	205	144	61	103
14	308	154	108	46	77
15	231	115	81	35	58

(iv) Based on these projections and applying the appropriate discount rate, FS determines that under the cost sharing alternative, the present value of the stream of residuals of its anticipated divisional profits, reduced by the anticipated operating cost contributions and cost contributions, but not reduced by any PCT Payments (that is, the stream of anticipated operating income as shown in column 5) would be $889 million. Under the licensing alternative, the present value of the stream of residuals of its anticipated divisional profits and losses minus the operating cost contributions (that is, the stream of anticipated operating income before licensing payments, which is the present value of column 7 reduced by column 8) would be $1.419 billion, and the present value of the licensing payments would be $994 million. Therefore, the total value of the licensing alternative would be $425 million. In order for the present value of the cost sharing alternative to equal the present value of the licensing alternative, the present value of the PCT Payments must equal $464 million. Therefore, the taxpayer makes and reports PCT Payments with a present value of $464 million.

Example 2. Arm's length range. (i) The facts are the same as in *Example 1.* The Commissioner accepts the financial projections undertaken by FS. Further, the Commissioner determines that the licensing discount rate and the CUT licensing rate are most reliably determined by reference to comparable uncontrolled discount rates and license rates, respectively. The observations that are in the interquartile range of the respective input parameters (see paragraph (g)(2)(ix) of this section) are as follows:

Observations that are within interquartile range	Comparable uncontrolled discount rate
1	11%
2	12
3 (Median)	13
4	15
5	17

Observations that are within interquartile range	Comparable uncontrolled licensing rate
1	30%
2	32
3 (Median)	35
4	37
5	40

(ii) Following the principles of paragraph (g)(2)(ix) of this section, the Commissioner undertakes 25 different applications of the

income method, using each combination of the discount rate and licensing rate parameters. In undertaking this analysis, the Commissioner assumes that the ratio of the median discount rate for the cost sharing alternative to the median discount rate for the licensing alternative (that is, 15% to 13%) is maintained. The results of the 25 applications of the income method, sorted in ascending order of calculated present value of the PCT Payment, are as follows:

LINCOME METHOD APPLICATION NUMBER:

Income method application number:	Comparable uncontrolled licensing discount rate	Comparable uncontrolled CSA discount rate	Comparable uncontrolled licensing rate	Calculated lump sum PCT payment	Interquartile range of PCT payments
1	17%	19.6%	30%	217	
2	17	19.6	32	263	
3	15	17.3	30	264	
4	15	17.3	32	315	
5	13	15	30	321	
6	17	19.6	35	331	
7	12	13.8	30	354	LQ = 354
8	17	19.6	37	376	
9	13	15	32	378	
10	11	12.7	30	391	
11	15	17.3	35	391	
12	12	13.8	32	415	
13	15	17.3	37	442	Median = 442
14	17	19.6	40	444	
15	11	12.7	32	455	
16	13	15	35	464	
17	12	13.8	35	505	
18	15	17.3	40	517	
19	13	15	37	520	UQ = 520
20	11	12.7	35	551	
21	12	13.8	37	566	
22	13	15	40	605	
23	11	12.7	37	615	
24	12	13.8	40	655	
25	11	12.7	40	710	

(iii) Accordingly, the Commissioner determines that a taxpayer will not be subject to adjustment if its initial (ex ante) determination of the present value of PCT Payments is between $354 million and $520 million (the lower and upper quartile results as shown in the last column). Because FS's determination of the present value of the PCT Payments, $464 million, is within the interquartile range, no adjustments are warranted.

Example 3. (i) For simplicity of calculation in this *Example 3,* all financial flows are assumed to occur at the beginning of each period. USP, a U.S. software company, has developed version 1.0 of a new software application, employed to store and retrieve complex data sets in certain types of storage media. Version 1.0 is currently being marketed. In Year 1, USP enters into a CSA with its wholly-owned foreign subsidiary, FS, to develop future versions of the software application. Under the CSA, USP will have the exclusive rights to exploit the future versions in the U.S., and FS will have the exclusive rights to exploit them in the rest of the world. USP's rights in version 1.0, and its development team, are reasonably anticipated to contribute to the development of future versions of the software application and, therefore, the rights in version 1.0 are platform contributions for which compensation is due from FS as part of a PCT. USP also transfers the current exploitation rights in version 1.0 to FS and the arm's length amount of the compensation for such transfer is determined in the aggregate with the arm's length PCT Payments in this *Example 3.* FS does not furnish any platform contributions to the CSA nor does it control any operating intangibles at the inception of the CSA that would be relevant to the exploitation of version 1.0 or future versions of the software. It is reasonably anticipated that FS will have gross sales of $1000X in its territory for 5 years attributable to its exploitation of version 1.0 and the cost shared intangibles, after which time the software application will be rendered obsolete and unmarketable by the obsolescence of the storage medium technology to which it relates. FS's costs reasonably attributable to the CSA, other than cost contributions and operating cost contributions, are anticipated to be $250X per year. Certain operating cost contributions that will be borne by FS are reasonably anticipated to equal $200X per annum for 5 years. In addition, FS is reasonably anticipated to pay cost contributions of $200X per year as a controlled participant in the CSA.

(ii) FS concludes that its realistic alternative would be to license software from an uncontrolled licensor that would undertake the commitment to bear the entire risk of software development. Applying CPM using the profit levels experienced by uncontrolled licensees with contractual provisions and allocations of risk that are comparable to those of FS's licensing alternative, FS determines that it could, as a licensee, reasonably expect a (pre-tax) routine return equal to 14% of gross sales or $140X per year for 5 years. The remaining net revenue would be paid to the uncontrolled licensor as a license fee of $410X per year. FS determines that the discount rate that would be applied to determine the present value of income and costs attributable to its participation in the licensing alternative would be 12.5% as compared to the 15% discount rate that would be applicable in determining the present valuable of the net income attributable to its participation in the CSA (reflecting the increased risk borne by FS in bearing a share of the R&D costs in the cost sharing alternative). FS also determines that the tax rate applicable to it will be the same in the licensing alternative as in the CSA.

(iii) On these facts, the present value to FS of entering into the cost sharing alternative equals the present value of the annual divisional profits ($1,000X minus $250X) minus operating cost contributions ($200X) minus cost contributions ($200X) minus PCT Payments, determined over 5 years by discounting at a discount rate of 15%. Thus, the present value of the residuals, prior to subtracting the present value of the PCT Payments, is $1349X.

(iv) On these facts, the present value to FS of entering into the licensing alternative would be $561X determined by discounting, over 5 years, annual divisional profits ($1,000X minus $250X) minus operating cost contributions ($200X) and licensing payments ($410X) at a discount rate of 12.5% per annum. The present value of the cost sharing alternative must also equal $561X but

equals $1349X prior to subtracting the present value of the PCT Payments. Consequently, the PCT Payments must have a present value of $788X.

Example 4. Pre-tax PCT Payment derived from post-tax information. (i) For simplicity of calculation in this *Example 4,* it is assumed that all payments are made at the end of each year. Domestic controlled participant USP has developed a technology, Z, that it would like to exploit for three years in a CSA. USP enters into a CSA with its wholly-owned foreign subsidiary, FS, that provides for PCT Payments from FS to USP with respect to USP's platform contribution to the CSA of Z in the form of three annual installment payments due from FS to USP on the last day of each of the first three years of the CSA. FS makes no platform contributions to the CSA. Prior to entering into the CSA, FS considers that it has the realistic alternative available to it of licensing Z from USP rather than entering into a CSA with USP to further develop Z for three years.

(ii) FS undertakes financial projections for both the licensing and cost sharing alternatives for exploitation of Z in its territory of the CSA. These projections are set forth in the following tables. The example assumes that there is a reasonably anticipated effective tax rate of 25% in each of years 1 through 3 under both the licensing and cost sharing alternatives. FS determines that the appropriate post-tax discount rate under the licensing alternative is 12.5%, and that the appropriate post-tax discount rate under the cost sharing alternative is 15%.

Licensing alternative	Present value (12.5% DR)	Year 1	Year 2	Year 3
(1) Sales		$1000	$1100	$1210
(2) License Fee		400	440	484
(3) Operating costs		500	550	605
(4) Operating Income	$261	100	110	121
(5) Tax (25%)		25	28	30
(6) Post-tax income	$196	$75	$82	$91
Cost sharing alternative	**Present value (15% DR)**	**Year 1**	**Year 2**	**Year 3**
(7) Sales		$1000	$1100	$1210
(8) Cost Contributions		200	220	242
(9) PCT Payments	D	A	B	C
(10) Operating costs		500	550	605
(11) Operating income excluding PCT	$749	300	330	363
(12) Operating income	H	E	F	G
(13) Tax				
(14) Post-tax income excluding PCT	$562	$225	$248	$272
(15) Post-tax income	L	I	J	K

(iii) Under paragraph (g)(4) of this section, the arm's length charge for a PCT Payment will be an amount such that a controlled participant's present value, as of the date of the PCT of its cost sharing alternative of entering into a CSA equals the present value of its best realistic alternative. This requires that L, the present value of the post-tax income under the CSA, equals the present value of the post-tax income under the licensing alternative, or $196.

(iv) FS determines that PCT Payments for Z should be $196 in Year 1 (A), $215 in Year 2 (B), and $236 in Year 3 (C). By using these amounts for A, B, and C in the table above, FS is able to derive the values of E, F, G, I, J, and K in the table above. Based on these PCT Payments for Z, the post-tax income will be $78 in Year 1 (I), $86 in Year 2 (J), and $95 in Year 3 (K). When this post-tax income stream is discounted at the appropriate rate for the cost sharing alternative (15%), the net present value is $196 (L). The present value of the PCT Payments, when discounted at the appropriate post-tax rate, is $488 (D).

(v) The Commissioner undertakes an audit of the PCT Payments made by FS to USP for Z in Years 1 through 3. The Commissioner concludes that the PCT Payments for Z are arm's length in accordance with this paragraph (g)(4).

Example 5. Pre-tax PCT Payment derived from post-tax information. (i) The facts are the same as in paragraphs (i) and (ii) of *Example 4.* In addition, under this paragraph (g)(4), the arm's length charge for a PCT Payment will be an amount such that a controlled participant's present value, as of the date of the PCT of its cost sharing alternative equals the present value of its best realistic alternative. This requires that L, the present value of the post-tax income under the CSA, equals the present value of the post-tax income under the licensing alternative, or $196.

(ii) FS determines that the post-tax present value of the cost sharing alternative (excluding PCT Payments) is $562. The post-tax present value of the licensing alternative is $196. Accordingly, payments with a post-tax present value of $366 are required.

(iii) The Commissioner undertakes an audit of the PCT Payments made by FS to USP for Z in Years 1 through 3. In correspondence to the Commissioner, USP maintains that the arm's length PCT Payment for Z should have a present value of $366 (D).

(iv) The Commissioner considers that if FS makes PCT Payments for Z with a present value of $366, then the post-tax present value under the CSA (considering the deductibility of the PCT Payments) will be $287, substantially higher than the post-tax present value of the licensing arrangement, $196. The Commissioner determines that, under the specific facts and assumptions of this example, the present value of the post-tax payments may be grossed up by a factor of (one minus the tax rate), resulting in a present value of pre-tax payments of $488. Accordingly, FS must make yearly PCT Payments (A, B, and C) such that the present value of the Payments is $488 (D). (When FS's post-tax income after these PCT Payments for Z is discounted at the appropriate rate for the cost sharing alternative (15%), the net present value is $196 (L), which is equal to the present value of post-tax income under the licensing alternative.) The Commissioner concludes that the calculations that it has made for the PCT Payments for Z are arm's length in accordance with this paragraph (g)(4) and, accordingly, makes the appropriate adjustments to USP's income tax return to account for the gross-up required by paragraph (g)(2)(x) of this section.

Example 6. Pre-tax PCT Payment derived from pre-tax information. (i) The facts are the same as in paragraphs (i) and (ii) of *Example 4.* In addition, under paragraph (g)(4) of this section, the arm's length charge for a PCT Payment will be an amount such that a controlled participant's present value, as of the date of the PCT of its cost sharing alternative of entering into a CSA equals the present value of its best realistic alternative. This requires that ''L,'' the present value of the post-tax income under the CSA, equals the present value of the post-tax income under the licensing alternative, or $196.

(ii) Under the specific facts and assumptions of this *Example 6* (see paragraph (g)(4)(i)(G) of this section), and using the same (post-tax) discount rates as in *Example 4,* the present value of pre-tax income under the licensing alternative (that is, the operating income) is $261, and the present value of pre-tax income under the cost sharing alternative (excluding PCT Payments) is $749. Accordingly, FS determines that its PCT Payments for Z should have a present value equal to the difference between the two, or $488 (D). Such

PCT Payments for Z result in a present value of post-tax income under the cost sharing alternative of $196 (L), which is equal to the present value of post-tax income under the licensing alternative.

(iii) The Commissioner undertakes an audit of the PCT Payments for Z made by FS to USP in Years 1 through 3. The Commissioner concludes that the PCT Payments for Z are arm's length in accordance with this paragraph (g)(4).

Example 7. Application of income method with a terminal value calculation. (i) For simplicity of calculation in this *Example 7,* all financial flows are assumed to occur at the beginning of each period. USP's research and development team, Q, has developed a technology, Z, for which it has several applications on the market now and several planned for release at future dates. In Year 1, USP, enters into a CSA with its wholly-owned subsidiary, FS, to develop future applications of Z. Under the CSA, USP will have the rights to further develop and exploit the future applications of Z in the United States, and FS will have the rights to further develop and exploit the future applications of Z in the rest of the world. Both Q and the rights to further develop and exploit future applications of Z are reasonably anticipated to contribute to the development of future applications of Z. Therefore, both Q and the rights to further develop and exploit the future applications of Z are platform contributions for which compensation is due from FS to USP as part of a PCT. USP does not transfer the current exploitation rights for current applications of Z to FS. FS will not perform any research or development activities on Z and does not furnish any platform contributions to the CSA, nor does it control any operating intangibles at the inception of the CSA that would be relevant to the exploitation of either current or future applications of Z.

(ii) At the outset of the CSA, FS undertakes an analysis of the PCTs involving Q and the rights with respect to Z in order to determine the arm's length PCT Payments owing from FS to USP under the CSA. In that evaluation, FS concludes that the cost sharing alternative represents a riskier alternative for FS than the licensing alternative. FS further concludes that the appropriate discount rate to apply in assessing the licensing alternative, based on discount rates of comparable uncontrolled companies undertaking comparable licensing transactions, would be 13% per annum, whereas the appropriate discount rate to apply in assessing the cost sharing alternative would be 14% per annum. FS undertakes financial projections and anticipates making $100 million in sales during the first two years of the CSA in its territory with sales in Years 3 through 8 increasing to $200 million, $400 million, $600 million, $650 million, $700 million, and $750 million, respectively. After Year 8, FS expects its sales of all products based upon exploitation of Z in the rest of the world to grow at 3% per annum for the future. FS and USP do not anticipate cessation of the CSA Activity with respect to Z at any determinable date. FS anticipates that its manufacturing and distribution costs for exploiting Z (including its operating cost contributions), will equal 60% of gross sales of Z from Year 1 onwards, and anticipates its cost contributions will equal $25 million per annum for Years 1 and 2, $50 million per annum for Years 3 and 4, and 10% of gross sales per annum thereafter.

(iii) Based on this analysis, FS determines that the arm's length royalty rate that USP would have charged an uncontrolled licensee for a license of future applications of Z if USP had further developed future applications of Z on its own is 30% of the sales price of the Z-based product, as determined under the comparable uncontrolled transaction method in § 1.482–4(c). In light of the expected sales growth and anticipation that the CSA Activity will not cease as of any determinable date, FS's determination includes a terminal value calculation. FS further determines that under the cost sharing alternative, the present value of FS's divisional profits, reduced by the present values of the anticipated operating cost contributions and cost contributions, would be $1,361 million. Under the licensing alternative, the present value of the operating divisional profits and losses, reduced by the operating cost contributions, would be $2,113 million, and the present value of the licensing payments would be $1,585 million. Therefore, the total value of the licensing alternative would be $528 million. In order for the present value of the cost sharing alternative to equal the present value of the licensing alternative, the present value of the PCT Payments must equal $833 million. Accordingly, FS pays USP a lump sum PCT Payment of $833 million in Year 1 for USP's platform contributions of Z and Q.

(iv) The Commissioner undertakes an audit of the PCTs and concludes, based on his own analysis, that this lump sum PCT Payment is within the interquartile range of arm's length results for these platform contributions. The calculations made by FS in determining the PCT Payment in this *Example 7* are set forth in the following tables:

COST SHARING ALTERNATIVE

Time Period (Y = Year, TV = Terminal Value).	Y1	Y2	Y3	Y4	Y5	Y6	Y7	Y8	TV
Discount Period	0	1	2	3	4	5	6	7	7
Items of Income/Expense at Beginning of Year:									
1 Sales	100	100	200	400	600	650	700	750	(3% annual growth in each year from previous year).
2 Routine Cost and Operating Cost Contributions (60% of sales amount in row 1 of relevant year).	60	60	120	240	360	390	420	450	(60% of annual sales in row 1 for each year).
3 Cost Contributions (10% of sales amount in row 1 for relevant year after Year 5).	25	25	50	50	60	65	70	75	(10% of annual sales in row 1 for each year).
4 Profit = amount in row 1 reduced by amounts in rows 2 and 3.	15	15	30	110	180	195	210	225	(row 1 minus rows 2 and 3 for each year).
5 PV (using 14% discount rate).	15	13.2	23.1	74.2	107	101	95.7	89.9	842.
6 TOTAL PV of Cost Sharing Alternative = Sum of all PV amounts in Row 5 for all Time Periods = $1,361 million.									

LICENSING ALTERNATIVE

Time Period (Y = Year, TV = Terminal Value).	Y1	Y2	Y3	Y4	Y5	Y6	Y7	Y8	TV
Discount Period	0	1	2	3	4	5	6	7	7
Items of Income/Expense at Beginning of Year:									

LICENSING ALTERNATIVE—Continued

7 Sales	100	100	200	400	600	650	700	750	(3% annual growth in each year from previous year).
8 Routine Cost and Operating Cost Contributions (60% of sales amount in row 7 of relevant year).	60	60	120	240	360	390	420	450	(60% of annual sales in row 7 for each year).
9 Operating Profit = amount in Row 7 reduced by amount in Row 8.	40	40	80	160	240	260	280	300	(Row 7 minus row 8 for each year).
10 PV of row 9 (using 13% discount rate).	40	35.4	62.7	111	147	141	135	128	1313.
11 TOTAL PV FOR ALL AMOUNTS IN ROW 10 = $2,112.7 million									
12 Licensing Payments (30% of sales amount in row 7).	30	30	60	120	180	195	210	225	(30% of amount in row 7 for each year).
13 PV of amount in row 12 (using 13% discount rate).	30	26.5	47	83.2	110	106	101	95.6	985.
14 TOTAL PV FOR ALL AMOUNTS IN ROW 13 = $1,584.5 million.									
15 TOTAL PV of Licensing Alternative = Row 11 minus Row 14 = $528 million.									

CALCULATION OF PCT PAYMENT

16	TOTAL PV OF COST SHARING ALTERNATIVE (FROM ROW 6 ABOVE) =	$1,361 million.
17	TOTAL PV OF LICENSING ALTERNATIVE (FROM ROW 15 ABOVE) =	$528 million.
18	LUMP SUM PCT PAYMENT = ROW 16 − ROW 17 =	$833 million.

(5) *Acquisition price method*—(i) *In general.* The acquisition price method applies the comparable uncontrolled transaction method of § 1.482–4(c), or the comparable uncontrolled services price method described in § 1.482–9(c), to evaluate whether the amount charged in a PCT, or group of PCTs, is arm's length by reference to the amount charged (the acquisition price) for the stock or asset purchase of an entire organization or portion thereof (the target) in an uncontrolled transaction. The acquisition price method is ordinarily used where substantially all the target's nonroutine contributions, as such term is defined in paragraph (j)(1)(i) of this section, made to the PCT Payee's business activities are covered by a PCT or group of PCTs.

(ii) *Determination of arm's length charge.* Under this method, the arm's length charge for a PCT or group of PCTs covering resources, capabilities, and rights of the target is equal to the adjusted acquisition price, as divided among the controlled participants according to their respective RAB shares.

(iii) *Adjusted acquisition price.* The adjusted acquisition price is the acquisition price of the target increased by the value of the target's liabilities on the date of the acquisition, other than liabilities not assumed in the case of an asset purchase, and decreased by the value of the target's tangible property on that date and by the value on that date of any other resources, capabilities, and rights not covered by a PCT or group of PCTs.

(iv) *Best method analysis considerations.* The comparability and reliability considerations stated in § 1.482–4(c)(2) apply. Consistent with those considerations, the reliability of applying the acquisition price method as a measure of the arm's length charge for the PCT Payment normally is reduced if—

(A) A substantial portion of the target's nonroutine contributions to the PCT Payee's business activities is not required to be covered by a PCT or group of PCTs, and that portion of the nonroutine contributions cannot reliably be valued;

(B) A substantial portion of the target's assets consists of tangible property that cannot reliably be valued; or

(C) The date on which the target is acquired and the date of the PCT are not contemporaneous.

(v) *Example.* The following example illustrates the principles of this paragraph (g)(5):

Example. USP, a U.S. corporation, and its newly incorporated, wholly-owned foreign subsidiary (FS) enter into a CSA at the start of Year 1 to develop Group Z products. Under the CSA, USP and FS will have the exclusive rights to exploit the Group Z products in the U.S. and the rest of the world, respectively. At the start of Year 2, USP acquires Company X for cash consideration worth $110 million. At this time USP's RAB share is 60%, and FS's RAB share is 40% and is not reasonably anticipated to change as a result of this acquisition. Company X joins in the filing of a U.S. consolidated income tax return with USP. Under paragraph (j)(2)(i) of this section, Company X and USP are treated as one taxpayer for purposes of this section. Accordingly, the rights in any of Company X's resources and capabilities that are reasonably anticipated to contribute to the development activities of the CSA will be considered platform contributions furnished by USP. Company X's resources and capabilities consist of its workforce, certain technology intangibles, $15 million of tangible property and other assets and $5 million in liabilities. The technology intangibles, as well as Company X's workforce, are reasonably anticipated to contribute to the development of the Group Z products under the CSA and, therefore, the rights in the technology intangibles and the workforce are platform contributions for which FS must make a PCT Payment to USP. None of Company X's existing intangible assets or any of its workforce are anticipated to contribute to activities outside the CSA. For purposes of this example, it is assumed that no additional adjustment on account of tax liabilities is needed. Applying the acquisition price method, the value of USP's platform contributions is the adjusted acquisition price of $100 million ($110 million acquisition price plus $5 million liabilities less $15 million tangible property and other assets). FS must make a PCT Payment to USP for these platform contributions with a reasonably anticipated present value of $40 million, which is the product of $100 million (the value of the platform contributions) and 40% (FS's RAB share).

(6) *Market capitalization method*—(i) *In general.* The market capitalization

method applies the comparable uncontrolled transaction method of § 1.482–4(c), or the comparable uncontrolled services price method described in § 1.482–9(c), to evaluate whether the amount charged in a PCT, or group of PCTs, is arm's length by reference to the average market capitalization of a controlled participant (PCT Payee) whose stock is regularly traded on an established securities market. The market capitalization method is ordinarily used where substantially all of the PCT Payee's nonroutine contributions to the PCT Payee's business are covered by a PCT or group of PCTs.

(ii) *Determination of arm's length charge.* Under the market capitalization method, the arm's length charge for a PCT or group of PCTs covering resources, capabilities, and rights of the PCT Payee is equal to the adjusted average market capitalization, as divided among the controlled participants according to their respective RAB shares.

(iii) *Average market capitalization.* The average market capitalization is the average of the daily market capitalizations of the PCT Payee over a period of time beginning 60 days before the date of the PCT and ending on the date of the PCT. The daily market capitalization of the PCT Payee is calculated on each day its stock is actively traded as the total number of shares outstanding multiplied by the adjusted closing price of the stock on that day. The adjusted closing price is the daily closing price of the stock, after adjustments for stock-based transactions (dividends and stock splits) and other pending corporate (combination and spin-off) restructuring transactions for which reliable arm's length adjustments can be made.

(iv) *Adjusted average market capitalization.* The adjusted average market capitalization is the average market capitalization of the PCT Payee increased by the value of the PCT Payee's liabilities on the date of the PCT and decreased by the value on such date of the PCT Payee's tangible property and of any other resources, capabilities, or rights of the PCT Payee not covered by a PCT or group of PCTs.

(v) *Best method analysis considerations.* The comparability and reliability considerations stated in § 1.482–4(c)(2) apply. Consistent with those considerations, the reliability of applying the comparable uncontrolled transaction method using the adjusted market capitalization of a company as a measure of the arm's length charge for the PCT Payment normally is reduced if—

(A) A substantial portion of the PCT Payee's nonroutine contributions to its business activities is not required to be covered by a PCT or group of PCTs, and that portion of the nonroutine contributions cannot reliably be valued;

(B) A substantial portion of the PCT Payee's assets consists of tangible property that cannot reliably be valued; or

(C) Facts and circumstances demonstrate the likelihood of a material divergence between the average market capitalization of the PCT Payee and the value of its resources, capabilities, and rights for which reliable adjustments cannot be made.

(vi) *Examples.* The following examples illustrate the principles of this paragraph (g)(6):

Example 1. (i) USP, a publicly traded U.S. company, and its newly incorporated wholly-owned foreign subsidiary (FS) enter into a CSA on Date 1 to develop software. At that time USP has in-process software but has no software ready for the market. Under the CSA, USP and FS will have the exclusive rights to exploit the software developed under the CSA in the United States and the rest of the world, respectively. On Date 1, USP's RAB share is 70% and FS's RAB share is 30%. USP's assembled team of researchers and its in-process software are reasonably anticipated to contribute to the development of the software under the CSA. Therefore, the rights in the research team and in-process software are platform contributions for which compensation is due from FS. Further, these rights are not reasonably anticipated to contribute to any business activity other than the CSA Activity.

(ii) On Date 1, USP had an average market capitalization of $205 million, tangible property and other assets that can be reliably valued worth $5 million, and no liabilities. Aside from those assets, USP had no assets other than its research team and in-process software. Applying the market capitalization method, the value of USP's platform contributions is $200 million ($205 million average market capitalization of USP less $5 million of tangible property and other assets). The arm's length value of the PCT Payments FS must make to USP for the platform contributions, before any adjustment on account of tax liability as described in paragraph (g)(2)(ii) of this section, is $60 million, which is the product of $200 million (the value of the platform contributions) and 30% (FS's RAB share on Date 1).

Example 2. Aggregation with make-or-sell rights. (i) The facts are the same as in *Example 1,* except that on Date 1 USP also has existing software ready for the market. USP separately enters into a license agreement with FS for make-or-sell rights for all existing software outside the United States. No marketing has occurred, and USP has no marketing intangibles. This license of current make-or-sell rights is a transaction governed by § 1.482–4. However, after analysis, it is determined that the arm's length PCT Payments and the arm's length payments for the make-or-sell license may be most reliably determined in the aggregate using the market capitalization method, under principles described in paragraph (g)(2)(iv) of this section, and it is further determined that those principles are most reliably implemented by computing the aggregate arm's length charge as the product of the aggregate value of the existing and in-process software and FS's RAB share on Date 1.

(ii) Applying the market capitalization method, the aggregate value of USP's platform contributions and the make-or-sell rights in its existing software is $250 million ($255 million average market capitalization of USP less $5 million of tangible property and other assets). The total arm's length value of the PCT Payments and licensing payments FS must make to USP for the platform contributions and current make-or-sell rights, before any adjustment on account of tax liability, if any, is $75 million, which is the product of $250 million (the value of the platform contributions and the make-or-sell rights) and 30% (FS's RAB share on Date 1).

Example 3. Reduced reliability. The facts are the same as in *Example 1* except that USP also has significant nonroutine assets that will be used solely in a nascent business division that is unrelated to the subject of the CSA and that cannot themselves be reliably valued. Those nonroutine contributions are not platform contributions and accordingly are not required to be covered by a PCT. The reliability of using the market capitalization method to determine the value of USP's platform contributions to the CSA is significantly reduced in this case because that method would require adjusting USP's average market capitalization to account for the significant nonroutine contributions that are not required to be covered by a PCT.

(7) *Residual profit split method*—(i) *In general.* The residual profit split method evaluates whether the allocation of combined operating profit or loss attributable to one or more platform contributions subject to a PCT is arm's length by reference to the relative value of each controlled participant's contribution to that combined operating profit or loss. The combined operating profit or loss must be derived from the most narrowly identifiable business activity (relevant business activity) of the controlled participants for which data are available that include the CSA Activity. The residual profit split method may not be used where only one controlled participant makes significant nonroutine contributions (including platform or operating contributions) to the CSA Activity. The provisions of § 1.482–6 shall apply to CSAs only to the extent provided and as modified in this paragraph (g)(7). Any other application to a CSA of a residual profit method not described in paragraphs (g)(7)(ii) and (iii) of this section will constitute an unspecified method for purposes of sections 482 and 6662(e)

and the regulations under those sections.

(ii) *Appropriate share of profits and losses.* The relative value of each controlled participant's contribution to the success of the relevant business activity must be determined in a manner that reflects the functions performed, risks assumed, and resources employed by each participant in the relevant business activity, consistent with the best method analysis described in § 1.482–1(c) and (d). Such an allocation is intended to correspond to the division of profit or loss that would result from an arrangement between uncontrolled taxpayers, each performing functions similar to those of the various controlled participants engaged in the relevant business activity. The profit allocated to any particular controlled participant is not necessarily limited to the total operating profit of the group from the relevant business activity. For example, in a given year, one controlled participant may earn a profit while another controlled participant incurs a loss. In addition, it may not be assumed that the combined operating profit or loss from the relevant business activity should be shared equally, or in any other arbitrary proportion.

(iii) *Profit split*—(A) *In general.* Under the residual profit split method, the present value of each controlled participant's residual divisional profit or loss attributable to nonroutine contributions (nonroutine residual divisional profit or loss) is allocated between the controlled participants that each furnish significant nonroutine contributions (including platform or operating contributions) to the relevant business activity in that division.

(B) *Determine nonroutine residual divisional profit or loss.* The present value of each controlled participant's nonroutine residual divisional profit or loss must be determined to reflect the most reliable measure of an arm's length result. The present value of nonroutine residual divisional profit or loss equals the present value of the stream of the reasonably anticipated residuals over the duration of the CSA Activity of divisional profit or loss, minus market returns for routine contributions, minus operating cost contributions, minus cost contributions, using a discount rate appropriate to such residuals in accordance with paragraph (g)(2)(v) of this section. As used in this paragraph (g)(7), the phrase ''market returns for routine contributions'' includes market returns for operating cost contributions and excludes market returns for cost contributions.

(C) *Allocate nonroutine residual divisional profit or loss*—(*1*) *In general.* The present value of nonroutine residual divisional profit or loss in each controlled participant's division must be allocated among all of the controlled participants based upon the relative values, determined as of the date of the PCTs, of the PCT Payor's as compared to the PCT Payee's nonroutine contributions to the PCT Payor's division. For this purpose, the PCT Payor's nonroutine contribution consists of the sum of the PCT Payor's nonroutine operating contributions and the PCT Payor's RAB share of the PCT Payor's nonroutine platform contributions. For this purpose, the PCT Payee's nonroutine contribution consists of the PCT Payor's RAB share of the PCT Payee's nonroutine platform contributions.

(*2*) *Relative value determination.* The relative values of the controlled participants' nonroutine contributions must be determined so as to reflect the most reliable measure of an arm's length result. Relative values may be measured by external market benchmarks that reflect the fair market value of such nonroutine contributions. Alternatively, the relative value of nonroutine contributions may be estimated by the capitalized cost of developing the nonroutine contributions and updates, as appropriately grown or discounted so that all contributions may be valued on a comparable dollar basis as of the same date. If the nonroutine contributions by a controlled participant are also used in other business activities (such as the exploitation of make-or-sell rights described in paragraph (c)(4) of this section), an allocation of the value of the nonroutine contributions must be made on a reasonable basis among all the business activities in which they are used in proportion to the relative economic value that the relevant business activity and such other business activities are anticipated to derive over time as the result of such nonroutine contributions.

(*3*) *Determination of PCT Payments.* Any amount of the present value of a controlled participant's nonroutine residual divisional profit or loss that is allocated to another controlled participant represents the present value of the PCT Payments due to that other controlled participant for its platform contributions to the relevant business activity in the relevant division. For purposes of paragraph (j)(3)(ii) of this section, the present value of a PCT Payor's PCT Payments under this paragraph shall be deemed reduced to the extent of the present value of any PCT Payments owed to it from other controlled participants under this paragraph (g)(7). The resulting remainder may be converted to a fixed or contingent form of payment in accordance with paragraph (h) (Form of payment rules) of this section.

(*4*) *Routine platform and operating contributions.* For purposes of this paragraph (g)(7), any routine platform or operating contributions, the valuation and PCT Payments for which are determined and made independently of the residual profit split method, are treated similarly to cost contributions and operating cost contributions, respectively. Accordingly, wherever used in this paragraph (g)(7), the term ''routine contributions'' shall not include routine platform or operating contributions, and wherever the terms ''cost contributions'' and ''operating cost contributions'' appear in this paragraph (g)(7), they shall include net routine platform contributions and net routine operating contributions, respectively, as defined in paragraph (g)(4)(vii) of this section. However, treatment of net operating contributions as operating cost contributions shall be coordinated with the treatment of other routine contributions pursuant to paragraphs (g)(4)(iii)(B) and (7)(iii)(B) of this section so as to avoid duplicative market returns to such contributions.

(iv) *Best method analysis considerations*—(A) *In general.* Whether results derived from this method are the most reliable measure of the arm's length result is determined using the factors described under the best method rule in § 1.482–1(c). Thus, comparability and quality of data, reliability of assumptions, and sensitivity of results to possible deficiencies in the data and assumptions, must be considered in determining whether this method provides the most reliable measure of an arm's length result. The application of these factors to the residual profit split in the context of the relevant business activity of developing and exploiting cost shared intangibles is discussed in paragraphs (g)(7)(iv)(B) through (D) of this section.

(B) *Comparability.* The derivation of the present value of nonroutine residual divisional profit or loss includes a carveout on account of market returns for routine contributions. Thus, the comparability considerations that are relevant for that purpose include those that are relevant for the methods that are used to determine market returns for the routine contributions.

(C) *Data and assumptions.* The reliability of the results derived from the residual profit split is affected by the quality of the data and assumptions used to apply this method. In particular, the following factors must be considered:

(*1*) The reliability of the allocation of costs, income, and assets between the relevant business activity and the controlled participants' other activities that will affect the reliability of the determination of the divisional profit or loss and its allocation among the controlled participants. See § 1.482–6(c)(2)(ii)(C)(*1*).

(*2*) The degree of consistency between the controlled participants and uncontrolled taxpayers in accounting practices that materially affect the items that determine the amount and allocation of operating profit or loss affects the reliability of the result. See § 1.482–6(c)(2)(ii)(C)(*2*).

(*3*) The reliability of the data used and the assumptions made in estimating the relative value of the nonroutine contributions by the controlled participants. In particular, if capitalized costs of development are used to estimate the relative value of nonroutine contributions, the reliability of the results is reduced relative to the reliability of other methods that do not require such an estimate. This is because, in any given case, the costs of developing a nonroutine contribution may not be related to its market value and because the calculation of the capitalized costs of development may require the allocation of indirect costs between the relevant business activity and the controlled participant's other activities, which may affect the reliability of the analysis.

(D) *Other factors affecting reliability.* Like the methods described in §§ 1.482–3 through 1.482–5 and § 1.482–9(c), the carveout on account of market returns for routine contributions relies exclusively on external market benchmarks. As indicated in § 1.482–1(c)(2)(i), as the degree of comparability between the controlled participants and uncontrolled transactions increases, the relative weight accorded the analysis under this method will increase. In addition, to the extent the allocation of nonroutine residual divisional profit or loss is not based on external market benchmarks, the reliability of the analysis will be decreased in relation to an analysis under a method that relies on market benchmarks. Finally, the reliability of the analysis under this method may be enhanced by the fact that all the controlled participants are evaluated under the residual profit split. However, the reliability of the results of an analysis based on information from all the controlled participants is affected by the reliability of the data and the assumptions pertaining to each controlled participant. Thus, if the data and assumptions are significantly more reliable with respect to one of the controlled participants than with respect to the others, a different method, focusing solely on the results of that party, may yield more reliable results.

(v) *Examples.* The following examples illustrate the principles of this paragraph (g)(7):

Example 1. (i) For simplicity of calculation in this *Example 1,* all financial flows are assumed to occur at the beginning of each period. USP, a U.S. electronic data storage company, has partially developed technology for a type of extremely small compact storage devices (nanodisks) which are expected to provide a significant increase in data storage capacity in various types of portable devices such as cell phones, MP3 players, laptop computers and digital cameras. At the same time, USP's wholly-owned subsidiary, FS, has developed significant marketing intangibles outside the United States in the form of customer lists, ongoing relations with various OEMs, and trademarks that are well recognized by consumers due to a long history of marketing successful data storage devices and other hardware used in various types of consumer electronics. At the beginning of Year 1, USP enters into a CSA with FS to develop nanodisk technologies for eventual commercial exploitation. Under the CSA, USP will have the right to exploit nanodisks in the United States, while FS will have the right to exploit nanodisks in the rest of the world. The partially developed nanodisk technologies owned by USP are reasonably anticipated to contribute to the development of commercially exploitable nanodisks and therefore the rights in the nanodisk technologies constitute platform contributions of USP for which compensation is due under PCTs. FS does not have any platform contributions for the CSA. Due to the fact that nanodisk technologies have yet to be incorporated into any commercially available product, neither USP nor FS transfers rights to make or sell current products in conjunction with the CSA.

(ii) Because only in FS's territory do both controlled participants make significant nonroutine contributions, USP and FS determine that they need to determine the relative value of their respective contributions to residual divisional profit or loss attributable to the CSA Activity only in FS's territory. FS anticipates making no nanodisk sales during the first year of the CSA in its territory with revenues in Year 2 reaching $200 million. Revenues through Year 5 are reasonably anticipated to increase by 50% per year. The annual growth rate for revenues is then expected to decline to 30% per annum in Years 6 and 7, 20% per annum in Years 8 and 9 and 10% per annum in Year 10. Revenues are then expected to decline 10% in Year 11 and 5% per annum, thereafter. The routine costs (defined here as costs other than cost contributions, routine platform and operating contributions, and nonroutine contributions) that are allocable to this revenue in calculating FS's divisional profit or loss, are anticipated to equal $40 million for the first year of the CSA and $130 for the second year and $200 and $250 million in Years 3 and 4. Total operating expenses attributable to product exploitation (including operating cost contributions) equal 52% of sales per year. FS undertakes routine distribution activities in its markets that constitute routine contributions to the relevant business activity of exploiting nanodisk technologies. USP and FS estimate that the total market return on these routine contributions will amount to 6% of the routine costs. FS expects its cost contributions to be $60 million in Year 1, rise to $100 million in Years 2 and 3, and then decline again to $60 million in Year 4. Thereafter, FS's cost contributions are expected to equal 10% of revenues.

(iii) USP and FS determine the present value of the stream of the reasonably anticipated residuals in FS's territory over the duration of the CSA Activity of the divisional profit or loss (revenues minus routine costs), minus the market returns for routine contributions, the operating cost contributions, and the cost contributions. USP and FS determine, based on the considerations discussed in paragraph (g)(2)(v) of this section, that the appropriate discount rate is 17.5% per annum. Therefore, the present value of the nonroutine residual divisional profit is $1,395 million.

(iv) After analysis, USP and FS determine that the relative value of the nanodisk technologies contributed by USP to CSA (giving effect only to its value in FS's territory) is roughly 150% of the value of FS's marketing intangibles (which only have value in FS's territory). Consequently, 60% of the nonroutine residual divisional profit is attributable to USP's platform contribution. Therefore, FS's PCT Payments should have an expected present value equal to $837 million (.6 x $1,395 million).

(v) The calculations for this *Example 1* are displayed in the following table:

Time Period (Y = Year) (TV = Terminal Value)	Y1	Y2	Y3	Y4	Y5	Y6	Y7	Y8	Y9	Y10	Y11	TV
Discount Period	0	1	2	3	4	5	6	7	8	9	10	10
[1] Sales	0	200	300	450	675	878	1141	1369	1643	1807	1626	
[2] Growth Rate	.....	.....	50%	50%	50%	30%	30%	20%	20%	10%	−10%	
[3] Exploitation Costs and Operating Cost Contributions (52% of Sales [1])	40	130	200	250	351	456	593	712	854	940	846	
[4] Return on [3] (6% of [3])	2.4	8	12	15	21	27	36	43	51	56	51	
[5] Cost Contributions (10% of Sales [1] after Year 5)	60	100	100	60	68	88	114	137	164	181	163	
[6] Residual Profit = [1] minus {[3] + [4] + [5]}	−102	−38	−12	125	235	306	398	477	573	630	567	2395

[7] Residual Profit [6] Discounted at 17.5% discount rate	−102	−32	−9	77	124	137	151	154	158	148	113	477
[8] Sum of all amounts in [7] for all time periods = $1,395 million												
[9] Relative value in FS's division of USP's nanotechnology to FS's marketing intangibles = 150%												
[10] Profit Split (USP)	60% = 1.5 x [11]											
[11] Profit Split (FS)	40%											
[12] FS's PCT Payments	[8] x [10] = $1,395 million x 60% = $837 million											

Example 2. (i) For simplicity of calculation in this *Example 2,* all financial flows are assumed to occur at the beginning of each period. USP is a U.S. automobile manufacturing company that has completed significant research on the development of diesel-electric hybrid engines that, if they could be successfully manufactured, would result in providing a significant increased fuel economy for a wide variety of motor vehicles. Successful commercialization of the diesel-electric hybrid engine will require the development of a new class of advanced battery that will be light, relatively cheap to manufacture and yet capable of holding a substantial electric charge. FS, a foreign subsidiary of USP, has completed significant research on developing lithium-ion batteries that appear likely to have the requisite characteristics. At the beginning of Year 1, USP enters into a CSA with FS to further develop diesel-electric hybrid engines and lithium-ion battery technologies for eventual commercial exploitation. Under the CSA, USP will have the right to exploit the diesel-electric hybrid engine and lithium-ion battery technologies in the United States, while FS will have the right to exploit such technologies in the rest of the world. The partially developed diesel-electric hybrid engine and lithium-ion battery technologies owned by USP and FS, respectively, are reasonably anticipated to contribute to the development of commercially exploitable automobile engines and therefore the rights in both these technologies constitute platform contributions of USP and of FS for which compensation is due under PCTs. At the time of inception of the CSA, USP owns operating intangibles in the form of self-developed marketing intangibles which have significant value in the United States, but not in the rest of the world, and that are relevant to exploiting the cost shared intangibles. Similarly, FS owns self-developed marketing intangibles which have significant value in the rest of the world, but not in the United States, and that are relevant to exploiting the cost shared intangibles. Although the new class of diesel-electric hybrid engine using lithium-ion batteries is not yet ready for commercial exploitation, components based on this technology are beginning to be incorporated in current-generation gasoline-electric hybrid engines and the rights to make and sell such products are transferred from USP to FS and vice-versa in conjunction with the inception of the CSA, following the same territorial division as in the CSA.

(ii) USP's estimated RAB share is 66.7%. During Year 1, it is anticipated that sales in USP's territory will be $1000X in Year 1. Sales in FS's territory are anticipated to be $500X. Thereafter, as revenue from the use of components in gasoline-electric hybrids is supplemented by revenues from the production of complete diesel-electric hybrid engines using lithium-ion battery technology, anticipated sales in both territories will increase rapidly at a rate of 50% per annum through Year 4. Anticipated sales are then anticipated to increase at a rate of 40% per annum for another 4 years. Sales are then anticipated to increase at a rate of 30% per annum through Year 10. Thereafter, sales are anticipated to decrease at a rate of 5% per annum for the foreseeable future as new automotive drivetrain technologies displace diesel-electric hybrid engines and lithium-ion batteries. Total operating expenses attributable to product exploitation (including operating cost contributions) equal 40% of sales per year for both USP and FS. USP and FS estimate that the total market return on these routine contributions to the CSA will amount to 6% of these operating expenses. USP is expected to bear ⅔ of the total cost contributions for the foreseeable future. Cost contributions are expected to total $375X in Year 1 (of which $250X are borne by USP) and increase at a rate of 25% per annum through Year 6. In Years 7 through 10, cost contributions are expected to increase 10% a year. Thereafter, cost contributions are expected to decrease by 5% a year for the foreseeable future.

(iii) USP and FS determine the present value of the stream of FS's reasonably anticipated residual divisional profit, which is the stream of FS's reasonably anticipated divisional profit or loss, minus the market returns for routine contributions, minus operating cost contributions, minus cost contributions. USP and FS determine, based on the considerations discussed in paragraph (g)(2)(v) of this section, that the appropriate discount rate is 12% per year. Therefore, the present value of the nonroutine residual divisional profit in USP's territory is $41,727X and in CFC's territory is $20,864X.

(iv) After analysis, USP and FS determine that, in the United States the relative value of the technologies contributed by USP and FS to the CSA and of the operating intangibles used by USP in the exploitation of the cost shared intangibles (reported as equaling 100 in total), equals: USP's platform contribution (59.5); FS's platform contribution (25.5); and USP's operating intangibles (15). Consequently, the present value of the arm's length amount of the PCT Payments that USP should pay to FS for FS's platform contribution is $10,640X (.255 x $41,727X). Similarly, USP and FS determine that, in the rest of the world, the relative value of the technologies contributed by USP and FS to the CSA and of the operating intangibles used by FS in the exploitation of the cost shared intangibles can be divided as follows: USP's platform contribution (63); FS's platform contribution (27); and FS's operating intangibles (10). Consequently, the present value of the arm's length amount of the PCT Payments that FS should pay to USP for USP's platform contribution is $13,144X (.63 × $20,864X). Therefore, FS is required to make a net payment to USP with a present value of $2,504X ($13,144X − 10,640X).

(v) The calculations for this *Example 2* are displayed in the following tables:

CALCULATION OF USP'S PCT PAYMENT TO FS

Time Period (Y = Year) (TV = Terminal Value)	Y1	Y2	Y3	Y4	Y5	Y6	Y7	Y8	Y9	Y10	TV
Discount Period	0	1	2	3	4	5	6	7	8	9	9
[1] Sales	1000	1500	2250	3375	4725	6615	9261	12965	16855	21912	
[2] Growth Rate	.....	50%	50%	50%	40%	40%	40%	40%	30%	30%	
[3] Exploitation Costs and Operating Cost Contributions (40% of Sales [1])	400	600	900	1350	1890	2646	3704	5186	6742	8765	
[4] Return on [3] = 6% of [3]	24	36	54	81	113	159	222	311	405	526	
[5] Cost Contributions	250	313	391	488	610	763	839	923	1015	1117	
[6] Residual Profit = [1] minus {[3] + [4] + [5]}	326	552	905	1456	2111	3047	4495	6545	8693	11504	64287
[7] Residual Profit [6] Discounted at 12% discount rate	326	492	722	1036	1342	1729	2277	2961	3511	4148	23183

[8] Sum of all amounts in [7] for all time periods = $41,727X

Profit Split for Calculation of USP's PCT Payment to FS: [Total of US contributions = 74.5%]
[9] USP's Platform Contribution = 59.5%

CALCULATION OF USP'S PCT PAYMENT TO FS—Continued

[10] FS's Platform Contribution = 25.5%
[11] USP's Operating Intangibles = 15%

[12] USP's PCT Payment to FS = [8] × [10] = $41,727X multiplied by 25.5% = $10,640X

CALCULATION OF FS'S NET PCT PAYMENT TO USF

Time Period (Y = Year) (TV = Terminal Value)	Y1	Y2	Y3	Y4	Y5	Y6	Y7	Y8	Y9	Y10	TV
Discount Period	0	1	2	3	4	5	6	7	8	9	9
[13] Sales	500	750	1125	1688	2363	3308	4631	6483	8428	10956	
[14] Growth Rate	.....	50%	50%	50%	40%	40%	40%	40%	30%	30%	
[15] Exploitation Costs and Operating Cost Contributions (40% of Sales [13])	200	300	450	675	945	1323	1852	2593	3371	4382	
[16] Return on [15] = 6% of [15]	12	18	27	41	57	79	111	156	202	263	
[17] Cost Contributions	125	156	195	244	305	381	420	462	508	559	
[18] Residual Profit = [13] minus {[15] + [16] + [17]}	163	276	453	728	1056	1524	2248	3272	4347	5752	32144
[19] Residual Profit [18] Discounted at 12% discount rate	163	246	361	518	671	865	1139	1480	1755	2074	11591

[20] Sum of all amounts in [19] for all time periods = $20,864X

Profit Split for Calculation of FS's PCT Payment to USP: [Total of FS's contributions = 37%]
[21] USP's Platform Contribution = 63%
[22] FS's Platform Contribution = 27%
[23] FS's Operating Intangibles = 10%

[24] FS's PCT Payment to USP = [20] × [21] = $20,864X multiplied by 63% = $13,144X

[25] FS's Net PCT Payment to USP = [24] minus [12] = $13,144X minus $10,640X = $2,504X

(8) *Unspecified methods.* Methods not specified in paragraphs (g)(3) through (7) of this section may be used to evaluate whether the amount charged for a PCT is arm's length. Any method used under this paragraph (g)(8) must be applied in accordance with the provisions of § 1.482–1 and of paragraph (g)(2) of this section. Consistent with the specified methods, an unspecified method should take into account the general principle that uncontrolled taxpayers evaluate the terms of a transaction by considering the realistic alternatives to that transaction, and only enter into a particular transaction if none of the alternatives is preferable to it. Therefore, in establishing whether a PCT achieved an arm's length result, an unspecified method should provide information on the prices or profits that the controlled participant could have realized by choosing a realistic alternative to the CSA. See paragraph (k)(2)(ii)(J) of this section. As with any method, an unspecified method will not be applied unless it provides the most reliable measure of an arm's length result under the principles of the best method rule. See § 1.482–1(c) (Best method rule). In accordance with § 1.482–1(d) (Comparability), to the extent that an unspecified method relies on internal data rather than uncontrolled comparables, its reliability will be reduced. Similarly, the reliability of a method will be affected by the reliability of the data and assumptions used to apply the method, including any projections used.

(h) *Form of payment rules*—(1) *CST Payments.* CST Payments may not be paid in shares of stock in the payor (or stock in any member of the controlled group that includes the controlled participants).

(2) *PCT Payments*—(i) *In general.* The consideration under a PCT for a platform contribution may take one or a combination of both of the following forms:

(A) Payments of a fixed amount (fixed payments), either paid in a lump sum payment or in installment payments spread over a specified period, with interest calculated in accordance with § 1.482–2(a) (Loans or advances).

(B) Payments contingent on the exploitation of cost shared intangibles by the PCT Payor (contingent payments). Accordingly, controlled participants have flexibility to adopt a form and period of payment, provided that such form and period of payment are consistent with an arm's length charge as of the date of the PCT. See also paragraphs (h)(2)(iv) and (3) of this section.

(ii) *No PCT Payor Stock.* PCT Payments may not be paid in shares of stock in the PCT Payor (or stock in any member of the controlled group that includes the controlled participants).

(iii) *Specified form of payment*—(A) *In general.* The form of payment selected (subject to the rules of this paragraph (h)) for any PCT, including, in the case of contingent payments, the contingent base and structure of the payments as set forth in paragraph (h)(2)(iii)(B) of this section, must be specified no later than the due date of the applicable tax return (including extensions) for the later of the taxable year of the PCT Payor or PCT Payee that includes the date of that PCT.

(B) *Contingent payments.* In accordance with paragraph (k)(1)(iv)(A) of this section, a provision of a written contract described in paragraph (k)(1) of this section, or of the additional documentation described in paragraph (k)(2) of this section, that provides for payments for a PCT (or group of PCTs) to be contingent on the exploitation of cost shared intangibles will be respected as consistent with economic substance only if the allocation between the controlled participants of the risks attendant on such form of payment is determinable before the outcomes of such allocation that would have materially affected the PCT pricing are known or reasonably knowable. A contingent payment provision must clearly and unambiguously specify the basis on which the contingent payment obligations are to be determined. In particular, the contingent payment provision must clearly and unambiguously specify the events that give rise to an obligation to make PCT Payments, the royalty base (such as sales or revenues), and the computation used to determine the PCT Payments. The royalty base specified must be one that permits verification of its proper use by reference to books and records maintained by the controlled participants in the normal course of business (for example, books and records maintained for financial

accounting or business management purposes).

(C) *Examples.* The following examples illustrate the principles of this paragraph (h)(2).

Example 1. A CSA provides that PCT Payments with respect to a particular platform contribution shall be contingent payments equal to 15% of the revenues from sales of products that incorporate cost shared intangibles. The terms further permit (but do not require) the controlled participants to adjust such contingent payments in accordance with a formula set forth in the arrangement so that the 15% rate is subject to adjustment by the controlled participants at their discretion on an after-the-fact, uncompensated basis. The Commissioner may impute payment terms that are consistent with economic substance with respect to the platform contribution because the contingent payment provision does not specify the computation used to determine the PCT Payments.

Example 2. Taxpayer, an automobile manufacturer, is a controlled participant in a CSA that involves research and development to perfect certain manufacturing techniques necessary to the actual manufacture of a state-of-the-art, hybrid fuel injection system known as DRL337. The arrangement involves the platform contribution of a design patent covering DRL337. Pursuant to paragraph (h)(2)(iii)(B) of this section, the CSA provides for PCT Payments with respect to the platform contribution of the patent in the form of royalties contingent on sales of automobiles that contain the DRL337 system. However, Taxpayer's system of book- and record-keeping does not enable Taxpayer to track which automobile sales involve automobiles that contain the DRL337 system. Because Taxpayer has not complied with paragraph (h)(2)(iii)(B) of this section, the Commissioner may impute payment terms that are consistent with economic substance and susceptible to verification by the Commissioner.

Example 3. (i) Controlled participants A and B enter into a CSA that provides for PCT Payments from A to B with respect to B's platform contribution, Z, in the form of three annual installment payments due from A to B on the last day of each of the first three years of the CSA.

(ii) On audit, based on all the facts and circumstances, the Commissioner determines that the installment PCT Payments are consistent with an arm's length charge as of the date of the PCT. Accordingly, the Commissioner does not make an adjustment with respect to the PCT Payments in any year.

Example 4. (i) The facts are the same as in *Example 3* except that the CSA contains an additional term with respect to the PCT Payments. Under this provision, A and B further agreed that, if the present value (as of the CSA Start Date) of A's actual divisional operating profit or loss during the three-year period is less than the present value (as of the CSA Start Date) of the divisional operating profit or loss that the parties projected for A upon formation of the CSA for that period, then the third installment payment shall be subject to a compensating adjustment in the amount necessary to reduce the present value (as of the CSA Start Date) of the aggregate PCT Payments for those three years to the amount that would have been calculated if the actual results had been used for the calculation instead of the projected results.

(ii) This provision further specifies that A will pay B an additional amount, $Q, in the first year of the CSA to compensate B for taking on additional downside risk through the contingent payment term described in paragraph (i) of this *Example 4.*

(iii) During the first two years, A pays B installment payments as agreed, as well as the additional amount, $Q. In the third year, A and B determine that the present value (as of the CSA Start Date) of A's actual divisional operating profit or loss during the three-year period is less than the present value (as of the CSA Start Date) of the divisional operating profit or loss that the parties projected for A upon formation of the CSA for that period. A reduces the PCT Payment to B in the third year in the amount necessary to reduce the present value (as of the CSA Start Date) of the aggregate PCT Payments for those three years to the amount that would have been calculated if the actual results had been used for the calculation instead of the projected results.

(iv) On audit, based on all the facts and circumstances, the Commissioner determines that the installment PCT Payments agreed to be paid by A to B were consistent with an arm's length charge as of the date of the PCT. The Commissioner further determines that the contingency was sufficiently specified such that its occurrence or nonoccurrence was unambiguous and determinable; that the projections were reliable; and that the contingency did, in fact, occur. Finally, the Commissioner determines, based on all the facts and circumstances, that $Q was within the arm's length range for the additional allocation of risk to B. Accordingly, no adjustment is made with respect to the installment PCT Payments, or the additional PCT Payment for the contingent payment term, in any year.

Example 5. (i) The facts are the same as in *Example 4* except that the CSA states the amount that A will pay B for the contingent payment term is $X, an amount that is less than $Q, and A pays B $X in the first year of the CSA.

(ii) On audit, based on all the facts and circumstances, the Commissioner determines that the installment PCT Payments agreed to be paid by A to B were consistent with an arm's length charge as of the date of the PCT. The Commissioner further determines that the contingency was sufficiently specified such that its occurrence or nonoccurrence was unambiguous and determinable; that the projections were reliable; and that the contingency did, in fact, occur. However, the Commissioner also determines, based on all the facts and circumstances, that the additional PCT Payment of $X from A to B for the contingent payment term was not an arm's length charge for the additional allocation of risk as of the CSA Start Date in connection with the contingent payment term. Accordingly, the Commissioner makes an adjustment to B's results equal to the difference between $X and the median of the arm's length range of charges for the contingent payment term.

Example 6. (i) The facts are the same as in *Example 3* except that A and B further agreed that, if the present value (as of the CSA Start Date) of A's actual divisional operating profit or loss during the three-year period is either less or greater than the present value (as of the CSA Start Date) of the divisional operating profit or loss that the parties projected for A upon formation of the CSA for that period, then A may make a compensating adjustment to the third installment payment in the amount necessary to reduce (if actual divisional operating profit or loss is less than the projections) or increase (if actual divisional operating profit or loss exceeds the projections) the present value (as of the CSA Start Date) of the aggregate PCT Payments for those three years to the amount that would have been calculated if the actual results had been used for the calculation instead of the projected results.

(ii) On audit, the Commissioner determines that the contingent payment term lacks economic substance under §§ 1.482–1(d)(3)(iii)(B) and 1.482–7(h)(2)(iii)(B). It lacks economic substance because the allocation of the risks between A and B was indeterminate as of the CSA Start Date due to the elective nature of the potential compensating adjustments. Specifically, the parties agreed upfront only that A might make compensating adjustments to the installment payments. By the terms of the agreement, A could decide whether to make such adjustments after the outcome of the risks was known or reasonably knowable. Even though the contingency and potential compensating adjustments were clearly defined in the CSA, no compensating adjustments were required by the CSA regardless of the occurrence or nonoccurrence of the contingency. As a result, the contingent payment terms did not clearly and unambiguously specify the events that give rise to an obligation to make PCT Payments, and, accordingly, the obligation to make compensating adjustments pursuant to the contingency was indeterminate. The contingent payment term allows the taxpayer to make adjustments that are favorable to its overall tax position in those years where the agreement allows it to make such adjustments, but decline to exercise its right to make any adjustment in those years in which such an adjustment would be unfavorable to its overall tax position. Such terms do not reflect a substantive upfront allocation of risk. In addition, the vagueness of the agreement makes it impossible to determine whether such contingent payment term warrants an additional arm's length charge and, if so, how much.

(iii) Accordingly, the Commissioner may disregard the contingent payment term under §§ 1.482–1(d)(3)(ii)(B)(*1*) and 1.482–7(k)(1)(iv) and may impute other contractual terms in its place consistent with the economic substance of the CSA.

Example 7. (i) The facts are the same as in *Example 6* except that the contingent payment term provides that, if the present

value (as of the CSA Start Date) of A's actual divisional operating profit or loss during the three-year period is either less or greater than the present value (as of the CSA Start Date) of the divisional operating profit or loss that the parties projected for A upon formation of the CSA for that period, then A will make a compensating adjustment to the third installment payment. The CSA does not specify the amount of (or a formula for) any such compensating adjustments.

(ii) On audit, the Commissioner determines that the contingent payment term lacks economic substance under §§ 1.482–1(d)(3)(iii)(B) and 1.482–7(h)(2)(iii)(B). It lacks economic substance because the allocation of the risks between A and B was indeterminate as of the CSA Start Date due to the failure to specify the amount of (or a formula for) the compensating adjustments that must be made if a contingency occurs. The basis on which the compensating adjustments were to be determined was neither clear nor unambiguous. Even though the contingency was clearly defined in the CSA and the requirement of a compensating adjustment in the event of a contingency was clearly specified in the CSA, the parties had no agreement regarding the amount of such compensating adjustments. As a result, the computation used to determine the PCT Payments was indeterminate. The parties could choose to make a small positive compensating adjustment if the actual results turned out to be much greater than the projections, and could choose to make a significant negative compensating adjustment if the actual results turned out to be less than the projections. Such terms do not reflect a substantive upfront allocation of risk. In addition, the vagueness of the agreement makes it impossible to determine whether such contingent payment term warrants an additional arm's length charge and, if so, how much.

(iii) Accordingly, the Commissioner may disregard the contingent price term under §§ 1.482–1(d)(3)(ii)(B)(*1*) and 1.482–7(k)(1)(iv) and may impute other contractual terms in its place consistent with economic substance of the CSA.

(iv) *Conversion from fixed to contingent form of payment.* With regard to a conversion of a fixed present value to a contingent form of payment, see paragraphs (g)(2)(v) (Discount rate) and (vi) (Financial projections) of this section.

(3) *Coordination of best method rule and form of payment.* A method described in paragraph (g)(1) of this section evaluates the arm's length amount charged in a PCT in terms of a form of payment (method payment form). For example, the method payment form for the acquisition price method described in paragraph (g)(5) of this section, and for the market capitalization method described in paragraph (g)(6) of this section, is fixed payment. Applications of the income method provide different method payment forms. See paragraphs (g)(4)(i)(E) and (iv) of this section. The method payment form may not necessarily correspond to the form of payment specified pursuant to paragraphs (h)(2)(iii) and (k)(2)(ii)(l) of this section (specified payment form). The determination under § 1.482–1(c) of the method that provides the most reliable measure of an arm's length result is to be made without regard to whether the respective method payment forms under the competing methods correspond to the specified payment form. If the method payment form of the method determined under § 1.482–1(c) to provide the most reliable measure of an arm's length result differs from the specified payment form, then the conversion from such method payment form to such specified payment form will be made to the satisfaction of the Commissioner.

(i) *Allocations by the Commissioner in connection with a CSA*—(1) *In general.* The Commissioner may make allocations to adjust the results of a controlled transaction in connection with a CSA so that the results are consistent with an arm's length result, in accordance with the provisions of this paragraph (i).

(2) *CST allocations*—(i) *In general.* The Commissioner may make allocations to adjust the results of a CST so that the results are consistent with an arm's length result, including any allocations to make each controlled participant's IDC share, as determined under paragraph (d)(4) of this section, equal to that participant's RAB share, as determined under paragraph (e)(1) of this section. Such allocations may result from, for purposes of CST determinations, adjustments to—

(A) Redetermine IDCs by adding any costs (or cost categories) that are directly identified with, or are reasonably allocable to, the IDA, or by removing any costs (or cost categories) that are not IDCs;

(B) Reallocate costs between the IDA and other business activities;

(C) Improve the reliability of the selection or application of the basis used for measuring benefits for purposes of estimating a controlled participant's RAB share;

(D) Improve the reliability of the projections used to estimate RAB shares, including adjustments described in paragraph (i)(2)(ii) of this section; and

(E) Allocate among the controlled participants any unallocated interests in cost shared intangibles.

(ii) *Adjustments to improve the reliability of projections used to estimate RAB shares*—(A) *Unreliable projections.* A significant divergence between projected benefit shares and benefit shares adjusted to take into account any available actual benefits to date (adjusted benefit shares) may indicate that the projections were not reliable for purposes of estimating RAB shares. In such a case, the Commissioner may use adjusted benefit shares as the most reliable measure of RAB shares and adjust IDC shares accordingly. The projected benefit shares will not be considered unreliable, as applied in a given taxable year, based on a divergence from adjusted benefit shares for every controlled participant that is less than or equal to 20% of the participant's projected benefits share. Further, the Commissioner will not make an allocation based on such divergence if the difference is due to an extraordinary event, beyond the control of the controlled participants, which could not reasonably have been anticipated at the time that costs were shared. The Commissioner generally may adjust projections of benefits used to calculate benefit shares in accordance with the provisions of § 1.482–1. In particular, if benefits are projected over a period of years, and the projections for initial years of the period prove to be unreliable, this may indicate that the projections for the remaining years of the period are also unreliable and thus should be adjusted. For purposes of this paragraph (i)(2)(ii)(A), all controlled participants that are not U.S. persons are treated as a single controlled participant. Therefore, an adjustment based on an unreliable projection of RAB shares will be made to the IDC shares of foreign controlled participants only if there is a matching adjustment to the IDC shares of controlled participants that are U.S. persons. Nothing in this paragraph (i)(2)(ii)(A) prevents the Commissioner from making an allocation if a taxpayer did not use the most reliable basis for measuring anticipated benefits. For example, if the taxpayer measures its anticipated benefits based on units sold, and the Commissioner determines that another basis is more reliable for measuring anticipated benefits, then the fact that actual units sold were within 20% of the projected unit sales will not preclude an allocation under this section.

(B) *Foreign-to-foreign adjustments.* Adjustments to IDC shares based on an unreliable projection also may be made among foreign controlled participants if the variation between actual and projected benefits has the effect of substantially reducing U.S. tax.

(C) *Correlative adjustments to PCTs.* Correlative adjustments will be made to any PCT Payments of a fixed amount that were determined based on RAB

shares that are subsequently adjusted on a finding that they were based on unreliable projections. No correlative adjustments will be made to contingent PCT Payments regardless of whether RAB shares were used as a parameter in the valuation of those payments.

(D) *Examples.* The following examples illustrate the principles of this paragraph (i)(2)(ii):

Example 1. U.S. Parent (USP) and Foreign Subsidiary (FS) enter into a CSA to develop new food products, dividing costs on the basis of projected sales two years in the future. In Year 1, USP and FS project that their sales in Year 3 will be equal, and they divide costs accordingly. In Year 3, the Commissioner examines the controlled participants' method for dividing costs. USP and FS actually accounted for 42% and 58% of total sales, respectively. The Commissioner agrees that sales two years in the future provide a reliable basis for estimating benefit shares. Because the differences between USP's and FS's adjusted and projected benefit shares are less than 20% of their projected benefit shares, the projection of future benefits for Year 3 is reliable.

Example 2. The facts are the same as in *Example 1,* except that in Year 3 USP and FS actually accounted for 35% and 65% of total sales, respectively. The divergence between USP's projected and adjusted benefit shares is greater than 20% of USP's projected benefit share and is not due to an extraordinary event beyond the control of the controlled participants. The Commissioner concludes that the projected benefit shares were unreliable, and uses adjusted benefit shares as the basis for an adjustment to the cost shares borne by USP and FS.

Example 3. U.S. Parent (USP), a U.S. corporation, and its foreign subsidiary (FS) enter into a CSA in Year 1. They project that they will begin to receive benefits from cost shared intangibles in Years 4 through 6, and that USP will receive 60% of total benefits and FS 40% of total benefits. In Years 4 through 6, USP and FS actually receive 50% each of the total benefits. In evaluating the reliability of the controlled participants' projections, the Commissioner compares the adjusted benefit shares to the projected benefit shares. Although USP's adjusted benefit share (50%) is within 20% of its projected benefit share (60%), FS's adjusted benefit share (50%) is not within 20% of its projected benefit share (40%). Based on this discrepancy, the Commissioner may conclude that the controlled participants' projections were unreliable and may use adjusted benefit shares as the basis for an adjustment to the cost shares borne by USP and FS.

Example 4. Three controlled taxpayers, USP, FS1, and FS2 enter into a CSA. FS1 and FS2 are foreign. USP is a domestic corporation that controls all the stock of FS1 and FS2. The controlled participants project that they will share the total benefits of the cost shared intangibles in the following percentages: USP 50%; FS1 30%; and FS2 20%. Adjusted benefit shares are as follows: USP 45%; FS1 25%; and FS2 30%. In evaluating the reliability of the controlled participants' projections, the Commissioner compares these adjusted benefit shares to the projected benefit shares. For this purpose, FS1 and FS2 are treated as a single controlled participant. The adjusted benefit share received by USP (45%) is within 20% of its projected benefit share (50%). In addition, the non-US controlled participant's adjusted benefit share (55%) is also within 20% of their projected benefit share (50%). Therefore, the Commissioner concludes that the controlled participant's projections of future benefits were reliable, despite the fact that FS2's adjusted benefit share (30%) is not within 20% of its projected benefit share (20%).

Example 5. The facts are the same as in *Example 4.* In addition, the Commissioner determines that FS2 has significant operating losses and has no earnings and profits, and that FS1 is profitable and has earnings and profits. Based on all the evidence, the Commissioner concludes that the controlled participants arranged that FS1 would bear a larger cost share than appropriate in order to reduce FS1's earnings and profits and thereby reduce inclusions USP otherwise would be deemed to have on account of FS1 under subpart F. Pursuant to paragraph (i)(2)(ii)(B) of this section, the Commissioner may make an adjustment solely to the cost shares borne by FS1 and FS2 because FS2's projection of future benefits was unreliable and the variation between adjusted and projected benefits had the effect of substantially reducing USP's U.S. income tax liability (on account of FS1 subpart F income).

Example 6. (i)(A) Foreign Parent (FP) and U.S. Subsidiary (USS) enter into a CSA in 1996 to develop a new treatment for baldness. USS's interest in any treatment developed is the right to produce and sell the treatment in the U.S. market while FP retains rights to produce and sell the treatment in the rest of the world. USS and FP measure their anticipated benefits from the CSA based on their respective projected future sales of the baldness treatment. The following sales projections are used:

SALES

[In millions of dollars]

Year	USS	FP
1	5	10
2	20	20
3	30	30
4	40	40
5	40	40
6	40	40
7	40	40
8	20	20
9	10	10
10	5	5

(B) In Year 1, the first year of sales, USS is projected to have lower sales than FP due to lags in U.S. regulatory approval for the baldness treatment. In each subsequent year, USS and FP are projected to have equal sales. Sales are projected to build over the first three years of the period, level off for several years, and then decline over the final years of the period as new and improved baldness treatments reach the market.

(ii) To account for USS's lag in sales in the Year 1, the present discounted value of sales over the period is used as the basis for measuring benefits. Based on the risk associated with this venture, a discount rate of 10 percent is selected. The present discounted value of projected sales is determined to be approximately $154.4 million for USS and $158.9 million for FP. On this basis USS and FP are projected to obtain approximately 49.3% and 50.7% of the benefit, respectively, and the costs of developing the baldness treatment are shared accordingly.

(iii)(A) In Year 6, the Commissioner examines the CSA. USS and FP have obtained the following sales results through Year 5:

SALES

[In millions of dollars]

Year	USS	FP
1	0	17
2	17	35
3	25	35
4	38	41
5	39	41

(B) USS's sales initially grew more slowly than projected while FP's sales grew more quickly. In each of the first three years of the period, the share of total sales of at least one of the parties diverged by over 20% from its projected share of sales. However, by Year 5 both parties' sales had leveled off at approximately their projected values. Taking into account this leveling off of sales and all the facts and circumstances, the Commissioner determines that it is appropriate to use the original projections for the remaining years of sales. Combining the actual results through Year 5 with the projections for subsequent years, and using a discount rate of 10%, the present discounted value of sales is approximately $141.6 million for USS and $187.3 million for FP. This result implies that USS and FP obtain approximately 43.1% and 56.9%, respectively, of the anticipated benefits from the baldness treatment. Because these adjusted benefit shares are within 20% of the benefit shares calculated based on the original sales projections, the Commissioner determines that, based on the difference between adjusted and projected benefit shares, the original projections were not unreliable. No adjustment is made based on the difference between adjusted and projected benefit shares.

Example 7. (i) The facts are the same as in *Example 6,* except that the actual sales results through Year 5 are as follows:

SALES

[In millions of dollars]

Year	USS	FP
1	0	17
2	17	35
3	25	44

SALES—Continued

[In millions of dollars]

Year	USS	FP
4	34	54
5	36	55

(ii) Based on the discrepancy between the projections and the actual results and on consideration of all the facts, the Commissioner determines that for the remaining years the following sales projections are more reliable than the original projections:

SALES

[In millions of dollars]

Year	USS	FP
6	36	55
7	36	55
8	18	28
9	9	14
10	4.5	7

(iii) Combining the actual results through Year 5 with the projections for subsequent years, and using a discount rate of 10%, the present discounted value of sales is approximately $131.2 million for USS and $229.4 million for FP. This result implies that USS and FP obtain approximately 35.4% and 63.6%, respectively, of the anticipated benefits from the baldness treatment. These adjusted benefit shares diverge by greater than 20% from the benefit shares calculated based on the original sales projections, and the Commissioner determines that, based on the difference between adjusted and projected benefit shares, the original projections were unreliable. The Commissioner adjusts cost shares for each of the taxable years under examination to conform them to the recalculated shares of anticipated benefits.

(iii) *Timing of CST allocations.* If the Commissioner makes an allocation to adjust the results of a CST, the allocation must be reflected for tax purposes in the year in which the IDCs were incurred. When a CST payment is owed by one controlled participant to another controlled participant, the Commissioner may make appropriate allocations to reflect an arm's length rate of interest for the time value of money, consistent with the provisions of § 1.482–2(a) (Loans or advances).

(3) *PCT allocations.* The Commissioner may make allocations to adjust the results of a PCT so that the results are consistent with an arm's length result in accordance with the provisions of the applicable sections of the regulations under section 482, as determined pursuant to paragraph (a)(2) of this section.

(4) *Allocations regarding changes in participation under a CSA.* The Commissioner may make allocations to adjust the results of any controlled transaction described in paragraph (f) of this section if the controlled participants do not reflect arm's length results in relation to any such transaction.

(5) *Allocations when CSTs are consistently and materially disproportionate to RAB shares.* If a controlled participant bears IDC shares that are consistently and materially greater or lesser than its RAB share, then the Commissioner may conclude that the economic substance of the arrangement between the controlled participants is inconsistent with the terms of the CSA. In such a case, the Commissioner may disregard such terms and impute an agreement that is consistent with the controlled participants' course of conduct, under which a controlled participant that bore a disproportionately greater IDC share received additional interests in the cost shared intangibles. See §§ 1.482–1(d)(3)(ii)(B) (Identifying contractual terms) and 1.482–4(f)(3)(ii) (Identification of owner). Such additional interests will consist of partial undivided interests in the other controlled participant's interest in the cost shared intangible. Accordingly, that controlled participant must receive arm's length consideration from any controlled participant whose IDC share is less than its RAB share over time, under the provisions of §§ 1.482–1 and 1.482–4 through 1.482–6 to provide compensation for the latter controlled participants' use of such partial undivided interest.

(6) *Periodic adjustments*—(i) *In general.* Subject to the exceptions in paragraph (i)(6)(vi) of this section, the Commissioner may make periodic adjustments for an open taxable year (the Adjustment Year) and for all subsequent taxable years for the duration of the CSA Activity with respect to all PCT Payments, if the Commissioner determines that, for a particular PCT (the Trigger PCT), a particular controlled participant that owes or owed a PCT Payment relating to that PCT (such controlled participant being referred to as the PCT Payor for purposes of this paragraph (i)(6)) has realized an Actually Experienced Return Ratio (AERR) that is outside the Periodic Return Ratio Range (PRRR). The satisfaction of the condition stated in the preceding sentence is referred to as a Periodic Trigger. See paragraphs (i)(6)(ii) through (vi) of this section regarding the PRRR, the AERR, and periodic adjustments. In determining whether to make such adjustments, the Commissioner may consider whether the outcome as adjusted more reliably reflects an arm's length result under all the relevant facts and circumstances, including any information known as of the Determination Date. The Determination Date is the date of the relevant determination by the Commissioner. The failure of the Commissioner to determine for an earlier taxable year that a PCT Payment was not arm's length will not preclude the Commissioner from making a periodic adjustment for a subsequent year. A periodic adjustment under this paragraph (i)(6) may be made without regard to whether the taxable year of the Trigger PCT or any other PCT remains open for statute of limitations purposes or whether a periodic adjustment has previously been made with respect to any PCT Payment.

(ii) *PRRR.* Except as provided in the next sentence, the *PRRR* will consist of return ratios that are not less than .667 nor more than 1.5. Alternatively, if the controlled participants have not substantially complied with the documentation requirements referenced in paragraph (k) of this section, as modified, if applicable, by paragraphs (m)(2) and (3) of this section, the PRRR will consist of return ratios that are not less than .8 nor more than 1.25.

(iii) *AERR*—(A) *In general.* The *AERR* is the present value of total profits (PVTP) divided by the present value of investment (PVI). In computing PVTP and PVI, present values are computed using the applicable discount rate (ADR), and all information available as of the Determination Date is taken into account.

(B) *PVTP.* The *PVTP* is the present value, as of the CSA Start Date, as defined in section (j)(1)(i) of this section, of the PCT Payor's actually experienced divisional profits or losses from the CSA Start Date through the end of the Adjustment Year.

(C) *PVI.* The *PVI* is the present value, as of the CSA Start Date, of the PCT Payor's investment associated with the CSA Activity, defined as the sum of its cost contributions and its PCT Payments, from the CSA Start Date through the end of the Adjustment Year. For purposes of computing the PVI, PCT Payments means all PCT Payments due from a PCT Payor before netting against PCT Payments due from other controlled participants pursuant to paragraph (j)(3)(ii) of this section.

(iv) *ADR*—(A) *In general.* Except as provided in paragraph (i)(6)(iv)(B) of this section, the ADR is the discount rate pursuant to paragraph (g)(2)(v) of this section, subject to such adjustments as the Commissioner determines appropriate.

(B) *Publicly traded companies.* If the PCT Payor meets the conditions of paragraph (i)(6)(iv)(C) of this section, the ADR is the PCT Payor WACC as of the date of the Trigger PCT. However, if the Commissioner determines, or the controlled participants establish to the satisfaction of the Commissioner, that a discount rate other than the PCT Payor WACC better reflects the degree of risk of the CSA Activity as of such date, the ADR is such other discount rate.

(C) *Publicly traded.* A PCT Payor meets the conditions of this paragraph (i)(6)(iv)(C) if—

(*1*) Stock of the PCT Payor is publicly traded; or

(*2*) Stock of the PCT Payor is not publicly traded, provided the PCT Payor is included in a group of companies for which consolidated financial statements are prepared; and a publicly traded company in such group owns, directly or indirectly, stock in PCT Payor. Stock of a company is publicly traded within the meaning of this paragraph (i)(6)(iv)(C) if such stock is regularly traded on an established United States securities market and the company issues financial statements prepared in accordance with United States generally accepted accounting principles for the taxable year.

(D) *PCT Payor WACC.* The *PCT Payor WACC* is the WACC, as defined in paragraph (j)(1)(i) of this section, of the PCT Payor or the publicly traded company described in paragraph (i)(6)(iv)(C)(*2*)(*ii*) of this section, as the case may be.

(E) *Generally accepted accounting principles.* For purposes of paragraph (i)(6)(iv)(C) of this section, a financial statement prepared in accordance with a comprehensive body of generally accepted accounting principles other than United States generally accepted accounting principles is considered to be prepared in accordance with United States generally accepted accounting principles provided that the amounts of debt, equity, and interest expense are reflected in any reconciliation between such other accounting principles and United States generally accepted accounting principles required to be incorporated into the financial statement by the securities laws governing companies whose stock is regularly traded on United States securities markets.

(v) *Determination of periodic adjustments.* In the event of a Periodic Trigger, subject to paragraph (i)(6)(vi) of this section, the Commissioner may make periodic adjustments with respect to all PCT Payments between all PCT Payors and PCT Payees for the Adjustment Year and all subsequent years for the duration of the CSA Activity pursuant to the residual profit split method as provided in paragraph (g)(7) of this section, subject to the further modifications in this paragraph (i)(6)(v). A periodic adjustment may be made for a particular taxable year without regard to whether the taxable years of the Trigger PCT or other PCTs remain open for statute of limitation purposes.

(A) *In general.* Periodic adjustments are determined by the following steps:

(*1*) First, determine the present value, as of the date of the Trigger PCT, of the PCT Payments under paragraph (g)(7)(iii)(C)(*3*) of this section pursuant to the Adjusted RPSM as defined in paragraph (i)(6)(v)(B) of this section (first step result).

(*2*) Second, convert the first step result into a stream of contingent payments on a base of reasonably anticipated divisional profits or losses over the entire duration of the CSA Activity, using a level royalty rate (second step rate). See paragraph (h)(2)(iv) of this section (Conversion from fixed to contingent form of payment). This conversion is made based on all information known as of the Determination Date.

(*3*) Third, apply the second step rate to the actual divisional profit or loss for taxable years preceding and including the Adjustment Year to yield a stream of contingent payments for such years, and convert such stream to a present value as of the CSA Start Date under the principles of paragraph (g)(2)(v) of this section (third step result). For this purpose, the second step rate applied to a loss for a particular year will yield a negative contingent payment for that year.

(*4*) Fourth, convert any actual PCT Payments up through the Adjustment Year to a present value as of the CSA Start Date under the principles of paragraph (g)(2)(v) of this section. Then subtract such amount from the third step result. Determine the nominal amount in the Adjustment Year that would have a present value as of the CSA Start Date equal to the present value determined in the previous sentence to determine the periodic adjustment in the Adjustment Year.

(*5*) Fifth, apply the second step rate to the actual divisional profit or loss for each taxable year after the Adjustment Year up to and including the taxable year that includes the Determination Date to yield a stream of contingent payments for such years. For this purpose, the second step rate applied to a loss will yield a negative contingent payment for that year. Then subtract from each such payment any actual PCT Payment made for the same year to determine the periodic adjustment for such taxable year.

(*6*) For each taxable year subsequent to the year that includes the Determination Date, the periodic adjustment for such taxable year (which is in lieu of any PCT Payment that would otherwise be payable for that year under the taxpayer's position) equals the second step rate applied to the actual divisional profit or loss for that year. For this purpose, the second step rate applied to a loss for a particular year will yield a negative contingent payment for that year.

(*7*) If the periodic adjustment for any taxable year is a positive amount, then it is an additional PCT Payment owed from the PCT Payor to the PCT Payee for such year. If the periodic adjustment for any taxable year is a negative amount, then it is an additional PCT Payment owed by the PCT Payee to the PCT Payor for such year.

(B) *Adjusted RPSM as of Determination Date.* The Adjusted RPSM is the residual profit split method pursuant to paragraph (g)(7) of this section applied to determine the present value, as of the date of the Trigger PCT, of the PCT Payments under paragraph (g)(7)(iii)(C)(*3*) of this section, with the following modifications.

(*1*) Actual results up through the Determination Date shall be substituted for what otherwise were the projected results over such period, as reasonably anticipated as of the date of the Trigger PCT.

(*2*) Projected results for the balance of the CSA Activity after the Determination Date, as reasonably anticipated as of the Determination Date, shall be substituted for what otherwise were the projected results over such period, as reasonably anticipated as of the date of the Trigger PCT.

(*3*) The requirement in paragraph (g)(7)(i) of this section, that at least two controlled participants make significant nonroutine contributions, does not apply.

(vi) *Exceptions to periodic adjustments*—(A) *Controlled participants establish periodic adjustment not warranted.* No periodic adjustment will be made under paragraphs (i)(6)(i) and (v) of this section if the controlled participants establish to the satisfaction of the Commissioner that all the conditions described in one of paragraphs (i)(6)(vi)(A)(*1*) through (*4*) of this section apply with respect to the Trigger PCT.

(*1*) *Transactions involving the same platform contribution as in the Trigger PCT.*

(*i*) The same platform contribution is furnished to an uncontrolled taxpayer under substantially the same circumstances as those of the relevant Trigger PCT and with a similar form of payment as the Trigger PCT;

(*ii*) This transaction serves as the basis for the application of the comparable uncontrolled transaction method described in paragraph (g)(3) of this section, in the first year and all subsequent years in which substantial PCT Payments relating to the Trigger PCT were required to be paid; and

(*iii*) The amount of those PCT Payments in that first year was arm's length.

(*2*) *Results not reasonably anticipated.* The differential between the AERR and the nearest bound of the PRRR is due to extraordinary events beyond the control of the controlled participants that could not reasonably have been anticipated as of the date of the Trigger PCT.

(*3*) *Reduced AERR does not cause Periodic Trigger.* The Periodic Trigger would not have occurred had the PCT Payor's divisional profits or losses used to calculate its PVTP both taken into account expenses on account of operating cost contributions and routine platform contributions, and excluded those profits or losses attributable to the PCT Payor's routine contributions to its exploitation of cost shared intangibles, nonroutine contributions to the CSA Activity, operating cost contributions, and routine platform contributions.

(*4*) *Increased AERR does not cause Periodic Trigger*—(*i*) The Periodic Trigger would not have occurred had the divisional profits or losses of the PCT Payor used to calculate its PVTP included its reasonably anticipated divisional profits or losses after the Adjustment Year from the CSA Activity, including from its routine contributions, its operating cost contributions, and its nonroutine contributions to that activity, and had the cost contributions and PCT Payments of the PCT Payor used to calculate its PVI included its reasonably anticipated cost contributions and PCT Payments after the Adjustment Year. The reasonably anticipated amounts in the previous sentence are determined based on all information available as of the Determination Date.

(*ii*) For purposes of this paragraph (i)(6)(vi)(A)(*4*), the controlled participants may, if they wish, assume that the average yearly divisional profits or losses for all taxable years prior to and including the Adjustment Year, in which there has been substantial exploitation of cost shared intangibles resulting from the CSA (exploitation years), will continue to be earned in each year over a period of years equal to 15 minus the number of exploitation years prior to and including the Determination Date.

(B) *Circumstances in which Periodic Trigger deemed not to occur.* No Periodic Trigger will be deemed to have occurred at the times and in the circumstances described in paragraph (i)(6)(vi)(B)(*1*) or (*2*) of this section.

(*1*) *10-year period.* In any year subsequent to the 10-year period beginning with the first taxable year in which there is substantial exploitation of cost shared intangibles resulting from the CSA, if the AERR determined is within the PRRR for each year of such 10-year period.

(*2*) *5-year period.* In any year of the 5-year period beginning with the first taxable year in which there is substantial exploitation of cost shared intangibles resulting from the CSA, if the AERR falls below the lower bound of the PRRR.

(vii) *Examples.* The following examples illustrate the rules of this paragraph (i)(6):

Example 1. (i) For simplicity of calculation in this *Example 1,* all financial flows are assumed to occur at the beginning of the year. At the beginning of Year 1, USP, a publicly traded U.S. company, and FS, its wholly-owned foreign subsidiary, enter into a CSA to develop new technology for cell phones. USP has a platform contribution, the rights for an in-process technology that when developed will improve the clarity of calls, for which compensation is due from FS. FS has no platform contributions to the CSA, no operating contributions, and no operating cost contributions. USP and FS agree to fixed PCT payments of $40 million in Year 1 and $10 million per year for Years 2 through 10. At the beginning of Year 1, the weighted average cost of capital of the controlled group that includes USP and FS is 15%. In Year 9, the Commissioner audits Years 5 through 7 of the CSA and considers whether any periodic adjustments should be made. USP and FS have substantially complied with the documentation requirements of paragraph (k) of this section.

(ii) FS experiences the results reported in the following table from its participation in the CSA through Year 7. In the table, all present values (PV) are reported as of the CSA Start Date, which is the same as the date of the PCT (and reflect a 15% discount rate as discussed in paragraph (iii) of this *Example 1*). Thus, in any year the present value of the cumulative investment is PVI and of the cumulative divisional profit or loss is PVTP. All amounts in this table and the tables that follow are reported in millions of dollars and cost contributions are referred to as ''CCs'' (for simplicity of calculation in this *Example 1,* all financial flows are assumed to occur at the beginning of the year).

a	b	c	d	e	f	g	h
Year	Sales	Non CC costs	CCs	PCT payments	Investment (d+e)	Divisional profit or loss (b-c)	AERR (PVTP/PVI) (g/f)
1	0	0	15	40	55	0	
2	0	0	17	10	27	0	
3	0	0	18	10	28	0	
4	705	662	20	10	30	46	
5	886	718	22	10	32	168	
6	1,113	680	24	10	34	433	
7	1,179	747	27	10	37	432	
PV through Year 5	970	846	69	69	138	124	0.90
PV through Year 6	1,523	1,184	81	74	155	340	2.20
PV through Year 7	2,033	1,507	93	78	171	526	3.09

(iii) Because USP is publicly traded in the United States and is a member of the controlled group to which FS (the PCT Payor) belongs, for purposes of calculating the AERR for FS, the present values of its PVTP and PVI are determined using an ADR of 15%, the weighted average cost of capital of the controlled group. (It is assumed that no other rate was determined or established, under paragraph (i)(6)(iv)(B) of this section, to better reflect the relevant degree of risk.) At a 15% discount rate, the PVTP, calculated as of Year 1, and based on actual profits realized by FS through Year 7 from exploiting the new cell phone technology developed by the CSA, is $526 million. The PVI, based on FS's cost contributions and its PCT Payments, is $171 million. The AERR for FS is equal to

its PVTP divided by its PVI, $526 million/$171 million, or 3.09. There is a Periodic Trigger because FS's AERR of 3.09 falls outside the PRRR of .67 to 1.5, the applicable PRRR for controlled participants complying with the documentation requirements of this section.

(iv) At the time of the Determination Date, it is determined that the first Adjustment Year in which a Periodic Trigger occurred was Year 6, when the AERR of FS was determined to be 2.20. It is also determined that for Year 6 none of the exceptions to periodic adjustments described in paragraph (i)(6)(vi) of this section applies. The Commissioner exercises its discretion under paragraph (i)(6)(i) of this section to make periodic adjustments using Year 6 as the Adjustment Year. Therefore, the arm's length PCT Payments from FS to USP shall be determined for each taxable year using the adjusted residual profit split method described in paragraphs (g)(7) and (i)(6)(v)(B) of this section. Periodic adjustments will be made for each year to the extent the PCT Payments actually made by FS differ from the PCT Payment calculation under the adjusted residual profit split method.

(v) It is determined, as of the Determination Date, that the cost shared intangibles will be exploited through Year 10. FS's return for routine contributions (determined by the Commissioner, based on the return for comparable functions undertaken by comparable uncontrolled companies, to be 8% of non-CC costs), and its actual and projected results, are described in the following table.

a	b	c	d	e	f	g
Year	Sales	Non-CC costs	Divisional profit or loss (b-c)	CCs	Routing return	Residual proift (d-e-f)
1	0	0	0	15	0	−15
2	0	0	0	17	0	−17
3	0	0	0	18	0	−18
4	705	662	43	20	53	−30
5	886	718	168	22	57	89
6	1,113	680	433	24	54	355
7	1,179	747	432	27	60	345
8	1,238	822	416	29	66	321
9	1,300	894	406	32	72	302
10	1,365	974	391	35	78	278
Cumulative PV through Year 10 as of CSA Start Date	3,312	2,385	927	124	191	612

(vi) The periodic adjustments are calculated in a series of steps set out in paragraph (i)(6)(v)(A) of this section. First, a lump sum for the PCT Payment is determined using the adjusted residual profit split method. Under the method, based on the considerations discussed in paragraph (g)(2)(v) of this section, the appropriate discount rate is 15% per year. The nonroutine residual divisional profit or loss described in paragraph (g)(7)(iii)(B) of this section is $612 million. Further, under paragraph (g)(7)(iii)(C) of this section, the entire nonroutine residual divisional profit constitutes the PCT Payment because only USP has nonroutine contributions.

(vii) In step two, the first step result ($612 million) is converted into a level royalty rate based on the reasonably anticipated divisional profit or losses of the CSA Activity, the PV of which is reported in the table above (net PV of divisional profit or loss for Years 1 through 10 is $927 million). Consequently, the step two result is a level royalty rate of 66.0% ($612/$927) of the divisional profit in Years 1 through 10.

(viii) In step three, the Commissioner calculates the PCT Payments due through Year 6 by applying the step two royalty rate to the actual divisional profits for each year and then determines the aggregate PV of these PCT Payments as of the CSA Start Date ($224 million as reported in the following table). In step four, the PCT Payments actually made through Year 6 are similarly converted to PV as of the CSA Start Date ($74 million) and subtracted from the amount determined in step three ($224 million—$74 million = $150 million). That difference of $150 million, representing a net PV as of the CSA Start Date, is then converted to a nominal amount, as of the Adjustment Year, of equivalent present value (again using a discount rate of 15%). That nominal amount is $302 million (not shown in the table), and is the periodic adjustment in Year 6.

a	b	c	d	e
Year	Divisional profit	Royalty rate	Nominal royalty due under adjusted RPSM (b*c)	Nominal payments made
Year 1	0	66.0	$0	$40
Year 2	0	66.0	0	10
Year 3	0	66.0	0	10
Year 4	43	66.0	28	10
Year 5	168	66.0	111	10
Year 6	433	66.0	286	10
Cumulative PV as of Year 1			224	74

(ix) Under step five, the royalties due from FS to USP for Year 7 (the year after the Adjustment Year) through Year 9 (the year including the Determination Date) are determined. (These determinations are made for Years 8 and 9 after the divisional profit for those years becomes available.) For each year, the periodic adjustment is a PCT Payment due in addition to the $10 million PCT Payment that must otherwise be paid under the CSA as described in paragraph (i) of this *Example 1.* That periodic adjustment is calculated as the product of the step two royalty rate and the divisional profit, minus the $10 million that was otherwise paid for that year. The calculations are shown in the following table:

a	b	c	d	e	f
Year	Divisional profit	Royalty rate	Royalty due (b*c)	PCT Payments otherwise paid	Periodic adjustment d-e)
7	432	66.0%	$285	$10	$275
8	416	66.0	275	10	265
9	406	66.0	268	10	258

(x) Under step six, the periodic adjustment for Year 10 (the only exploitation year after the year containing the Determination Date) will be determined by applying the step two royalty rate to the divisional profit. This periodic adjustment is a PCT Payment payable from FS to USP, and is in lieu of the $10 payment otherwise due. The calculations are shown in the following table, based on a divisional profit of $391 million. USP and FS experienced the following results in Year 10.

Year	Divisional profit	Royalty rate	Royalty due	PCT payment called for under original agreement but not made	Periodic adjustment
10	391	66.0%	$258	$10 (not paid)	$258

Example 2. The facts are the same as in paragraphs (i) through (iii) of *Example 1.* At the time of the Determination Date, it is determined that the first Adjustment Year in which a Periodic Trigger occurred was Year 6, when the AERR of FS was determined to be 2.73. Upon further investigation as to what may have caused the high return in FS's market, the Commissioner learns that, in Years 4 through 6, USP's leading competitors experienced severe, unforeseen disruptions in their supply chains resulting in a significant increase in USP's and FS's market share for cell phones. Further analysis determines that without this unforeseen occurrence the Periodic Trigger would not have occurred. Based on paragraph (i)(6)(vi)(A)(*2*) of this section, the Commissioner determines to his satisfaction that no adjustments are warranted.

Example 3. (i) USP, a U.S. corporation, and its wholly-owned foreign subsidiaries FS1, FS2, and FS3 enter into a CSA at the start of Year 1 to develop version 2.0 of a computer program. USP makes a platform contribution, version 1.0 of the program (upon which version 2.0 will be based), for which compensation is due from FS1, FS2, and FS3. None of the foreign subsidiaries makes any platform contributions.

(ii) In Year 6, the Commissioner audits Years 3 through 5 of the CSA and considers whether any periodic adjustments should be made. At the time of the Determination Date, the Commissioner determines that the first Adjustment Year in which a Periodic Trigger occurred was Year 3, and further determines that none of the exceptions to periodic adjustments described in paragraph (i)(6)(vi) of this section applies. The Commissioner exercises his discretion under paragraph (i)(6)(i) of this section to make periodic adjustments using Year 3 as the Adjustment Year. Therefore, the arm's length PCT Payments from FS1, FS2, and FS3 to USP shall be determined using the adjusted residual profit split method described in paragraphs (g)(7)(v)(B) and (i)(6)(v)(B) of this section. Periodic adjustments will be made for each year to the extent the PCT Payments actually made by FS1, FS2, and FS3 differ from the PCT Payment calculation under the adjusted residual profit split method.

(iii) The periodic adjustments are calculated in a series of steps set out in paragraph (i)(6)(v)(A) of this section. First, a lump sum for the PCT Payments is determined using the adjusted residual profit split method. The following results are calculated (based on actual results for years for which actual results are available and projected results for all years thereafter) in order to apply the adjusted residual profit split method (it is determined that the cost shared intangibles will be exploited through Year 7, so the results reported in the following table are cumulative values through Year 7):

Participant	Divisional profits (cumulative PV through year 7 as of the CSA start date)	Residual profits (cumulative PV through year 7 as of the CSA start date)
FS1	$667	$314
FS2	271	159
FS3	592	295

Because only USP had nonroutine contributions, under paragraph (g)(7)(iii)(C) of this section, the entire nonroutine residual divisional profit constitutes the PCT Payment owed to USP. Therefore, the present values (as of the CSA Start Date) of the PCT Payments owed are as follows:

PCT Payment owed from FS1 to USP: $314 million

PCT Payment owed from FS2 to USP: $159 million

PCT Payment owed from FS3 to USP: $295 million

Pursuant to paragraph (i)(6)(v)(A) of this section, the steps in paragraphs (i)(6)(v)(A)(*2*) through (*7*) of this section are performed separately for the PCT Payments that are owed to USP by each of FS1, FS2, and FS3.

(iv) First, the steps are performed with respect to FS1. In step two, the first step result ($314 million) is converted into a level royalty rate based on FS1's reasonably anticipated divisional profits or losses through Year 7 (the PV of which is $667 million). Consequently, the step two result is a level royalty rate of 47.1% ($314/$667) of the divisional profits in Years 1 through 7. In step three, the Commissioner calculates the PCT Payments due through Year 3 (the Adjustment Year) by applying the step two royalty rate (47.1%) to FS1's actual divisional profits for each year up to and including Year 3 and then determining the aggregate PV of these PCT Payments as of Year 3. In step four, the PCT Payments actually made by FS1 to USP through Year 3 are similarly converted to a PV as of Year 3 and subtracted from the amount determined in step three. That difference is the periodic adjustment in Year 3 with respect to the PCT Payments made for Years 1 through 3 from FS1 to USP. Under step five, the royalties due from FS1 to USP for Year 4 (the year after the Adjustment Year) through Year 6 (the year including the Determination Date) are determined. The periodic adjustment for each of these years is calculated as the product of the step two royalty rate and the

divisional profit for that year, minus any actual PCT Payment made by FS1 to USP in that year. The periodic adjustment for each such year is a PCT Payment due in addition to the PCT Payment from FS1 to USP that was already made under the CSA. Under step six, the periodic adjustment for Year 7 (the only exploitation year after the year containing the Determination Date) will be determined by applying the step two royalty rate to FS1's divisional profit for that year. This periodic adjustment for Year 7 is a PCT Payment payable from FS1 to USP and is in lieu of any PCT Payment from FS1 to USP otherwise due.

(v) Next, the steps in paragraphs (i)(6)(v)(A)(*2*) through (*7*) of this section are performed with respect to FS2. In step two, the first step result ($159 million) is converted into a level royalty rate based on FS2's reasonably anticipated divisional profits or losses through Year 7 (the PV of which is $271 million). Consequently, the step two result is a level royalty rate of 58.7% ($159/$271) of the divisional profits in Years 1 through 7. In step three, the Commissioner calculates the PCT Payments due through Year 3 (the Adjustment Year) by applying the step two royalty rate (58.7%) to FS2's actual divisional profits for each year up to and including Year 3 and then determining the aggregate PV of these PCT Payments as of Year 3. In step four, the PCT Payments actually made by FS2 to USP through Year 3 are similarly converted to a PV as of Year 3 and subtracted from the amount determined in step three. That difference is the periodic adjustment in Year 3 with respect to the PCT Payments made for Years 1 through 3 from FS2 to USP. Under step five, the royalties due from FS2 to USP for Year 4 (the year after the Adjustment Year) through Year 6 (the year including the Determination Date) are determined. The periodic adjustment for each of these years is calculated as the product of the step two royalty rate and the divisional profit for that year, minus any actual PCT Payment made by FS2 to USP in that year. The periodic adjustment for each such year is a PCT Payment due in addition to the PCT Payment from FS2 to USP that was already made under the CSA. Under step six, the periodic adjustment for Year 7 (the only exploitation year after the year containing the Determination Date) will be determined by applying the step two royalty rate to FS2's divisional profit for that year. This periodic adjustment for Year 7 is a PCT Payment payable from FS2 to USP and is in lieu of any PCT Payment from FS2 to USP otherwise due.

(vi) Finally, the steps in paragraphs (i)(6)(v)(A)(*2*) through (*7*) of this section are performed with respect to FS3. In step two, the first step result ($295 million) is converted into a level royalty rate based on FS3's reasonably anticipated divisional profits or losses through Year 7 (the PV of which is $592 million). Consequently, the step two result is a level royalty rate of 49.8% ($295/$592) of the divisional profits in Years 1 through 7. In step three, the Commissioner calculates the PCT Payments due through Year 3 (the Adjustment Year) by applying the step two royalty rate (49.8%) to FS3's actual divisional profits for each year up to and including Year 3 and then determining the aggregate PV of these PCT Payments as of Year 3. In step four, the PCT Payments actually made by FS3 to USP through Year 3 are similarly converted to a PV as of Year 3 and subtracted from the amount determined in step three. That difference is the periodic adjustment in Year 3 with respect to the PCT Payments made for Years 1 through 3 from FS3 to USP. Under step five, the royalties due from FS3 to USP for Year 4 (the year after the Adjustment Year) through Year 6 (the year including the Determination Date) are determined. The periodic adjustment for each of these years is calculated as the product of the step two royalty rate and the divisional profit for that year, minus any actual PCT Payment made by FS3 to USP in that year. The periodic adjustment for each such year is a PCT Payment due in addition to the PCT Payment from FS3 to USP that was already made under the CSA. Under step six, the periodic adjustment for Year 7 (the only exploitation year after the year containing the Determination Date) will be determined by applying the step two royalty rate to FS3's divisional profit for that year. This periodic adjustment for Year 7 is a PCT Payment payable from FS3 to USP and is in lieu of any PCT Payment from FS3 to USP otherwise due.

(j) *Definitions and special rules*—(1) *Definitions*—(i) *In general.* For purposes of this section—

Term	Definition	Main cross references
Acquisition price		§ 1.482–7(g)(5)(i).
Adjusted acquisition price		§ 1.482–7(g)(5)(iii).
Adjusted average market capitalization		§ 1.482–7(g)(6)(iv).
Adjusted benefit shares		§ 1.482–7(i)(2)(ii)(A).
Adjusted RPSM		§ 1.482–7(i)(6)(v)(B).
Adjustment Year		§ 1.482–7(i)(6)(i).
ADR		§ 1.482–7(i)(6)(iv).
AERR		§ 1.482–7(i)(6)(iii).
Applicable Method		§ 1.482–7(g)(2)(ix)(A).
Average market capitalization		§ 1.482–7(g)(6)(iii).
Benefits	*Benefits* mean the sum of additional revenue generated, plus cost savings, minus any cost increases from exploiting cost shared intangibles.	§ 1.482–7(e)(1)(i).
Capability variation		§ 1.482–7(f)(3).
Change in participation under a CSA		§ 1.482–7(f).
Consolidated group		§ 1.482–7(j)(2)(i).
Contingent payments		§ 1.482–7(h)(2)(i)(B).
Controlled participant	*Controlled participant* means a controlled taxpayer, as defined under § 1.482–1(i)(5), that is a party to the contractual agreement that underlies the CSA, and that reasonably anticipates that it will derive benefits, as defined in paragraph (e)(1)(i) of this section, from exploiting one or more cost shared intangibles.	§ 1.482–7(a)(1).
Controlled transfer of interests		§ 1.482–7(f)(2).
Cost contribution		§ 1.482–7(d)(4).

Term	Definition	Main cross references
Cost shared intangible	*Cost shared intangible* means any intangible, within the meaning of § 1.482–4(b), that is developed by the IDA, including any portion of such intangible that reflects a platform contribution. Therefore, an intangible developed by the IDA is a cost shared intangible even though the intangible was not always or was never a reasonably anticipated cost shared intangible.	§ 1.482–7(b).
Cost sharing alternative		§ 1.482–7(g)(4)(i)(B).
Cost sharing arrangement or CSA		§ 1.482–7(a), (b).
Cost sharing transactions or CSTs		§ 1.482–7(a)(1), (b)(1)(i).
Cross operating contributions	A cross operating contribution is any resource or capability or right, other than a platform contribution, that a controlled participant has developed, maintained, or acquired prior to the CSA Start Date, or subsequent to the CSA start date by means other than operating cost contributions or cost contributions, that is reasonably anticipated to contribute to the CSA Activity within another controlled participant's division.	§ 1.482–7(a)(3)(iii), (g)(2)(iv).
CSA Activity	*CSA Activity* is the activity of developing and exploiting cost shared intangibles.	§ 1.482–7(c)(2)(i).
CSA Start Date	The *CSA Start Date* is the earlier of the date of the CSA contract or the first occurrence of any IDC to which the CSA applies, in accordance with § 1.482–7(k)(1)(iii).	§ 1.482–7(i)(6)(iii)(B) and (k)(1)(ii) and (iii).
CST Payments		§ 1.482–7(b)(1).
Date of PCT		§ 1.482–7(b)(3).
Determination Date		§ 1.482–7(i)(6)(i).
Differential income stream		§ 1.482–7(g)(4)(vi)(F)(*2*).
Division	*Division* means the territory or other division that serves as the basis of the division of interests under the CSA in the cost shared intangibles pursuant to § 1.482–7(b)(4).	See definitions of divisional profit or loss, operating contribution, and operating cost contribution.
Divisional interest		§ 1.482–7(b)(1)(iii), (b)(4).
Divisional profit or loss	*Divisional profit or loss* means the operating profit or loss as separately earned by each controlled participant in its division from the CSA Activity, determined before any expense (including amortization) on account of cost contributions, operating cost contributions, routine platform and operating contributions, nonroutine contributions (including platform and operating contributions), and tax.	§ 1.482–7(g)(4)(iii).
Fixed payments		§ 1.482–7(h)(2)(i)(A).
Implied discount rate		§ 1.482–7(g)(2)(v)(B)(*2*).
IDC share		§ 1.482–7(d)(4).
Input parameters		§ 1.482–7(g)(2)(ix)(B).
Intangible development activity or IDA		§ 1.482–7(d)(1).
Intangible development costs or IDCs		§ 1.482–7(a)(1), (d)(1).
Licensing alternative		§ 1.482–7(g)(4)(i)(C).
Licensing payments	*Licensing payments* means payments pursuant to the licensing obligations under the licensing alternative.	§ 1.482–7(g)(4)(iii).
Make-or-sell rights		§ 1.482–7(c)(4), (g)(2)(iv).
Market-based input parameter		§ 1.482–7(g)(2)(ix)(B).
Market returns for routine contributions	*Market returns for routine contributions* means returns determined by reference to the returns achieved by uncontrolled taxpayers engaged in activities similar to the relevant business activity in the controlled participant's division, consistent with the methods described in §§ 1.482–3, 1.482–4, 1.482–5, or § 1.482–9(c).	§ 1.482–7(g)(4), (g)(7).
Method payment form		§ 1.482–7(h)(3).

Term	Definition	Main cross references
Nonroutine contributions	*Nonroutine contributions* means a controlled participant's contributions to the relevant business activities that are not routine contributions. Nonroutine contributions ordinarily include both nonroutine platform contributions and nonroutine operating contributions used by controlled participants in the commercial exploitation of their interests in the cost shared intangibles (for example, marketing intangibles used by a controlled participant in its division to sell products that are based on the cost shared intangible).	§ 1.482–7(g).
Nonroutine residual divisional profit or loss		§ 1.482–7(g)(7)(iii).
Operating contributions	An *operating contribution* is any resource or capability or right, other than a platform contribution, that a controlled participant has developed, maintained, or acquired prior to the CSA Start Date, or subsequent to the CSA Start Date by means other than operating cost contributions or cost contributions, that is reasonably anticipated to contribute to the CSA Activity within the controlled participant's division.	§ 1.482–7(g)(2)(ii), (g)(4)(vi)(E), (g)(7)(iii)(A) and (C).
Operating cost contributions	*Operating cost contributions* means all costs in the ordinary course of business on or after the CSA Start Date that, based on analysis of the facts and circumstances, are directly identified with, or are reasonably allocable to, developing resources, capabilities, or rights (other than reasonably anticipated cost shared intangibles) that are reasonably anticipated to contribute to the CSA Activity within the controlled participant's division.	§ 1.482–7(g)(2)(ii), (g)(4)(iii), (g)(7)(iii)(B).
PCT Payee		§ 1.482–7(b)(1)(ii).
PCT Payment		§ 1.482–7(b)(1)(ii).
PCT Payor		§ 1.482–7(b)(1)(ii), (i)(6)(i).
PCT Payor WACC		§ 1.482–7(i)(6)(iv)(D).
Periodic adjustments		§ 1.482–7(i)(6)(i).
Periodic Trigger		§ 1.482–7(i)(6)(i).
Platform contribution transaction or PCT		§ 1.482–7(a)(2), (b)(1)(ii).
Platform contributions		§ 1.482–7(c)(1).
Post-tax income		§ 1.482–7(g)(2)(v)(B)(*4*), (g)(4)(i)(G).
Pre-tax income		§ 1.482–7(g)(2)(v)(B)(*4*), (g)(4)(i)(G).
Projected benefit shares		§ 1.482–7(i)(2)(ii)(A).
PRRR		§ 1.482–7(i)(6)(ii).
PVI		§ 1.482–7(i)(6)(iii)(C).
PVTP		§ 1.482–7(i)(6)(iii)(B).
Reasonably anticipated benefits	A controlled participant's *reasonably anticipated benefits* mean the benefits that reasonably may be anticipated to be derived from exploiting cost shared intangibles. For purposes of this definition, benefits mean the sum of additional revenue generated, plus cost savings, minus any cost increases from exploiting cost shared intangibles.	§ 1.482–7(e)(1).
Reasonably anticipated benefits or RAB shares		§ 1.482–7(a)(1), (e)(1).
Reasonably anticipated cost shared intangible		§ 1.482–7(d)(1)(ii).
Relevant business activity		§ 1.482–7(g)(7)(i).

Term	Definition	Main cross references
Routine contributions	*Routine contributions* means a controlled participant's contributions to the relevant business activities that are of the same or similar kind to those made by uncontrolled taxpayers involved in similar business activities for which it is possible to identify market returns. Routine contributions ordinarily include contributions of tangible property, services and intangibles that are generally owned by uncontrolled taxpayers engaged in similar activities. A functional analysis is required to identify these contributions according to the functions performed, risks assumed, and resources employed by each of the controlled participants.	§ 1.482–7(g)(4), (g)(7).
Routine platform and operating contributions, and net routine platform and operating contributions.		§ 1.482–7(g)(4)(vii), 1.482–7(g)(7)(iii)(C)(*4*).
Specified payment form		§ 1.482–7(h)(3).
Stock-based compensation		§ 1.482–7(d)(3).
Stock options		§ 1.482–7(d)(3)(i).
Subsequent PCT		§ 1.482–7(g)(2)(viii).
Target		§ 1.482–7(g)(5)(i).
Tax rate	Reasonably anticipated effective tax rate with respect to the pre-tax income to which the tax rate is being applied. For example, under the income method, this rate would be the reasonably anticipated effective tax rate of the PCT Payor or PCT Payee under the cost sharing alternative or the licensing alternative, as appropriate.	§ 1.482–7(g)(2)(v)(B)(*4*)(*ii*), (g)(4)(i)(G).
Trigger PCT		§ 1.482–7(i)(6)(i).
Variable input parameter		§ 1.482–7(g)(2)(ix)(C).
WACC	*WACC* means weighted average cost of capital.	§ 1.482–7(i)(6)(iv)(D).

(ii) *Examples.* The following examples illustrate certain definitions in paragraph (j)(1)(i) of this section:

Example 1. Controlled participant. Foreign Parent (FP) is a foreign corporation engaged in the extraction of a natural resource. FP has a U.S. subsidiary (USS) to which FP sells supplies of this resource for sale in the United States. FP enters into a CSA with USS to develop a new machine to extract the natural resource. The machine uses a new extraction process that will be patented in the United States and in other countries. The CSA provides that USS will receive the rights to exploit the machine in the extraction of the natural resource in the United States, and FP will receive the rights in the rest of the world. This resource does not, however, exist in the United States. Despite the fact that USS has received the right to exploit this process in the United States, USS is not a controlled participant because it will not derive a benefit from exploiting the intangible developed under the CSA.

Example 2. Controlled participants. (i) U.S. Parent (USP), one foreign subsidiary (FS), and a second foreign subsidiary constituting the group's research arm (R+D) enter into a CSA to develop manufacturing intangibles for a new product line A. USP and FS are assigned the exclusive rights to exploit the intangibles respectively in the United States and the rest of the world, where each presently manufactures and sells various existing product lines. R+D is not assigned any rights to exploit the intangibles. R+D's activity consists solely in carrying out research for the group. It is reliably projected that the RAB shares of USP and FS will be 66⅔% and 33⅓%, respectively, and the parties' agreement provides that USP and FS will reimburse 66⅔% and 33⅓%, respectively, of the IDCs incurred by R+D with respect to the new intangible.

(ii) R+D does not qualify as a controlled participant within the meaning of paragraph (j)(1)(i) of this section, because it will not derive any benefits from exploiting cost shared intangibles. Therefore, R+D is treated as a service provider for purposes of this section and must receive arm's length consideration for the assistance it is deemed to provide to USP and FS, under the rules of paragraph (a)(3) of this section and §§ 1.482–4(f)(3)(iii) and (4), and 1.482–9, as appropriate. Such consideration must be treated as IDCs incurred by USP and FS in proportion to their RAB shares (that is, 66⅔% and 33⅓%, respectively). R+D will not be considered to bear any share of the IDCs under the arrangement.

Example 3. Cost shared intangible, reasonably anticipated cost shared intangible. U.S. Parent (USP) has developed and currently exploits an antihistamine, XY, which is manufactured in tablet form. USP enters into a CSA with its wholly-owned foreign subsidiary (FS) to develop XYZ, a new improved version of XY that will be manufactured as a nasal spray. Work under the CSA is fully devoted to developing XYZ, and XYZ is developed. During the development period, XYZ is a reasonably anticipated cost shared intangible under the CSA. Once developed, XYZ is a cost shared intangible under the CSA.

Example 4. Cost shared intangible. The facts are the same as in *Example 3,* except that in the course of developing XYZ, the controlled participants by accident discover ABC, a cure for disease D. ABC is a cost shared intangible under the CSA.

Example 5. Reasonably anticipated benefits. Controlled parties A and B enter into a cost sharing arrangement to develop product and process intangibles for an already existing Product P. Without such intangibles, A and B would each reasonably anticipate revenue, in present value terms, of $100M from sales of Product P until it became obsolete. With the intangibles, A and B each reasonably anticipate selling the same number of units each year, but reasonably anticipate that the price will be higher. Because the particular product intangible is more highly regarded in A's market, A reasonably anticipates an increase of $20M in present value revenue from the product intangible, while B reasonably anticipates only an increase of $10M. Further, A and B each reasonably anticipate spending an extra $5M present value in production costs to include the feature embodying the product intangible. Finally, A and B each reasonably anticipate saving $2M present value in

production costs by using the process intangible. A and B reasonably anticipate no other economic effects from exploiting the cost shared intangibles. A's reasonably anticipated benefits from exploiting the cost shared intangibles equal its reasonably anticipated increase in revenue ($20M) plus its reasonably anticipated cost savings ($2M) minus its reasonably anticipated increased costs ($5M), which equals $17M. Similarly, B's reasonably anticipated benefits from exploiting the cost shared intangibles equal its reasonably anticipated increase in revenue ($10M) plus its reasonably anticipated cost savings ($2M) minus its reasonably anticipated increased costs ($5M), which equals $7M. Thus A's reasonably anticipated benefits are $17M and B's reasonably anticipated benefits are $7M.

(2) *Special rules*—(i) *Consolidated group.* For purposes of this section, all members of the same consolidated group shall be treated as one taxpayer. For these purposes, the term *consolidated group* means all members of a group of controlled entities created or organized within a single country and subjected to an income tax by such country on the basis of their combined income.

(ii) *Trade or business.* A participant that is a foreign corporation or nonresident alien individual will not be treated as engaged in a trade or business within the United States solely by reason of its participation in a CSA. See generally § 1.864–2(a).

(iii) *Partnership.* A CSA, or an arrangement to which the Commissioner applies the rules of this section, will not be treated as a partnership to which the rules of subchapter K of the Internal Revenue Code apply. See § 301.7701–1(c) of this chapter.

(3) *Character*—(i) *CST Payments.* CST Payments generally will be considered the payor's costs of developing intangibles at the location where such development is conducted. For these purposes, IDCs borne directly by a controlled participant that are deductible are deemed to be reduced to the extent of any CST Payments owed to it by other controlled participants pursuant to the CSA. Each cost sharing payment received by a payee will be treated as coming pro rata from payments made by all payors and will be applied pro rata against the deductions for the taxable year that the payee is allowed in connection with the IDCs. Payments received in excess of such deductions will be treated as in consideration for use of the land and tangible property furnished for purposes of the CSA by the payee. For purposes of the research credit determined under section 41, CST Payments among controlled participants will be treated as provided for intra-group transactions in § 1.41–6(i). Any payment made or received by a taxpayer pursuant to an arrangement that the Commissioner determines not to be a CSA will be subject to the provisions of §§ 1.482–1 through 1.482–6 and 1.482–9. Any payment that in substance constitutes a cost sharing payment will be treated as such for purposes of this section, regardless of its characterization under foreign law.

(ii) *PCT Payments.* A PCT Payor's payment required under paragraph (b)(1)(ii) of this section is deemed to be reduced to the extent of any payments owed to it under such paragraph from other controlled participants. Each PCT Payment received by a PCT Payee will be treated as coming pro rata out of payments made by all PCT Payors. PCT Payments will be characterized consistently with the designation of the type of transaction pursuant to paragraphs (c)(3) and (k)(2)(ii)(H) of this section. Depending on such designation, such payments will be treated as either consideration for a transfer of an interest in intangible property or for services.

(iii) *Examples.* The following examples illustrate this paragraph (j)(3):

Example 1. U.S. Parent (USP) and its wholly owned Foreign Subsidiary (FS) form a CSA to develop a miniature widget, the Small R. Based on RAB shares, USP agrees to bear 40% and FS to bear 60% of the costs incurred during the term of the agreement. The principal IDCs are operating costs incurred by FS in Country Z of 100X annually, and costs incurred by USP in the United States also of 100X annually. Of the total costs of 200X, USP's share is 80X and FS's share is 120X so that FS must make a payment to USP of 20X. The payment will be treated as a reimbursement of 20X of USP's costs in the United States. Accordingly, USP's Form 1120 will reflect an 80X deduction on account of activities performed in the United States for purposes of allocation and apportionment of the deduction to source. The Form 5471 ''Information Return of U.S. Persons With Respect to Certain Foreign Corporations'' for FS will reflect a 100X deduction on account of activities performed in Country Z and a 20X deduction on account of activities performed in the United States.

Example 2. The facts are the same as in *Example 1,* except that the 100X of costs borne by USP consist of 5X of costs incurred by USP in the United States and 95X of arm's length rental charge, as described in paragraph (d)(1)(iii) of this section, for the use of a facility in the United States. The depreciation deduction attributable to the U.S. facility is 7X. The 20X net payment by FS to USP will first be applied in reduction pro rata of the 5X deduction for costs and the 7X depreciation deduction attributable to the U.S. facility. The 8X remainder will be treated as rent for the U.S. facility.

Example 3. (i) Four members (A, B, C, and D) of a controlled group form a CSA to develop the next generation technology for their business. Based on RAB shares, the participants agree to bear shares of the costs incurred during the term of the agreement in the following percentages: A 40%; B 15%; C 25%; and D 20%. The arm's length values of the platform contributions they respectively own are in the following amounts for the taxable year: A 80X; B 40X; C 30X; and D 30X. The provisional (before offsets) and final PCT Payments among A, B, C, and D are shown in the table as follows:

(All amounts stated in X's)

	A	B	C	D
Payments	<40>	<21>	<37.5>	<30>
Receipts	48	34	22.5	24
Final	8	13	<15>	<6>

(ii) The first row/first column shows A's provisional PCT Payment equal to the product of 100X (sum of 40X, 30X, and 30X) and A's RAB share of 40%. The second row/first column shows A's provisional PCT receipts equal to the sum of the products of 80X and B's, C's, and D's RAB shares (15%, 25%, and 20%, respectively). The other entries in the first two rows of the table are similarly computed. The last row shows the final PCT receipts/payments after offsets. Thus, for the taxable year, A and B are treated as receiving the 8X and 13X, respectively, pro rata out of payments by C and D of 15X and 6X, respectively.

(k) *CSA administrative requirements.* A controlled participant meets the requirements of this paragraph if it substantially complies, respectively, with the CSA contractual, documentation, accounting, and reporting requirements of paragraphs (k)(1) through (4) of this section.

(1) *CSA contractual requirements*—(i) *In general.* A CSA must be recorded in writing in a contract that is contemporaneous with the formation (and any revision) of the CSA and that includes the contractual provisions described in this paragraph (k)(1).

(ii) *Contractual provisions.* The written contract described in this paragraph (k)(1) must include provisions that—

(A) List the controlled participants and any other members of the controlled group that are reasonably anticipated to benefit from the use of the cost shared intangibles, including the address of each domestic entity and the country of organization of each foreign entity;

(B) Describe the scope of the IDA to be undertaken and each reasonably anticipated cost shared intangible or class of reasonably anticipated cost shared intangibles;

(C) Specify the functions and risks that each controlled participant will undertake in connection with the CSA;

(D) Divide among the controlled participants all divisional interests in cost shared intangibles and specify each controlled participant's divisional interest in the cost shared intangibles, as described in paragraphs (b)(1)(iii) and (4) of this section, that it will own and exploit without any further obligation to compensate any other controlled participant for such interest;

(E) Provide a method to calculate the controlled participants' RAB shares, based on factors that can reasonably be expected to reflect the participants' shares of anticipated benefits, and require that such RAB shares must be updated, as described in paragraph (e)(1) of this section (see also paragraph (k)(2)(ii)(F) of this section);

(F) Enumerate all categories of IDCs to be shared under the CSA;

(G) Specify that the controlled participant must use a consistent method of accounting to determine IDCs and RAB shares, as described in paragraphs (d) and (e) of this section, respectively, and must translate foreign currencies on a consistent basis;

(H) Require the controlled participant to enter into CSTs covering all IDCs, as described in paragraph (b)(1)(i) of this section, in connection with the CSA;

(I) Require the controlled participants to enter into PCTs covering all platform contributions, as described in paragraph (b)(1)(ii) of this section, in connection with the CSA;

(J) Specify the form of payment due under each PCT (or group of PCTs) in existence at the formation (and any revision) of the CSA, including information and explanation that reasonably supports an analysis of applicable provisions of paragraph (h) of this section; and

(K) Specify the date on which the CSA is entered into (CSA Start Date) and the duration of the CSA, the conditions under which the CSA may be modified or terminated, and the consequences of a modification or termination (including consequences described under the rules of paragraph (f) of this section).

(iii) *Meaning of contemporaneous*—(A) *In general.* For purposes of this paragraph (k)(1), a written contractual agreement is contemporaneous with the formation (or revision) of a CSA if, and only if, the controlled participants record the CSA, in its entirety, in a document that they sign and date no later than 60 days after the first occurrence of any IDC described in paragraph (d) of this section to which such agreement (or revision) is to apply.

(B) *Example.* The following example illustrates the principles of this paragraph (k)(1)(iii):

Example. Companies A and B, both of which are members of the same controlled group, commence an IDA on March 1, Year 1. Company A pays the first IDCs in relation to the IDA, as cash salaries to A's research staff, for the staff's work during the first week of March, Year 1. A and B, however, do not sign and date any written contractual agreement until August 1, Year 1, whereupon they execute a ''Cost Sharing Agreement'' that purports to be ''effective as of'' March 1 of Year 1. The arrangement fails the requirement that the participants record their arrangement in a written contractual agreement that is contemporaneous with the formation of a CSA. The arrangement has failed to meet the requirements set forth in paragraph (b)(2) of this section and, pursuant to paragraph (b) of this section, cannot be a CSA.

(iv) *Interpretation of contractual provisions*—(A) *In general.* The provisions of a written contract described in this paragraph (k)(1) and of the additional documentation described in paragraph (k)(2) of this section must be clear and unambiguous. The provisions will be interpreted by reference to the economic substance of the transaction and the actual conduct of the controlled participants. See § 1.482–1(d)(3)(ii)(B) (Identifying contractual terms). Accordingly, the Commissioner may impute contractual terms in a CSA consistent with the economic substance of the CSA and may disregard contractual terms that lack economic substance. An allocation of risk between controlled participants after the outcome of such risk is known or reasonably knowable lacks economic substance. See § 1.482–1(d)(3)(iii)(B) (Identification of taxpayer that bears risk). A contractual term that is disregarded due to a lack of economic substance does not satisfy a contractual requirement set forth in this paragraph (k)(1) or documentation requirement set forth in paragraph (k)(2) of this section. See paragraph (b)(5) of this section for the treatment of an arrangement among controlled taxpayers that fails to comply with the requirements of this section.

(B) *Examples.* The following examples illustrate the principles of this paragraph (k)(1)(iv). In each example, it is assumed that the Commissioner will exercise the discretion granted pursuant to paragraph (b)(5)(ii) of this section to apply the provisions of this section to the arrangement that purports to be a CSA.

Example 1. The contractual provisions recorded upon formation of an arrangement that purports to be a CSA provide that PCT Payments with respect to a particular platform contribution will consist of payments contingent on sales. Contrary to the contractual provisions, the PCT Payments actually made are contingent on profits. Because the controlled participants' actual conduct is different from the contractual terms, the Commissioner may determine, based on the facts and circumstances, that—

(i) The actual payments have economic substance and, therefore, impute payment terms in the CSA consistent with the actual payments; or

(ii) The contract terms reflect the economic substance of the arrangement and, therefore, the actual payments must be adjusted to conform to the terms.

Example 2. An arrangement that purports to be a CSA provides that PCT Payments with respect to a particular platform contribution shall be contingent payments equal to 10% of sales of products that incorporate cost shared intangibles. The contract terms further provide that the controlled participants must adjust such contingent payments in accordance with a formula set forth in the terms. During the first three years of the arrangement, the controlled participants fail to make the adjustments required by the terms with respect to the PCT Payments. The Commissioner may determine, based on the facts and circumstances, that—

(i) The contingent payment terms with respect to the platform contribution do not have economic substance because the controlled participants did not act in accordance with their upfront risk allocation; or

(ii) The contract terms reflect the economic substance of the arrangement and, therefore, the actual payments must be adjusted to conform to the terms.

(2) *CSA documentation requirements*—(i) *In general.* The controlled participants must timely update and maintain sufficient documentation to establish that the participants have met the CSA contractual requirements of paragraph (k)(1) of this section and the additional CSA documentation requirements of this paragraph (k)(2).

(ii) *Additional CSA documentation requirements.* The controlled participants to a CSA must timely update and maintain documentation sufficient to—

(A) Describe the current scope of the IDA and identify—

(*1*) Any additions or subtractions from the list of reasonably anticipated cost shared intangibles reported pursuant to paragraph (k)(1)(ii)(B) of this section;

(*2*) Any cost shared intangible, together with each controlled participant's interest therein; and

(*3*) Any further development of intangibles already developed under the CSA or of specified applications of such intangibles which has been removed from the IDA (see paragraphs (d)(1)(ii) and (j)(1)(i) of this section for the definitions of reasonably anticipated cost shared intangible and cost shared intangible) and the steps (including any accounting classifications and allocations) taken to implement such removal.

(B) Establish that each controlled participant reasonably anticipates that it will derive benefits from exploiting cost shared intangibles;

(C) Describe the functions and risks that each controlled participant has undertaken during the term of the CSA;

(D) Provide an overview of each controlled participant's business segments, including an analysis of the economic and legal factors that affect CST and PCT pricing;

(E) Establish the amount of each controlled participant's IDCs for each taxable year under the CSA, including all IDCs attributable to stock-based compensation, as described in paragraph (d)(3) of this section (including the method of measurement and timing used in determining such IDCs, and the data, as of the date of grant, used to identify stock-based compensation with the IDA);

(F) Describe the method used to estimate each controlled participant's RAB share for each year during the course of the CSA, including—

(*1*) All projections used to estimate benefits;

(*2*) All updates of the RAB shares in accordance with paragraph (e)(1) of this section; and

(*3*) An explanation of why that method was selected and why the method provides the most reliable measure for estimating RAB shares;

(G) Describe all platform contributions;

(H) Designate the type of transaction involved for each PCT or group of PCTs;

(I) Specify, within the time period provided in paragraph (h)(2)(iii) of this section, the form of payment due under each PCT or group of PCTs, including information and explanation that reasonably supports an analysis of applicable provisions of paragraph (h) of this section;

(J) Describe and explain the method selected to determine the arm's length payment due under each PCT, including—

(*1*) An explanation of why the method selected constitutes the best method, as described in § 1.482–1(c)(2), for measuring an arm's length result;

(*2*) The economic analyses, data, and projections relied upon in developing and selecting the best method, including the source of the data and projections used;

(*3*) Each alternative method that was considered, and the reason or reasons that the alternative method was not selected;

(*4*) Any data that the controlled participant obtains, after the CSA takes effect, that would help determine if the controlled participant's method selected has been applied in a reasonable manner;

(*5*) The discount rate or rates, where applicable, used for purposes of evaluating PCT Payments, including information and explanation that reasonably supports an analysis of applicable provisions of paragraph (g)(2)(v) of this section;

(*6*) The estimated arm's length values of any platform contributions as of the dates of the relevant PCTs, in accordance with paragraph (g)(2)(ii) of this section;

(*7*) A discussion, where applicable, of why transactions were or were not aggregated under the principles of paragraph (g)(2)(iv) of this section;

(*8*) The method payment form and any conversion made from the method payment form to the specified payment form, as described in paragraph (h)(3) of this section; and

(*9*) If applicable under paragraph (i)(6)(iv) of this section, the WACC of the parent of the controlled group that includes the controlled participants.

(iii) *Coordination rules and production of documents*—(A) *Coordination with penalty regulations.* See § 1.6662–6(d)(2)(iii)(D) regarding coordination of the rules of this paragraph (k) with the documentation requirements for purposes of the accuracy-related penalty under section 6662(e) and (h).

(B) *Production of documentation.* Each controlled participant must provide to the Commissioner, within 30 days of a request, the items described in this paragraph (k)(2) and paragraph (k)(3) of this section. The time for compliance described in this paragraph (k)(2)(iii)(B) may be extended at the discretion of the Commissioner.

(3) *CSA accounting requirements*—(i) *In general.* The controlled participants must maintain books and records (and related or underlying data and information) that are sufficient to—

(A) Establish that the controlled participants have used (and are using) a consistent method of accounting to measure costs and benefits;

(B) Permit verification that the amount of any contingent PCT Payments due have been (and are being) properly determined;

(C) Translate foreign currencies on a consistent basis; and

(D) To the extent that the method of accounting used materially differs from U.S. generally accepted accounting principles, explain any such material differences.

(ii) *Reliance on financial accounting.* For purposes of this section, the controlled participants may not rely solely upon financial accounting to establish satisfaction of the accounting requirements of this paragraph (k)(3). Rather, the method of accounting must clearly reflect income. *Thor Power Tools Co.* v. *Commissioner,* 439 U.S. 522 (1979).

(4) *CSA reporting requirements*—(i) *CSA Statement.* Each controlled participant must file with the Internal Revenue Service, in the manner described in this paragraph (k)(4), a ''Statement of Controlled Participant to § 1.482–7 Cost Sharing Arrangement'' (CSA Statement) that complies with the requirements of this paragraph (k)(4).

(ii) *Content of CSA Statement.* The CSA Statement of each controlled participant must—

(A) State that the participant is a controlled participant in a CSA;

(B) Provide the controlled participant's taxpayer identification number;

(C) List the other controlled participants in the CSA, the country of organization of each such participant, and the taxpayer identification number of each such participant;

(D) Specify the earliest date that any IDC described in paragraph (d)(1) of this section occurred; and

(E) Indicate the date on which the controlled participants formed (or revised) the CSA and, if different from such date, the date on which the controlled participants recorded the CSA (or any revision) contemporaneously in accordance with paragraphs (k)(1)(i) and (iii) of this section.

(iii) *Time for filing CSA Statement*—(A) *90-day rule.* Each controlled participant must file its original CSA Statement with the Internal Revenue Service Ogden Campus (addressed as follows: ''Attn: CSA Statements, Mail Stop 4912, Internal Revenue Service, 1973 North Rulon White Blvd., Ogden, Utah 84404–0040''), no later than 90 days after the first occurrence of an IDC to which the newly-formed CSA applies, as described in paragraph (k)(1)(iii)(A) of this section, or, in the case of a taxpayer that became a

controlled participant after the formation of the CSA, no later than 90 days after such taxpayer became a controlled participant. A CSA Statement filed in accordance with this paragraph (k)(4)(iii)(A) must be dated and signed, under penalties of perjury, by an officer of the controlled participant who is duly authorized (under local law) to sign the statement on behalf of the controlled participant.

(B) *Annual return requirement*—(*1*) *In general.* Each controlled participant must attach to its U.S. income tax return, for each taxable year for the duration of the CSA, a copy of the original CSA Statement that the controlled participant filed in accordance with the 90-day rule of paragraph (k)(4)(iii)(A) of this section. In addition, the controlled participant must update the information reflected on the original CSA Statement annually by attaching a schedule that documents changes in such information over time.

(*2*) *Special filing rule for annual return requirement.* If a controlled participant is not required to file a U.S. income tax return, the participant must ensure that the copy or copies of the CSA Statement and any updates are attached to Schedule M of any Form 5471, any Form 5472 ''Information Return of a Foreign Owned Corporation,'' or any Form 8865 ''Return of U.S. Persons With Respect to Certain Foreign Partnerships,'' filed with respect to that participant.

(iv) *Examples.* The following examples illustrate this paragraph (k)(4). In each example, Companies A and B are members of the same controlled group.

Example 1. A and B, both of which file U.S. tax returns, agree to share the costs of developing a new chemical formula in accordance with the provisions of this section. On March 30, Year 1, A and B record their agreement in a written contract styled, ''Cost Sharing Agreement.'' The contract applies by its terms to IDCs occurring after March 1, Year 1. The first IDCs to which the CSA applies occurred on March 15, Year 1. To comply with paragraph (k)(4)(iii)(A) of this section, A and B individually must file separate CSA Statements no later than 90 days after March 15, Year 1 (June 13, Year 1). Further, to comply with paragraph (k)(4)(iii)(B) of this section, A and B must attach copies of their respective CSA Statements to their respective Year 1 U.S. income tax returns.

Example 2. The facts are the same as in *Example 1,* except that a year has passed and C, which files a U.S. tax return, joined the CSA on May 9, Year 2. To comply with the annual filing requirement described in paragraph (k)(4)(iii)(B) of this section, A and B must each attach copies of their respective CSA Statements (as filed for Year 1) to their respective Year 2 income tax returns, along with a schedule updated appropriately to reflect the changes in information described in paragraph (k)(4)(ii) of this section resulting from the addition of C to the CSA. To comply with both the 90-day rule described in paragraph (k)(4)(iii)(A) of this section and the annual filing requirement described in paragraph (k)(4)(iii)(B) of this section, C must file a CSA Statement no later than 90 days after May 9, Year 2 (August 7, Year 2), and must attach a copy of such CSA Statement to its Year 2 income tax return.

(l) *Effective/applicability date.* This section applies on December 16, 2011.

(m) *Transition rule*—(1) *In general.* An arrangement in existence on January 5, 2009, will be considered a CSA, as described under paragraph (b) of this section, if, prior to such date, it was a qualified cost sharing arrangement under the provisions of § 1.482–7 (as contained in the 26 CFR part 1 edition revised as of January 1, 1996, hereafter referred to as ''former § 1.482–7''), but only if the written contract, as described in paragraph (k)(1) of this section, is amended, if necessary, to conform with, and only if the activities of the controlled participants substantially comply with, the provisions of this section, as modified by paragraphs (m)(2) and (m)(3) of this section, by July 6, 2009.

(2) *Transitional modification of applicable provisions.* For purposes of this paragraph (m), conformity and substantial compliance with the provisions of this section shall be determined with the following modifications:

(i) CSTs and PCTs occurring prior to January 5, 2009, shall be subject to the provisions of former § 1.482–7 rather than this section.

(ii) Except to the extent provided in paragraph (m)(3) of this section, PCTs that occur under a CSA that was a qualified cost sharing arrangement under the provisions of former § 1.482–7 and remained in effect on January 5, 2009, shall be subject to the periodic adjustment rules of § 1.482–4(f)(2) rather than the rules of paragraph (i)(6) of this section.

(iii) Paragraphs (b)(1)(iii) and (b)(4) of this section shall not apply.

(iv) Paragraph (k)(1)(ii)(D) of this section shall not apply.

(v) Paragraphs (k)(1)(ii)(H) and (I) of this section shall be construed as applying only to transactions entered into on or after January 5, 2009.

(vi) The deadline for recordation of the revised written contractual agreement pursuant to paragraph (k)(1)(iii) of this section shall be no later than July 6, 2009.

(vii) Paragraphs (k)(2)(ii)(G) through (J) of this section shall be construed as applying only with reference to PCTs entered into on or after January 5, 2009.

(viii) Paragraph (k)(4)(iii)(A) of this section shall be construed as requiring a CSA Statement with respect to the revised written contractual agreement described in paragraph (m)(2)(vi) of this section no later than September 2, 2009.

(ix) Paragraph (k)(4)(iii)(B) of this section shall be construed as only applying for taxable years ending after the filing of the CSA Statement described in paragraph (m)(2)(viii) of this section.

(3) *Special rule for certain periodic adjustments.* The periodic adjustment rules in paragraph (i)(6) of this section (rather than the rules of § 1.482–4(f)(2)) shall apply to PCTs that occur on or after the date of a material change in the scope of the CSA from its scope as of January 5, 2009. A material change in scope would include a material expansion of the activities undertaken beyond the scope of the intangible development area, as described in former § 1.482–7(b)(4)(iv). For this purpose, a contraction of the scope of a CSA, absent a material expansion into one or more lines of research and development beyond the scope of the intangible development area, does not constitute a material change in scope of the CSA. Whether a material change in scope has occurred is determined on a cumulative basis. Therefore, a series of expansions, any one of which is not a material expansion by itself, may collectively constitute a material expansion.

§ 1.482–7T [Removed]

■ **Par. 14.** Section 1.482–7T is removed.

■ **Par. 15.** Section 1.482–8 is amended by:

■ 1. Revising *Examples 13* through *18* at the end of paragraph (b).

■ 2. Revising paragraph (c)(1).

The additions and revision reads as follows:

§ 1.482–8 Examples of the best method rule.

* * * * *

(b) * * *

Example 13. Preference for acquisition price method. (i) USP develops, manufacturers, and distributes pharmaceutical products. USP and FS, USP's wholly-owned subsidiary, enter into a CSA to develop a new oncological drug, Oncol. Immediately prior to entering into the CSA, USP acquires Company X, an unrelated U.S. pharmaceutical company. Company X is solely engaged in oncological pharmaceutical research, and its only significant resources and capabilities are its workforce and its sole patent, which is associated with Compound X, a promising molecular compound derived from a rare plant, which USP reasonably

anticipates will contribute to developing Oncol. All of Company X researchers will be engaged solely in research that is reasonably anticipated to contribute to developing Oncol as well. The rights in the Compound X and the commitment of Company X's researchers to the development of Oncol are platform contributions for which compensation is due from FS as part of a PCT.

(ii) In this case, the acquisition price method, based on the lump sum price paid by USP for Company X, is likely to provide a more reliable measure of an arm's length PCT Payment due to USP than the application of any other method. See §§ 1.482–4(c)(2) and 1.482–7(g)(5)(iv)(A).

Example 14. Preference for market capitalization method. (i) Company X is a publicly traded U.S. company solely engaged in oncological pharmaceutical research and its only significant resources and capabilities are its workforce and its sole patent, which is associated with Compound Y, a promising molecular compound derived from a rare plant. Company X has no marketable products. Company X enters into a CSA with FS, a newly-formed foreign subsidiary, to develop a new oncological drug, Oncol, derived from Compound Y. Compound Y is reasonably anticipated to contribute to developing Oncol. All of Company X researchers will be engaged solely in research that is reasonably anticipated to contribute to developing Oncol under the CSA. The rights in Compound Y and the commitment of Company X's researchers are platform contributions for which compensation is due from FS as part of a PCT.

(ii) In this case, given that Company X's platform contributions covered by PCTs relate to its entire economic value, the application of the market capitalization method, based on the market capitalization of Company X, provides a reliable measure of an arm's length result for Company X's PCTs to the CSA. See §§ 1.482–4(c)(2) and 1.482–7(g)(6)(v)(A).

Example 15. Preference for market capitalization method. (i) MicroDent, Inc. (MDI) is a publicly traded company that developed a new dental surgical microscope ScopeX–1, which drastically shortens many surgical procedures. On January 1 of Year 1, MDI entered into a CSA with a wholly-owned foreign subsidiary (FS) to develop ScopeX–2, the next generation of ScopeX–1. In the CSA, divisional interests are divided on a territorial basis. The rights associated with ScopeX–1, as well as MDI's research capabilities are reasonably anticipated to contribute to the development of ScopeX–2 and are therefore platform contributions for which compensation is due from FS as part of a PCT. At the time of the PCT, MDI's only product was the ScopeX–I microscope, although MDI was in the process of developing ScopeX–2. Concurrent with the CSA, MDI separately transfers exclusive and perpetual exploitation rights associated with ScopeX–1 to FS in the same territory as assigned to FS in the CSA.

(ii) Although the transactions between MDI and FS under the CSA are distinct from the transactions between MDI and FS relating to the exploitation rights for ScopeX–1, it is likely to be more reliable to evaluate the combined effect of the transactions than to evaluate them in isolation. This is because the combined transactions between MDI and FS relate to all of the economic value of MDI (that is, the exploitation rights and research rights associated with ScopeX–1, as well as the research capabilities of MDI). In this case, application of the market capitalization method, based on the enterprise value of MDI on January 1 of Year 1, is likely to provide a reliable measure of an arm's length payment for the aggregated transactions. See §§ 1.482–4(c)(2) and 1.482–7(g)(6)(v)(A).

(iii) Notwithstanding that the market capitalization method provides the most reliable measure of the aggregated transactions between MDI and FS, see § 1.482–7(g)(2)(iv) for further considerations of when further analysis may be required to distinguish between the remuneration to MDI associated with PCTs under the CSA (for research rights and capabilities associated with ScopeX–1) and the remuneration to MDI for the exploitation rights associated with ScopeX–1.

Example 16. Income method (applied using CPM) preferred to acquisition price method. The facts are the same as in *Example 13,* except that the acquisition occurred significantly in advance of formation of the CSA, and reliable adjustments cannot be made for this time difference. In addition, Company X has other valuable molecular patents and associated research capabilities, apart from Compound X, that are not reasonably anticipated to contribute to the development of Oncol and that cannot be reliably valued. The CSA divides divisional interests on a territorial basis. Under the terms of the CSA, USP will undertake all R&D (consisting of laboratory research and clinical testing) and manufacturing associated with Oncol, as well as the distribution activities for its territory (the United States). FS will distribute Oncol in its territory (the rest of the world). FS's distribution activities are routine in nature, and the profitability from its activities may be reliably determined from third-party comparables. FS does not furnish any platform contributions. At the time of the PCT, reliable (ex ante) financial projections associated with the development of Oncol and its separate exploitation in each of USP's and FSub's assigned geographical territories are undertaken. In this case, application of the income method using CPM is likely to provide a more reliable measure of an arm's length result than application of the acquisition price method based on the price paid by USP for Company X. See § 1.482–7(g)(4)(vi) and (5)(iv)(C).

Example 17. Evaluation of alternative methods. (i) The facts are the same as in *Example 13,* except that the acquisition occurred sometime prior to the CSA, and Company X has some areas of promising research that are not reasonably anticipated to contribute to developing Oncol. For purposes of this example, the CSA is assumed to divide divisional interests on a territorial basis. In general, the Commissioner determines that the acquisition price data is useful in informing the arm's length price, but not necessarily determinative. Under the terms of the CSA, USP will undertake all R&D (consisting of laboratory research and clinical testing) and manufacturing associated with Oncol, as well as the distribution activities for its territory (the United States). FS will distribute Oncol in its territory (the rest of the world). FS's distribution activities are routine in nature, and the profitability from its activities may be reliably determined from third-party comparables. At the time of the PCT, financial projections associated with the development of Oncol and its separate exploitation in each of USP's and FSub's assigned geographical territories are undertaken.

(ii) Under the facts, it is possible that the acquisition price method or the income method using CPM might reasonably be applied. Whether the acquisition price method or the income method provides the most reliable evidence of the arm's length price of USP's contributions depends on a number of factors, including the reliability of the financial projections, the reliability of the discount rate chosen, and the extent to which the acquisition price of Company X can be reliably adjusted to account for changes in value over the time period between the acquisition and the formation of the CSA and to account for the value of the in-process research done by Company X that does not constitute platform contributions to the CSA. See § 1.482–7(g)(4)(vi) and (5)(iv)(A) and (C).

Example 18. Evaluation of alternative methods. (i) The facts are the same as in *Example 17,* except that FS has a patent on Compound Y, which the parties reasonably anticipate will be useful in mitigating potential side effects associated with Compound X and thereby contribute to the development of Oncol. The rights in Compound Y constitute a platform contribution for which compensation is due from USP as part of a PCT. The value of FS's platform contribution cannot be reliably measured by market benchmarks.

(ii) Under the facts, it is possible that either the acquisition price method and the income method together or the residual profit split method might reasonably be applied to determine the arm's length PCT Payments due between USP and FS. Under the first option the PCT Payment for the platform contributions related to Company X's workforce and Compound X would be determined using the acquisition price method referring to the lump sum price paid by USP for Company X. Because the value of these platform contributions can be determined by reference to a market benchmark, they are considered routine platform contributions. Accordingly, under this option, the platform contribution related to Compound Y would be the only nonroutine platform contribution and the relevant PCT Payment is determined using the income method. Under the second option, rather than looking to the acquisition price for Company X, all the platform contributions are considered nonroutine and the RPSM is applied to determine the PCT Payments for each platform contribution. Under either option, the PCT Payments will be netted against each other.

(iii) Whether the acquisition price method together with the income method or the

residual profit split method provides the most reliable evidence of the arm's length price of the platform contributions of USP and FS depends on a number of factors, including the reliability of the determination of the relative values of the platform contributions for purposes of the RPSM, and the extent to which the acquisition price of Company X can be reliably adjusted to account for changes in value over the time period between the acquisition and the formation of the CSA and to account for the value of the rights in the in-process research done by Company X that does not constitute platform contributions to the CSA. In these circumstances, it is also relevant to consider whether the results of each method are consistent with each other, or whether one or both methods are consistent with other potential methods that could be applied. See § 1.482–7(g)(4)(vi), (5)(iv), and (7)(iv).

(c) *Effective/applicability date*—(1) *In general.* Paragraphs (a) and (b) *Examples 10* through *12* of this section are generally applicable for taxable years beginning after December 31, 2006. Paragraph (b) *Examples 13* through *18* of this section are generally applicable on January 5, 2009.

* * * * *

§ 1.482–8T [Removed].

■ **Par. 16.** Section 1.482–8T is removed.

■ **Par. 17.** Section 1.482–9 is amended by revising paragraph (m)(3) to read as follows:

§ 1.482–9 Methods to determine taxable income in connection with a controlled services transaction.

* * * * *

(m) * * *

(3) *Coordination with rules governing cost sharing arrangements.* Section 1.482–7 provides the specific methods to be used to determine arm's length results of controlled transactions in connection with a cost sharing arrangement. This section provides the specific methods to be used to determine arm's length results of a controlled service transaction, including in an arrangement for sharing the costs and risks of developing intangibles other than a cost sharing arrangement covered by § 1.482–7. In the case of such an arrangement, consideration of the principles, methods, comparability, and reliability considerations set forth in § 1.482–7 is relevant in determining the best method, including an unspecified method, under this section, as appropriately adjusted in light of the differences in the facts and circumstances between such arrangement and a cost sharing arrangement.

* * * * *

§ 1.482–9T [Removed].

■ **Par. 18.** Section 1.482–9T is removed.

■ **Par. 19.** Section 1.861–17 is amended by revising paragraph (c)(3)(iv) to read as follows:

§ 1.861–17 Allocation and apportionment of research and experimental expenditures.

* * * * *

(c) * * *

(3) * * *

(iv) *Effect of cost sharing arrangements.* If the corporation controlled by the taxpayer has entered into a cost sharing arrangement, in accordance with the provisions of § 1.482–7, with the taxpayer for the purpose of developing intangible property, then that corporation shall not reasonably be expected to benefit from the taxpayer's share of the research expense.

* * * * *

■ **Par. 20.** Section 1.6662–6 is amended by revising paragraph (d)(2)(iii)(D) to read as follows:

§ 1.6662–6 Transaction between persons described in section 482 and net section 482 transfer price adjustments.

* * * * *

(d) * * *

(2) * * *

(iii) * * *

(D) Satisfaction of the documentation requirements described in § 1.482–7(k)(2) for the purpose of complying with the rules for CSAs under § 1.482–7 also satisfies all of the documentation requirements listed in paragraph (d)(2)(iii)(B) of this section, except the requirements listed in paragraphs (d)(2)(iii)(B)(*2*) and (*10*) of this section, with respect to CSTs and PCTs described in § 1.482–7(b)(1)(i) and (ii), provided that the documentation also satisfies the requirements of paragraph (d)(2)(iii)(A) of this section.

* * * * *

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 21.** The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 22.** Section 301.7701–1 is amended by revising paragraph (c) to read as follows:

§ 301.7701–1 Classification of organizations for Federal tax purposes.

* * * * *

(c) *Cost sharing arrangements.* A cost sharing arrangement that is described in § 1.482–7 of this chapter, including any arrangement that the Commissioner treats as a CSA under § 1.482–7(b)(5) of this chapter, is not recognized as a separate entity for purposes of the Internal Revenue Code. See § 1.482–7 of this chapter for the rules regarding CSAs.

* * * * *

PART 602—OMB CONTROL NUMBER UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 23.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 24.** In § 602.101, paragraph (b) is amended as follows:

1. The following entry to the table is removed:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
1.482–7T	1545–1364
* * * * *	

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: December 8, 2011.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2011–32458 Filed 12–16–11; 2 pm]

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Part IV

National Labor Relations Board

29 CFR Parts 101 and 102

Representation—Case Procedures; Final Rule

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101 and 102

RIN 3142–AA08

Representation—Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: On June 22, 2011, the National Labor Relations Board (the Board) issued a Notice of Proposed Rulemaking proposing various amendments of its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. This document explains which of the proposed amendments the Board is adopting at this time in the final rule and sets forth the Board's responses to comments concerning those proposals.

The Board believes that the final rule will reduce unnecessary litigation in representation cases and thereby enable the Board to better fulfill its duty to expeditiously resolve questions concerning representation. The final rule will also save time and resources for the parties and the agency. The final rule will focus pre-election hearings on those issues relevant to determining if there is a question concerning representation, provide for pre-election briefing only when it will assist the decision makers, reduce piecemeal appeals to the Board, consolidate requests for Board review of regional directors' pre- and post-election determinations into a single, post-election request, make Board review of post-election regional determinations discretionary, and eliminate duplicative regulations. The final rule will allow the Board to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret-ballot election and certifying the results.

DATES: This rule will be effective on April 30, 2012.

FOR FURTHER INFORMATION CONTACT: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570, (202) 273–1067 (this is not a toll-free number), 1–(866) 315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background on the Rulemaking

The National Labor Relations Board administers the National Labor Relations Act, which, among other things, governs the formation of collective-bargaining relationships between employers and groups of employees in the private sector. Section 7 of the Act, 29 U.S.C. 157, gives employees the right ''to bargain collectively through representatives of their own choosing * * * and to refrain from * * * such activity.''

When employees and their employer are unable to agree whether the employees should be represented for purposes of collective bargaining, Section 9 of the Act, 29 U.S.C. 159, gives the Board authority to resolve the question of representation.

The Act itself sets forth only the basic steps for resolving a question of representation. First, a petition is filed by an employee, a labor organization, or an employer. Second, if there is reasonable cause, a hearing is held to determine whether a question of representation exists, unless the parties agree that an election should be conducted and agree concerning election details. Third, if there is such a question, an election by secret ballot is conducted. Fourth, the results of the election are certified.

Aside from these general requirements, however, the statute says very little about representation case procedures. Instead, Congress left these procedures within the broad discretion of the Board.

The Board has exercised this discretion through two mechanisms. First, the Board has promulgated binding rules of procedure, most of which are found in 29 CFR part 102, subpart C. Second, the Board has interpreted and occasionally altered or created its representation case procedures through adjudication.[1] In addition, the Board's General Counsel has prepared a non-binding Casehandling Manual describing representation case procedures in detail. The relevant sections of the Casehandling Manual are Sections 11000 through 11886.[2]

Within the framework of the current rules, the Board, the General Counsel and the agency's regional directors[3] have sought to achieve efficient, fair, uniform, and timely resolution of representation cases. But under the current rules, inefficiency, abuse of the process, and delay still hamper resolution of many questions of representation.

In this final rule, the Board makes eight amendments to its regulations governing representation case procedures. The amendments are intended to eliminate unnecessary litigation, delay, and duplicative regulations. The final rule follows an extensive consultation with the public initiated by the Board's Notice of Proposed Rulemaking (NPRM) on June 22, 2011. 76 FR 36812. As explained below, the final rule adopts some of the proposed amendments and leaves the remainder for further deliberation.

A. Summary of Current Procedures[4]

When an employee, union, employer, individual, or organization wants the Board to determine whether employees wish to bargain collectively through a union, that party must file, in the Board's regional office, a petition, which the regional director then serves on other interested parties. An employee or union petitioner must also, ordinarily, provide evidence that a substantial number of employees support the petition. Board agents then conduct an ex parte investigation to determine if there is enough interest to justify further processing of the petition.

In further processing, three general types of disputes can arise among the parties. First are pre-election disputes. These may concern whether the employees at issue may be represented as a group—that is, whether they are ''an appropriate unit.'' At this stage, the parties may also disagree about the Board's jurisdiction, whether an election is barred by the Act or Board law, and the time, place, and other details of the election itself.

Second, disputes can also arise during the election about whether particular persons are eligible to vote. These disputes arise through ''challenges'' to the disputed individuals' ballots. When this occurs, the ballots of challenged voters are segregated from the other ballots in a manner that will not disclose the voters' identity.

Third, disputes can arise after the election about whether actions of the parties or the Board agents—or some other circumstance—made the election unfair. These disputes are brought before the Board by the filing of ''objections.''

In the vast majority of cases, the parties, often with Board agent assistance, are able to resolve pre-election disputes without litigation. In these cases, either a ''consent''

[1] *See, e.g., NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 764, 770, 777, 779 (1969).

[2] NLRB Casehandling Manual (Part Two) Representation Proceedings.

[3] Pursuant to Section 3(b) of the Act, the Board has delegated to its regional directors the authority to conduct pre-election hearings, to determine whether questions of representation exist, to direct elections, and to certify election results. 29 U.S.C. 153(b). The General Counsel administratively oversees the regions. 29 U.S.C. 153(d).

[4] For a more complete discussion and citations, see the NPRM. 76 FR 36812.

agreement or a ''stipulation'' agreement is entered into. Both kinds of agreements fully resolve pre-election disputes, but in a consent agreement the parties also waive the right to Board review of the regional director's disposition of any challenges or objections, while in a stipulation agreement the parties provide for Board disposition of such disputes.[5]

If no agreement on pre-election issues can be reached, a hearing must be held. The hearing officer, the Board agent in charge of the hearing, takes evidence relevant to the issues in dispute, and the parties often file briefs. The regional director then issues a decision, either dismissing the petition or directing an election. The regional director does not have to resolve all voter eligibility questions before the election, but can defer those questions by permitting employees whose eligibility is disputed to vote subject to challenge.

If an election is directed, the regional director typically schedules it no sooner than 25 days after the decision, so that the Board can rule on any interlocutory request for review that might be filed. Such interlocutory requests are rarely granted, still more rarely result in the regional director's decision being reversed, and virtually never result in elections being stayed. If the Board does not rule on the request before the election date, the election is held, and the ballots are impounded pending a Board ruling.

After the regional director's decision directing an election, the employer must provide the regional office a list of eligible voters and their home addresses. The regional office gives the list to the parties. The parties use the list for two purposes: To communicate with eligible voters about the election, and to determine whether to challenge a particular voter.

Elections are decided by a majority of the valid votes cast. As mentioned, during the election, the parties may challenge ballots cast by voters. A tally of ballots generally takes place shortly after the polls close. If the challenged ballots are too few in number to change the outcome of the election, the challenges will not be litigated or resolved.

Within one week after the tally, parties may file objections with the regional director. Within one additional week, the objecting party must furnish evidence in support of its objections.

The regional director has discretion to investigate any potentially determinative challenges or objections or to immediately direct a hearing. If the director conducts an investigation, he will set a hearing only if the challenges or objections raise substantial and material questions of fact. If no hearing is held, the regional director will issue a supplemental decision or a report disposing of the challenges or objections.

If a post-election hearing is held, the parties have the opportunity to present evidence to a hearing officer. The hearing officer will issue a report resolving any credibility issues and containing findings of fact and recommendations.

In cases involving consent elections, the regional director's rulings on challenges and objections are final. In cases involving stipulated elections or elections directed by a regional director, the parties generally have the right to obtain review by the Board, by filing exceptions to the report disposing of the objections and/or challenges. If a regional director directs an election and subsequently determines that the challenges or objections warrant a hearing, the regional director may direct that the hearing officer's recommendation be made directly to the Board, in which case a party has the right to Board review. On the other hand, if the regional director orders that the hearing officer's recommendations be made directly to him or her, parties can file exceptions to the hearing officer's report to the regional director, but thereafter can seek Board review of the regional director's determination only through the discretionary request-for-review procedure. Similarly, if the regional director decides to resolve the challenges and objections without directing a hearing, he or she can choose to issue a report, in which case parties have a right to Board review, or the regional director can choose to issue a supplemental decision, in which case parties may only request Board review. By contrast, if the parties enter into a stipulated election agreement, the parties are entitled to Board review of the regional director's or hearing officer's disposition of the post-election matters.

B. Problems Identified and Amendments Proposed

The Board published an NPRM on June 22, 2011, 76 FR 36812, proposing a number of changes to these procedures. These proposals are set forth at length in the NPRM. The purpose of this brief summary is to introduce the more complete discussion of the final rule. The proposed amendments are presented in the chronological order of a typical representation case.

First, under current procedures, the petitioner must file the petition in hard copy. The Board proposed to also permit electronic filing of the petition.

Second, under current procedures, the petition is filed by the petitioner and then served by the regional office on the other interested parties. The Board proposed that the petitioner would directly serve a copy of the petition.

Third, under current procedures, the petitioner may wait 48 hours before providing evidence that the employees support the petition (the ''showing of interest''). The Board proposed that the petitioner be required to file the petition and the showing of interest simultaneously. The Board also asked for comments concerning whether electronic signatures should be accepted in support of the showing of interest.

Fourth, under current procedures, after a petition is filed, the regional director asks the employer to voluntarily post a generic notice of employee rights. The Board proposed that the notice describe the type of petition that has been filed, the name of the petitioner, the petitioned-for unit, and the procedures that will follow, and that the employer be required to post the notice.

Fifth, under current procedures, some regional offices routinely schedule pre-election hearings to commence seven days after the petition is filed, while other regions wait longer. The Board proposed that the regional director set the hearing to commence seven days after the filing of the petition absent ''special circumstances.'' The Board also proposed that the hearing be continued from day to day absent extraordinary circumstances.

Sixth, under current procedures, prior to or at the opening of the pre-election hearing, regional personnel typically ask the parties what position they will take on the common subjects of pre-election disputes, such as jurisdiction, the appropriateness of the proposed unit, and any bars to an election. The Board proposed that non-petitioning parties be required to file, no later than the opening of the hearing, a statement of position setting forth their position on these issues. The Board also proposed that the employer's statement include a list of employees in the petitioned-for unit.

Seventh, under current procedures, the hearing officer may ask the parties to clarify their positions on issues

[5] In the alternative, a third type of agreement, called a ''full consent'' agreement, may also be entered into. This occurs when the parties disagree about pre-election issues but are willing to permit the regional director to resolve them as well as any post-election disputes with finality. Full consent agreements are rare.

potentially in dispute. Although the hearing officer can prohibit a party from introducing evidence when it refuses to take a position on an issue, hearing officers' practice is not uniform. The Board proposed that the hearing process be made uniform through use of the following procedures at the commencement of the pre-election hearing. First, the petitioner would have to respond to (or ''join'') the issues raised by the other parties in their statements of position. Second, if there is a dispute between the parties, each would describe what evidence they would introduce in support of their position. The hearing officer would not permit a party to present evidence related to an issue concerning which the party had failed to take a position or concerning which there was no genuine dispute of material fact. However, parties could contest individual employees' eligibility or inclusion for the first time through a challenge during the election. In addition, the petitioner would be permitted to present evidence relevant to the appropriateness of the unit even if the non-petitioning parties declined to take a position on that issue. Finally, any party could contest the Board's jurisdiction at any time.

Eighth, under current procedures, the hearing officer takes evidence at the pre-election hearing on any individual eligibility issue raised, even though these issues need not be decided pre-election, and the regional director and Board commonly defer resolution of the issues until after the election via the challenge procedure. The Board proposed that the hearing officer exclude evidence relevant only to individual employees' voting eligibility or inclusion in the unit, subject to an exception where the dispute involves a total of more than 20 percent of the unit employees.

Ninth, under the current procedures, the parties have a right in most kinds of cases to file post-hearing briefs at any time up to seven days after the close of the hearing. The Board proposed to vest the hearing officer with discretion concerning whether to permit post-hearing briefs and, if permitted, over their contents and timing.

Tenth, under current procedures, after the pre-election hearing the regional director can choose to transfer the case to the Board without deciding it. The Board proposed to eliminate the transfer procedure.

Eleventh, under current procedures, if the regional director directs an election, the parties are required to request Board review within 14 days or they waive the right to later raise any issues that could have been raised at that time. The Board proposed to eliminate the requirement to request review before the election, instead permitting the request to be filed after the election and consolidated with any request for review of the regional director's disposition of post-election challenges and objections.

Twelfth, under current procedures, parties can request special permission to appeal both from a ruling of the hearing officer to the regional director and from a ruling of the hearing officer or the regional director to the Board, but the regulations establish no standard for the grant of such requests. The Board proposed a strict standard for the grant of such requests.

Thirteenth, under current procedures, the regional director is instructed not to schedule an election sooner than 25 days after his or her decision, so that the Board can rule on any interlocutory request for review that might be filed. The Board proposed to eliminate the 25-day waiting period.

Fourteenth, under current procedures, the employer must give the region a list of eligible voters within seven days of the regional director's decision, and the region then gives the list to the other parties. The Board proposed to codify this requirement, to shorten the time to two days, and to provide for direct service by the employer on the other parties.

Fifteenth, under current procedures, the eligibility list contains only names and home addresses. The Board proposed that the list should also include available telephone numbers and email addresses, as well as the work location, shift, and classification for each employee.

Sixteenth, under current procedures, when a charge is filed alleging the commission of unfair labor practices that could compromise the fairness of the election, the regional director has discretion to delay (or ''block'') the election until the issue can be resolved. In the NPRM, the Board asked for comments on whether the Board should change its blocking charge policy.

Seventeenth, under current procedures, after the tally of ballots from the election, the parties have seven days to file a pleading with the regional director specifying any objections. Objecting parties then have an additional seven days to describe the evidence supporting their objections. The Board proposed that the offer of proof be filed simultaneously with the objections.

Eighteenth, under current procedures, regional directors have discretion over the scheduling of a hearing concerning challenges or objections. The Board proposed that the hearing be held fourteen days after the tally of ballots, or as soon as practicable thereafter.

Nineteenth, under current procedures, in most instances, parties have a right to appeal a regional director's or hearing officer's disposition of challenges or objections to the Board. The Board proposed to make Board review of post-election regional dispositions discretionary, as is the case with pre-election rulings.

Twentieth, the current regulations are redundant in a number of places and located in various parts of Title 29 of the Code of Federal Regulations. The Board proposed to eliminate redundant regulations and consolidate and reorganize the regulations so that they may be more easily understood.

C. The Final Rule and a Concise, General Statement of Its Basis and Purpose

As explained in the NPRM, the Board proposed various revisions to its rules and regulations to further ''the Act's policy of expeditiously resolving questions concerning representation'' [6] and to better ensure ''that employees' votes may be recorded accurately, efficiently and speedily.'' [7] Over 65,000 public comments were filed in response to the NPRM. Many of the comments focused primarily on a few of the proposed amendments, most notably the proposed changes concerning the scheduling of the pre-election hearing, the requirement of a statement of position, and the content and timing of eligibility lists. In light of this commentary, further Board deliberation concerning those proposals (and some others) is necessary at this time. However, a number of the proposals were less controversial. The Board has had the opportunity to fully consider all the comments and to deliberate concerning the proposed amendments and believes it is appropriate to adopt some of the proposals in this final rule and leave the others for further consideration. The Board considers the amendments adopted in this final rule to be severable from the remainder of the proposals, and from each other.[8]

[6] *Northeastern University,* 261 NLRB 1001, 1002 (1982), *enforced,* 707 F.2d 15 (1st Cir. 1983).

[7] *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 331 (1946).

[8] Each of the major changes adopted in this final rule is independently justified, and thus the Board has decided to adopt each of them, while also deciding to deliberate further on the remaining proposals. Although, at a very high level of generality, the various proposals in the NPRM shared a common purpose to improve ''efficiency,'' in fact, each of the proposals addressed discrete sources of inefficiency in the rules, and it is clear that the amendments will serve their functions whether adopted in whole or in part, together or

For the reasons explained below, the Board has decided to adopt the following eight proposals at this time.

First, the Board has decided to amend § 102.64 in order to expressly construe Section 9(c) of the Act and to state that the statutory purpose of a pre-election hearing is to determine if a question of representation exists. Second, the Board has decided to amend § 102.66(a) and eliminate § 101.20(c) (along with all of Part 101, Subpart C) in order to ensure that hearing officers presiding over pre-election hearings have the authority to limit the presentation of evidence to that which supports a party's contentions and which is relevant to the existence of a question concerning representation. Third, the Board has decided to amend § 102.66(d) to afford hearing officers presiding over pre-election hearings discretion over the filing of post-hearing briefs, including over the subjects to be addressed and the time for filing. Fourth, the Board has decided to amend §§ 102.67 and 102.69 to eliminate the parties' right to file a pre-election request for review of a regional director's decision and direction of election, and instead to defer all requests for Board review until after the election, when any such request can be consolidated with a request for review of any post-election rulings. Fifth, the Board has decided to eliminate the recommendation in § 101.21(d) (as stated, along with all of Part 101, Subpart C) that the regional director should ordinarily not schedule an election sooner than 25 days after the decision and direction of election in order to give the Board an opportunity to rule on a pre-election request for review. Sixth, the Board has decided to amend § 102.65 to make explicit and narrow the circumstances under which a request for special permission to appeal to the Board will be granted. Seventh, the Board has decided to amend §§ 102.62(b) and 102.69 to create a uniform procedure for resolving election objections and potentially outcome-determinative challenges in stipulated and directed election cases and to provide that Board review of regional directors' resolution of such disputes is discretionary. Eighth, as mentioned, the Board has decided to eliminate part 101, subpart C of its regulations, which is redundant. The remainder of the amendments merely conform other sections of the Board's Rules and Regulations to the eight amendments described above. The Board has concluded, after careful review of all public comments and after deliberation, that adopting those eight proposals in a final rule will eliminate wholly unnecessary litigation and delay in the processing of petitions filed under Section 9 of the Act and thus in the resolution of questions of representation.[9]

The current rules have been interpreted to give parties a right to present evidence at a pre-election hearing relating to matters that need not be addressed in order for the hearing to fulfill its statutory function of creating a record based on which the regional director can determine if there is a question of representation that should be answered via an election. Furthermore, the current rules have been understood to give parties a right to present evidence at a pre-election hearing concerning such matters even though neither the regional director nor the Board must address those matters prior to the election, and a decision on such matters is commonly deferred until after the election. In other words, such litigation is wholly unnecessary prior to an election. Moreover, the issues in dispute in such litigation are often rendered moot by the election results or resolved by the parties post-election, thus eliminating the need for litigation of the issues. Therefore, the Board has determined that amending § 102.64(a) to expressly construe the statutory purpose of the hearing and amending § 102.66(a) to vest hearing officers with authority to limit the presentation of evidence to that supporting a party's contentions and relevant to the existence of a question concerning representation will eliminate unnecessary litigation and delay.

After the pre-election hearing, the filing of post-hearing briefs often delays issuance of the regional director's decision and direction of election, thereby delaying resolution of the question of representation even when the issue or issues in dispute can be accurately and fairly resolved without briefing. Given the recurring and often familiar and uncomplicated legal and factual issues arising in pre-election hearings, the filing of briefs, which also imposes financial costs on the parties, is not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions. Therefore, the Board has decided to amend § 102.66(d) to vest hearing officers presiding over pre-election hearings with authority to provide for the filing of post-hearing briefs only in those instances when they would be of assistance to the decision-maker and to control the subjects addressed in, and the time for filing of, any such briefs. The Board has determined that amending the rules to give the hearing officer discretion to permit the filing of post-hearing briefs will eliminate unnecessary expense and delay.

The Board's current rules require parties to file a request for review of the regional director's decision and direction of election before the election is held in order to preserve their right to raise disputed issues in post-election proceedings, even though the issues in dispute are often rendered moot by the election results or resolved by the parties post-election thus eliminating the need for litigation of the issues at any time. The pre-election request for review procedure is inconsistent with judicial procedures, which limit interlocutory appeals in order to avoid unnecessary litigation and delay. In addition, § 101.21(d) of the Board's current Statements of Procedure provides that elections ''normally'' are delayed for a period of at least 25 days after the regional director directs that an election should be conducted, ''to permit the Board to rule on any request for review which may be filed.'' This provision effectively stays the conduct of all elections for at least 25 days despite Congress's instruction in Section 3(b) of the Act that even the grant of review by the Board ''shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.'' Furthermore, even in the cases in which a request for review is filed, review is granted only rarely and the Board almost never stays the conduct of the election either before or after granting review, instead permitting employees to vote and then impounding the ballots. For these reasons, the waiting period unnecessarily delays the resolution of questions of representation in all cases, and the delay is not justified by the only purpose articulated in the Board's Statements of Procedure. Therefore, the Board has determined that amending the rules to defer the right to file requests for review of the direction of the election until after the election and to eliminate the mandatory waiting period will eliminate unnecessary litigation and delay.

Consistent with the effort to avoid piecemeal appeals to the Board, the Board has also decided to amend § 102.65 to provide that a request for special permission to appeal to the Board will only be granted under

one at a time. For this reason as well, each of the amendments in this final rule would be adopted by the Board independently of the others.

[9] The Board has not, in each instance, adopted the precise rule language proposed in the NPRM. To the extent alternative language has been adopted in the final rule, the Board sets forth its rationale in Part IV below.

extraordinary circumstances, when it appears that the issue will otherwise evade review. To further discourage piecemeal appeals, the amendments provide that a party need not seek special permission to appeal in order to preserve an issue for review post-election. Consistent with current practice, the amendments provide that neither the filing of a request for special permission to appeal nor the grant of such a request will stay an election or any other action or require impounding of ballots unless specifically ordered by the Board. The Board has determined that narrowing the circumstances under which a request for special permission to appeal will be granted will eliminate unnecessary litigation and delay.

Under the current rules, the nature of Board review of a regional director's disposition of pre- and post-election disputes varies, but for no articulated reason. Pre-election review is discretionary, while post-election review is ordinarily mandatory. This is the case even though many post-election disputes raise no question of policy and often turn on the application of well-established principles of law to particular facts. In addition, the procedures for post-election review vary from case to case even though the nature of the issues is the same. Therefore, the Board has decided to amend §§ 102.62(b) and 102.69 to create a uniform procedure in both stipulated and directed election cases, whereby parties may file exceptions to any hearing officer's report with the regional director, and file a request for review of the regional director's disposition of the post-election matters with the Board. That request may be consolidated with a request for review of the regional director's decision and direction of election, if any. Permitting the Board to deny review when a party's request raises no compelling grounds for review will eliminate the most significant source of administrative delay in achieving finality of election results. The Board has determined that amending the rules to create this uniform procedure for handling pre- and post-election disputes will eliminate unnecessary litigation and delay.

Finally, the Board currently has two sets of regulations describing its procedures in representation cases, one in Part 102, Subpart C of its Rules and Regulations and the other in Part 101, Subpart C of its Statements of Procedure. 29 CFR Part 102, Subpart C; 29 CFR Part 101, Subpart C. The two sets of regulations are almost entirely redundant. This redundancy is a potential source of confusion. The Board has determined that eliminating Part 101, Subpart C will reduce such confusion.

II. The Rulemaking Process

A. A Brief History of Board Rulemaking

As the NPRM explains, the Board has amended its representation case procedures repeatedly over the years as part of a continuing effort to improve the process and eliminate unnecessary delays. Indeed, the Board has amended its representation case procedures more than three dozen times since they were published in the very first volume of the **Federal Register**, 1 FR 207 (April 18, 1936), and has only rarely utilized the Administrative Procedures Act's notice-and-comment rulemaking procedures; most often the Board simply implemented the changes without prior notice or request for public comment.

In fact, the Board has seldom acted through notice-and-comment rulemaking on any subject. The Board typically makes substantive policy determinations in the course of adjudication rather than through rulemaking, a practice that has occasionally drawn the ire of academic commentators and the courts.[10]

The Board has thus asked for public comments on few proposed rules of any kind. A review of prior Board rulemaking procedures reveals that the Board has not held a public hearing attended by all Board Members for at least half a century. In the rulemaking proceedings that resulted in adoption of rules defining appropriate units in acute care hospitals, the Board directed an administrative law judge to hold a series of public hearings to take evidence concerning the proposed rules, but no Board Members participated in the hearings. In fact, even in the course of adjudication, the Board has not held oral argument since 2007 and has held only two oral arguments in the last decade. The last open meeting of the Board, prior to the open meeting on November 30, 2011, to discuss and vote on whether to adopt any of the proposed amendments in a final rule in this proceeding, was held in 1989 and also concerned the acute care hospital bargaining-unit rule.

B. The Process of This Rulemaking

On June 22, 2011, the Board issued a Notice of Proposed Rulemaking. The Notice provided 60 days for comments and 14 additional days for reply comments, and announced a public hearing to be held on July 18 and 19, 2011. The Board issued press releases about the proposals and hearings, and placed summaries, answers to frequently asked questions, and other more detailed information on its Web site (*www.nlrb.gov*).

The Board Members also held two days of hearings in Washington, DC, on July 18 and 19, 2011, where 66 individuals representing diverse organizations and groups gave oral statements and answered questions asked by the Board Members. The purpose of all of these procedures was to give the Board the benefit of the views of the public. In this the Board was quite successful, receiving 65,958 written comments and taking 438 transcript pages of oral testimony.

Nonetheless, a number of comments criticize the Board's process: Some claim there should have been some pre-notice-and-comment notice and opportunity to comment; some criticize the length of the hearing (2 full days), the location of the hearing (Washington, DC), or the timing of the hearing (halfway through the comment period); some criticize the length of the comment periods (60 days plus 14 days).

1. The Pre-NPRM Process

The comment of the Chamber of Commerce of the United States of

[10] See R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, over Policy Prescriptions, at the NLRB,* 5 FIU L. Rev. 347, 351–52 (2010); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act,* 79 Yale L.J. 571 (1970); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking,* 37 Admin. L. Rev. 163 (1985); Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB,* 5 FIU L. Rev. 411, 414–17, 435 (Spring 2010); Kenneth Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication,* 21 UCLA L. Rev. 63 (1973); Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?,* 24 San Diego L. Rev. 9 (1987); Cornelius Peck, *The Atrophied Rulemaking Powers of the National Labor Relations Board,* 70 Yale L.J. 729 (1961); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making,* 117 U. Pa. L. Rev. 254 (1968); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 Harv. L. Rev. 921 (1965); Carl S. Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction,* 25 Lab. L.J. 607 (1974); and Berton B. Subrin, *Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units,* 32 Lab. L.J. 105 (1981); see also *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 295 (1974); *NLRB* v. *Wyman-Gordon* Co., 394 U.S. 759, 764, 770, 777, 779, 783 n.2 (1969). The Portland Cement Association (PCA) contends, as it did in another recent Board rulemaking, that the Board should place these and other law review articles discussed in the NPRM online for the public to read for free on *regulations.gov.* Just as the Board replied in that prior rulemaking, 76 FR 54014, the Board has placed these articles in the hard copy docket, but has not uploaded these articles to the electronic docket because such an action could violate copyright laws. It should also be noted that these materials are generally available in libraries.

America (the Chamber) provides a representative example of criticism of the pre-NPRM process. The Chamber believes that the Board missed ''an opportunity to explore whether a consensus could have been reached'' on the rule among stakeholder groups through forums such as the American Bar Association's Labor and Employment Law Section. The Chamber concedes that stakeholders ''have widely divergent views,'' but argues that a consensus on at least some changes might have been reached. The Chamber suggests that the Board should withdraw the NPRM and publish a more open-ended Advanced Notice of Proposed Rulemaking.

The Chamber cites Executive Order 13563 Section 2(c) (''Improving Regulation and Regulatory Review''), 76 FR 51735, as support. Section 2(c) of the Executive Order states that ''[b]efore issuing a proposed regulation, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected * * *.'' *Id.* In the NPRM, the Board explained the decision to issue a set of specific proposals, rather than a more open-ended Advanced NPRM, by stating that ''public participation would be more orderly and meaningful if it was based on * * * specific proposals.'' 76 FR 36829. The Chamber incorrectly suggests the Board conceded that it violated the Executive Order, and questions whether the comment process actually was more orderly or meaningful. Some other comments suggest that the Board should have engaged in negotiated rulemaking, or that the pre-NPRM process was insufficiently transparent.[11]

The Board continues to believe that it has followed a lawful, fair, and open process that succeeded in eliciting broad and informed public participation to a greater extent than ever before in connection with the Board's representation (or unfair labor practice) case procedures.

An agency generally has discretion over its pre-NPRM procedures, including whether to use advanced NPRMs, negotiated rulemaking, or other pre-NPRM consultation. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519, 543–44 (1978). Moreover, as recognized by the American Hospital Association (AHA), the Board is not directly subject to E.O. 13563, nor is its language pertaining to pre-NPRM procedures mandatory in any event. As explained in the NPRM, in this instance, the Board concluded that beginning the process of public comment by issuing a NPRM would be the most effective method of proceeding.

The course of proceedings since issuance of the NPRM has confirmed the Board's initial judgment. The notice of the two-day public hearing published in the **Federal Register** on June 27, 2011, specifically invited interested members of the public to appear and comment on the proposals set forth in the NPRM and to ''make other proposals for improving representation case procedures.'' 76 FR 37291. Yet at the public hearing, while the Board heard a considerable amount of valuable testimony concerning the specific proposals in the NPRM, it received almost no suggestions unrelated to those proposals. Similarly, in the NPRM, while the Board proposed specific rule language related to most of the problems it identified, in several areas the Board identified a problem or question and invited comment without proposing specific rule language. For example, the Board specifically invited comments on whether the Board should take any action related to the use of electronic signatures in relation to the showing of interest supporting certain forms of petitions. 76 FR 36812, 36819. The Board also specifically invited comments ''on whether any final amendments should include changes in the current blocking charge policy.'' 76 FR 36812, 36827. The NPRM specifically invited comments on whether the Board should change that policy in several respects or leave the policy unchanged. *Id.* While the Board received many meaningful comments on the specific proposals in the NPRM, it received very few comments in response to the more open-ended inquiries, and the comments that were received were less specific and less helpful in analyzing the procedural questions at stake.

The Board also is doubtful about the Chamber's suggestion that a broad consensus might have been reached through a different process. As the Chamber concedes, the labor-management bar is polarized on many of the relevant issues. Given the degree of polarization reflected both at the public hearing and in the comments, the Board continues to believe that following the notice-and-comment procedures set forth in the APA—and thereby giving formal notice of specific proposals to all members of the public at the same time in the **Federal Register** and permitting all members of the public to comment on those proposals through the same procedures and during the same time periods—was the fairest and soundest method of proceeding.

In sum, the Board's pre-NPRM process was lawful and appropriate.

2. The Length, Timing, and Location of the Hearing

The Board Members held a two-day public hearing in Washington, DC, approximately halfway through the initial comment period, i.e., about one month after publication of the NPRM and one month before the initial comment period closed. All Board Members heard five-minute statements from 66 individuals, representing diverse organizations and groups, and then actively questioned the speakers for an additional period of time.[12] This hearing was not legally required.

Some comments compare this proceeding to the hospital unit rulemaking and essentially argue that the Board should have held 14 days of hearings around the country over the course of years.[13] For example, the National Association of Manufacturers (NAM)—and many nearly identical form comments by member companies—claim that the ''relative rush'' of these hearings ''is a departure from past Board practice that will result in both an inadequate opportunity for stakeholders to address the merits of the rules and inadequate information and data for the Board to make a prudential judgment regarding the rules.''

Agencies are not bound to use the same procedures in every rulemaking proceeding. Otherwise, agencies could neither learn from experience, e.g., what rulemaking procedures are helpful and what procedures are simply wasteful, nor adopt procedures suited to the precise question at stake. The procedures the Board has employed in order to obtain public input on proposed rules have, in fact, varied considerably, and the Board has substantial discretion to use procedures suited to the matter under consideration. Indeed, the Board has adopted amendments to its representation case procedures without any notice or opportunity for comment or with opportunities considerably more

[11] See, e.g., joint comment of HR Policy Association and Society for Human Resource Management (collectively, SHRM); Greater Easley Chamber of Commerce; Georgia Association of Manufacturers (GAM).

[12] After the public hearing, the transcript of each speaker's testimony along with any Board questioning of the speaker was made part of the record of the rulemaking as a separate comment. Any such testimony discussed in this final rule is cited as follows: ''Testimony of [name of speaker].''

[13] See, e.g., Coalition for a Democratic Workplace (CDW); Council on Labor Law Equality (COLLE); SHRM. By contrast, scholars have described the Board's procedures in the earlier rulemaking as ''procedural overkill.'' See Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism,* 41 Duke L. J. 274, 319 (1991).

limited than in the instant matter.[14] In contrast to the subject matter of the acute care hospital unit proceeding, the proposals at issue in this proceeding involve a matter uniquely within the Board's own expertise: the operation of the Board's own procedural rules.

The Board believes that the hearing not only exceeded the requirements of the APA, it was fair, appropriate, and useful. Holding the hearing in Washington, DC was appropriate because many of the Board's major stakeholders are either headquartered in DC or are represented by counsel in the city or who frequently appear in the city.[15]

The hearing was also properly noticed and appropriately timed during the initial comment period. The NPRM was published on June 22, 2011, and informed the public that the Board intended to hold a public hearing on July 18 and 19. A subsequent notice published in the **Federal Register** on June 27, 2011 informed the public of the details of the hearing. 76 FR 37291. In fact, the Board accommodated all parties who wished to appear at the hearing, even those whose requests to appear were made after the deadline.[16] That the public notice was sufficient to permit interested parties to appear is evidenced by the fact that 66 individuals appeared at the hearing, representing many major management and labor organizations as well as many other groups. No individual or organization informed the Board that it was unable to participate due to the shortness of time between the June 22 and June 27 notices and the hearing. The two-day hearing was held about a month after the NPRM was published, giving participants adequate time to carefully read the proposal, consult with each other and with clients, and develop detailed positions. And the five minutes that speakers were given was supplemented by substantial time for questioning and the opportunity for written comments. Some speakers gave 2,000 words or more of well-informed testimony during their allotted time. In total, the hearings resulted in more than 400 pages of transcript (promptly made available to the public on the Board's Web site[17]). The Board found that the speakers provided informed, thorough, and thoughtful analysis, and the back-and-forth dialogue with the Board Members demonstrated the wide-ranging familiarity of the speakers with the proposals.

Some comments suggest that the hearing should have been held after the comment period closed so that the speakers could address arguments presented in the written comments. But holding the hearing first made the subsequent written comments more informed, thoughtful, and technically sophisticated, and many commenters, such as the Chamber, took the opportunity to cite extensively from the hearing transcripts for support and to respond to arguments made at the hearing. The Board believes the chosen sequence—the hearing followed by the close of the initial comment period and then the reply period—produced more meaningful public comments than the proposed alternative because written comments are better suited to the technical issues at stake and thus appropriately came after the public hearing.

In sum, the Board believes that the two-day public hearing attended by all Board Members was highly valuable, was of an appropriate length, and was held at an appropriate time and in an appropriate location.

3. The Length and Timing of the Comment Periods

The Board provided an initial comment period of 60 days beginning June 22, followed by a reply comment period of 14 days that ended on September 6, 2011. No late comments were accepted.

COLLE describes the NLRB's comment period as ''the bare-minimum 60-day[s],'' but the APA provides no minimum comment period, and many agencies, including the Board in some recent rulemaking proceedings, have afforded comment periods of only 30 days. The agency has discretion to provide still shorter periods, and is simply ''encouraged to provide an appropriate explanation for doing so.'' Administrative Conference of the United States (ACUS), Recommendation 2011–2 at 3 (June 16, 2011). Indeed, for procedural rules, such as the final rule here, no comment period at all is required.

Sixty days has become the benchmark period for comments on significant substantive rules. *Id.* Countless NPRMs provide 60 days for comments.

Nevertheless, a number of comments opposing the rule assert that the comment period was inadequate. For example, SHRM characterized the comment period as ''hurried, abridged and clandestine.'' But the Montana Chamber of Commerce—though opposing the rule—states that ''[t]his 60-day window seems like a very reasonable timeframe to allow ample comments and statements from all interested parties, whether they are supportive of these sweeping changes or not.''

In practice, the Montana Chamber of Commerce proved correct on this point: 60 days was quite ample. The Board received hundreds of detailed, informed, and thoughtful comments. Many were submitted by the very same parties that asserted the comment period should have been longer, such as the 88-page comment—and hundreds of accompanying nearly identical form comments—submitted by SHRM and its members. The U.S. Chamber states that it needed more time to ''study Board data'' and conduct ''rigorous'' economic analysis. But the Chamber did provide detailed discussions of data and many studies in its comment. Although the desire for additional time to gather additional support and develop arguments is understandable, agencies must set some end to the comment period: ''Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently.'' ACUS 2011–2 at 3.

Fourteen days were given for reply comments. The Chamber suggested that 14 days was insufficient time to review tens of thousands of comments, and noted that some of the comments submitted were not available to the public until some time after the close of the initial comment period. Neither the APA nor any other law requires an opportunity to reply to initial public comments. Moreover, while some comments were not available to the public immediately upon the close of the initial comment period, the comments that were unavailable were largely identical ''postcard comments,'' tens of thousands supporting the proposal in general terms, and tens of thousands opposing the proposal in general terms.[18] And the purpose of the reply period was not to afford interested

[14] In its run-off election rulemaking proceedings, for example, the Board provided only two weeks for comments, with a short hearing on the final day of the comment period. 8 FR 10031–32 (1943).

[15] No party informed the Board that it wished to appear at the hearing but was unable to send a representative to Washington, DC.

[16] The Board did, however, limit organizations to presenting one speaker at the hearing.

[17] The hearing was also streamed live on the Board's Web site.

[18] By August 24, 2011, the day after the close of the initial comment period, 29,236 timely filed initial comments were available electronically for review. The Board believes, based on its staff's investigation, that initial comments that were not available at that time fall into one of three categories: (1) Timely filed form letters submitted by the AFL–CIO, (2) timely filed form letters submitted by Americans for Prosperity or CDW or mailed by individual businesses using a common form, and (3) late-filed comments submitted electronically.

parties an opportunity to read and reply to all of the comments submitted, but to provide an opportunity to read the most significant comments and respond to the arguments raised in them.

This the Chamber and others did quite successfully within the 14 days provided. For example, the Service Employees International Union (SEIU) cited and replied to over twenty unique, detailed, and lengthy comments submitted by other parties. Others, such as the Association of Corporate Counsel (ACC), took the opportunity to focus on elaborating one particular issue of special importance. Both approaches were quite helpful, and served the purpose for which the Board afforded the reply period.

The over 65,000 comments submitted and the depth of analysis they provided are ample testament to the adequacy of the opportunities for public participation in the rulemaking process.

4. The Final Rule

In light of the procedural concerns voiced in some of the comments, it seems likely that some stakeholders will believe that the period of time between the close of the reply comment period and the issuance of the final rule was too short, and that the Board was required to spend additional time considering the comments. This concern is suggested by NAM in its reply comment, stating that ''failure to give due consideration to the public comments would nonetheless render * * * the rules * * * arbitrary and capricious * * *. Absent due consideration of all the comments, the Board would be unable to certify that it has examined and considered all relevant arguments and data.''

In order to allay this concern, the Board assures all those who provided comments that the Board, through its Members personally or staff acting at the Members' direction, read every non-duplicative comment.[19] The comments were coded so that all comments addressing specific issues could be electronically identified. All specific arguments raised in the comments were identified, grouped by subject matter, and analyzed. Through this process, the Board has read and carefully considered every relevant argument, datum, or suggestion in the comments.

Finally, the Board has decided to take additional time to deliberate concerning the majority of the proposals in the NPRM, including many of those that generated the most comments and controversy.

The Board thoroughly considered and deliberated about all substantive comments relevant to the final rule.

Some comments expressed the view that the rulemaking procedure suggested a fait accompli, or created an appearance of favoritism.[20] Any sense of a fait accompli could have mistakenly arisen only from the detailed specificity of most of the proposed amendments, as compared with the open-ended queries concerning several subjects. However, as explained above, the comments addressing the proposals accompanied by proposed rule text and detailed explanation far exceeded in number and quality those addressing the open-ended questions unaccompanied by such specifics, bearing out the Board's judgment that a more specific proposal would promote more useful public participation in the process. And contrary to any suggestion of favoritism, the process was completely transparent and provided multiple opportunities for any member of the public to participate. The process resulted in significant changes to the proposed rule as well as a decision not to proceed with all the proposals at this time. In short, the process was fair, open, and successful.

5. Board Membership

Some comments question whether a divided three-member Board can or should issue a final rule, arguing that the Board lacks the authority to do so or that such action would be contrary to the Board's traditions or otherwise imprudent.[21] Certain comments contend that a Board Member serving a recess appointment may not, or should not, participate in any action that represents a change in Board law or practice.[22] After careful consideration, the Board rejects these arguments.

Under the National Labor Relations Act, a lawful quorum of the Board consists of three Members (out of the five Members provided for by the statute). Section 3(b) of the Act expressly provides that:

> A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board * * *.

29 U.S.C. 153(b). See generally *New Process Steel L.P.* v. *NLRB,* __ U.S. __, 130 S.Ct. 2635, 2639–42 (2010) (analyzing quorum requirement). Rulemaking is one of the ''powers of the Board,'' as Section 6 of the Act provides. See 29 U.S.C. 156. Adoption of the final rule, then, reflects the proper exercise of the Board's powers by the majority of a lawful quorum of three Members.

Nothing in the text of the Act or its legislative history suggests that, even if the Board has a lawful quorum, certain Board powers may be exercised only if approved by at least three Members. Put somewhat differently, there is no statutory basis to argue that a three-Member quorum of the Board must act unanimously—as opposed to acting by majority vote as is typical—in order properly to exercise the Board's powers. During the many periods in which the Board consisted of only three Members, including the period since August 27, 2011, it routinely has issued non-unanimous decisions in adjudicated cases. See, e.g. *Arkema, Inc.,* 357 NLRB No. 103 (Oct. 31, 2011); *Allied Mechanical Services, Inc.,* 357 NLRB No. 101 (Oct. 25, 2011).

The Board does have a tradition of not overruling its own prior decisions through adjudication with fewer than three votes to do so. See *Hacienda Resort Hotel & Casino,* 355 NLRB No. 154, slip op. at 2, 2 n.1 (2010) (concurring opinion of Chairman Liebman and Member Pearce) (listing cases dating to 1985). This tradition—which is not unbroken[23]—is not based on the Act itself, nor has it been codified in a Board rule or statement of procedure.

While the rationale for this tradition does not appear to have been clearly set forth in any Board decision, it was recently articulated by a Federal appellate court. In *Hacienda Resort,* supra—where the Board had deadlocked 2–2 and thus decided the case under existing law, despite a prior court remand directing reconsideration—the U.S. Court of Appeals for the Ninth Circuit reversed the Board's decision, while acknowledging the Board's traditional approach to overruling precedent in adjudication:

> We recognize the Board's interest in protecting the stability of its legal precedent. Unlike other federal agencies, the NLRB

[19] Using electronic means, the Board identified all identical comments and read only one of each group of identical comments. More than 90 percent of the over 65,000 comments were duplicates, near duplicates, devoid of analysis, or irrelevant. In this connection, see ACUS 2011–1 ¶ 1(a)(1): While 5 U.S.C. 553 requires agencies to consider all comments received, it does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments.

[20] See, e.g., CDW; Indiana Chamber of Commerce.

[21] See, e.g., Chamber; SHRM; Associated Builders & Contractors (ABC).

[22] See, e.g., National Grocers Association (NGA); Testimony of Harold Weinrich.

[23] See *Mathews Readymix, Inc.,* 324 NLRB 1005, 1008 n. 14 (1997), *enforced,* 165 F.3d 74 (DC Cir. 1999) (two-member majority overrules precedent); *Service Employees Local 87 (Cresleigh Mgmt.*), 324 NLRB 774, 775 n.3 (1997) (same).

promulgates nearly all of its legal rules through adjudication rather than rulemaking * * *. Under such a scheme, the Board's rules would be of little assistance to employers and unions in following the NLRA if the Board's rules interpreting the Act were subject to routine, frequent change. The Board reasonably has decided that requiring a three-member majority to overturn precedent provides for the necessary stability of its rules, and we defer to that judgment.

Local Joint Executive Bd. of Las Vegas v. *NLRB,* 657 F.3d 865, 872 (9th Cir. 2011).

The Ninth Circuit's statement underscores a critical aspect of the Board's tradition: It has been followed in the Board's adjudication of cases, as opposed to in notice-and-comment rulemaking. The notice-and-comment process of rulemaking does not implicate the same concerns about the stability of legal rules that adjudication does, because it does not permit ''routine, frequent change'' in the words of the court. The greater stability inherent in notice-and-comment rulemaking has been cited by ACUS in recommending increased use of rulemaking by the Board. See ACUS, Recommendation 91–5, *Facilitating the Use of Rulemaking by the National Labor Relations Board* (adopted June 14, 1991), 56 FR 33851 (July 24, 1991).

Whatever its limited legal weight may be, the Board's traditional practice with respect to overruling precedent through adjudication is simply not implicated here for several reasons. The final rule is the product of notice-and-comment rulemaking, not adjudication. Moreover, the final rule reverses no prior Board decisions. It amends rules that themselves are not the product of adjudication, and, indeed, were in large measure adopted without notice-and-comment rulemaking. Finally, the final rule is purely procedural. Procedural rules, governing such subjects as whether parties have a right to file a post-hearing brief, do not implicate the sorts of reliance interests that underlie the Board's tradition. Under all these circumstances, the Board construes its unwritten tradition of not overruling precedent in adjudication absent three votes to not apply here.

In addition, the Board rejects the argument that the presence of a Member serving on the Board under a recess appointment has any bearing on the adoption of the final rule. There is no basis in the Act, in administrative law, or in the Constitution for distinguishing between Members of the Board serving under a recess appointment and Members confirmed by the Senate. The Board itself has no rule, statement of procedure, or tradition that would bar a recess appointee from participating in an adjudication or a rulemaking or that requires some minimum number of Senate-confirmed Members to exercise the Board's powers. Notably, the Board has overruled precedent in cases where the majority consisted entirely of recess appointees. See *MV Transportation,* 337 NLRB 770 (2002). Recess appointees have been essential to a majority vote to overrule precedent in many decisions issued by prior Boards. See, e.g., *Randall Warehouse of Arizona,* 347 NLRB 591 (2006) (two recess appointees among three-member majority); *Dana Corp.,* 351 NLRB 434 (2007) (one recess appointee). If effective administration of the Act is the goal, treating recess appointees as lesser Members of the Board or deferring action until the Board has some particular number of Senate-confirmed Members is untenable.

In sum, the present Board has full authority to adopt the final rule.

6. The Dissent

The final rule has been approved by a two-Member majority of the Board. The Board currently has three Members, a lawful quorum under Section 3(b) of the Act, as explained above.

Member Hayes has effectively indicated his opposition to the final rule by voting against publication of the NPRM and voting against proceeding with the drafting of the final rule at the Board's public meeting on November 30, 2011. Although Member Hayes has not yet supplied a dissent or similar statement in connection with the final rule itself, the Board has authorized the publication of such a document in the **Federal Register**, together with any separate concurring opinion, when they are made available. The Board has delayed the effective date of the final rule so that Member Hayes will have over 90 days after he received a final draft of this final rule to write a dissent and have it published prior to the effective date of the rule. The Board believes that this procedure will provide Member Hayes with a reasonable period of time to express his views in a timely, formal, and public manner.

The Board has no desire to prevent Member Hayes from expressing his views in any manner he deems appropriate. Indeed, the Board has facilitated Member Hayes' expression of a dissenting view in earlier instances of rulemaking, including the initial stage of this proceeding.[24] The Board has also invited and attempted to facilitate Member Hayes' expression of his views to his fellow Board Members through all appropriate means, including at the public meeting on November 30. At the same time, under the circumstances involved in this rulemaking, the Board does not believe that it is required, either by law or agency practice, to delay the adoption and publication of a final rule in order to accommodate a dissenting Member.[25] Nothing in the APA compels that course of action, nor does the National Labor Relations Act demand it.[26]

Neither do the Board's rules, statements of procedure, internal operating procedures, or traditional practices, which do not address the internal process of rulemaking, compel such action. In its 76-year history, the Board—which has interpreted and administered the National Labor Relations Act primarily through adjudication—has engaged in notice-and-comment rulemaking only rarely.[27] The rarity of Board rulemaking explains why the sole internal Board rule establishing a timetable for decision-making addresses only the adjudication of cases. Executive Secretary's Memorandum No. 01–1 (''Timely Circulation of Dissenting/Concurring Opinions''), issued to Board staff on January 19, 2001, provides that a Board decision in an adjudicated case may issue without a dissent if 90 days have passed following the circulation of a majority-approved draft without action by the remaining Board Member or Members. Notably, the Memorandum provides that ''[f]or good cause, the Board has the discretion to allow departure from these procedures on a case-by-case basis.'' Like Memorandum

[24] Member Hayes dissented from the Board's Notice of Proposed Rulemaking (NPRM) in this proceeding, and his dissent was published as part of the NPRM. 76 FR 36812, 36829 (June 22, 2001) (dissenting view of Member Brian E. Hayes).

Member Hayes also dissented from the Board's final rule regarding notification of employee rights under the National Labor Relations Act, and his dissent was published with the final rule. 76 FR 54006, 54037 (Aug. 30, 2011) (dissenting view of Member Brian E. Hayes). Member Hayes had earlier dissented from the NPRM in that proceeding. 75 FR 80410, 80415 (Dec. 22, 2010) (dissenting view of Member Brian E. Hayes).

[25] The Board's decision in this regard is informed by the possibility that after Member Becker's service ends at the end of the current congressional session, no later than January 3, 2012, the Board will be reduced to two Members, and under the Supreme Court's recent *New Process* decision, supra, may be unable to act on the proposed rule for a considerable period of time.

[26] See Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB,* 5 FIU L. Rev. 411, 431 n.102 (2010) (''[T]he APA does not address the possibility of dissents in agency rulemakings, and agencies seem to have widely different practices in this regard.'').

[27] See generally Administrative Conference of the United States, Recommendation 91–5, *Facilitating the Use of Rulemaking by the National Labor Relations Board* (adopted June 14, 1991), 56 FR 33851 (July 24, 1991).

No. 01–1, which superseded them, prior memoranda from the Executive Secretary addressing the circulation of individual opinions by Board Members refer only to the adjudication of cases and make no mention of rulemaking. Rather, the Board has treated each rulemaking proceeding as unique and adopted internal procedures suited to the particular matter. In any event, to the extent that the 90-day period for dissents reflected in Memorandum 01–1 could be regarded as establishing a traditional norm that applies not only to routine adjudication, but also to the rare rulemaking proceedings at the Board, the Board has honored that norm by authorizing a dissent to be submitted and published during the more than 90-day period between publication of the final rule and its effective date.[28]

The notice-and-comment rulemaking process, which the Board has followed in this proceeding, is distinct from adjudication in its iterative nature (a proposed rule, followed by a final rule) and the high degree of public participation it involves. The focus of the process is, in effect, a dialogue between the administrative agency and the public—not an intramural debate between or among agency officials. As explained, the final rule adopted today has been approved by a majority of a lawful quorum of the Board, in full compliance with the APA and other applicable statutes. That action follows both full public participation and extensive internal deliberations by the Members of the Board.

Member Hayes has in no respect been excluded from the rulemaking process. Rather, Member Hayes has had every opportunity to participate in the Board's extensive internal deliberations concerning the final rule and to express his views to the other Members of the Board and to the public. To a highly unusual, indeed, unprecedented and unfortunate, degree, the Board's internal deliberations have become public, although not disclosed by the Board itself. Those communications have already revealed that Member Hayes has been kept fully informed at every significant stage in the conception and development of the final rule (an undertaking of more than one year) and that he has been repeatedly invited to share his views with his fellow Board Members over the course of that process. Member Hayes was briefed on internal proposals to revise the Board's representation case procedures. He was provided with a draft NPRM and was offered a briefing before the NPRM was published (along with his dissent) on June 22, 2011.[29] When the Board held a public hearing on the proposed rule on July 18–19, 2011, Member Hayes attended and actively participated in questioning witnesses. Following the close of the initial public comment period (August 22, 2011) and of the period for reply comments (September 6, 2011), Member Hayes and his staff (which comprises more than 25 attorneys) had access to all public comments filed with the Board as soon as they were filed. When the Board's review and coding of comments began, Member Hayes was invited to have his staff participate. He did not respond to that invitation, and no member of his staff participated in the laborious comment-review process. Nevertheless, Member Hayes was specially provided with copies of those comments considered by the other Members and their senior staff to be the most extensive, detailed, and useful; with computer-generated reports identifying particular issues raised in the comments that had been coded ''most significant'' or ''significant'' by Board staff; with instructions on how to locate any of the more than 65,000 comments on the Board's shared computer system; and with lists of issues raised in the comments grouped by subject matter. On November 30, 2011, the Board held a public meeting to discuss the rulemaking, at which a majority voted to proceed to a final rule. Member Hayes attended, participated fully, and voted against proceeding.

In sum, Member Hayes has been afforded a full opportunity to participate in the deliberative process by which this final rule was developed. While the Board respects any Member's right to disagree and to express that disagreement at appropriate times and in an appropriate form, the Board perceives no basis—in law, in policy, or in tradition—for indefinitely postponing adoption of the final rule and for, in essence, permitting one Member to exercise what would amount to a minority veto over a proper exercise of the Board's rulemaking authority. Such a course of action would be plainly inconsistent with the operation of a multi-member independent agency that is, and always has been, governed by majority vote.

[28] While the Board construes its Memorandum governing its own internal, operating procedures not to apply to rulemaking, it also finds good cause to depart from those procedures in this proceeding in the manner and for the reasons explained in the text.

[29] 76 FR 36812, 36829 (June 22, 2001) (dissenting view of Member Brian E. Hayes).

III. Comments on General Issues

Before turning to comments on specific provisions of the final rule, the Board addresses a number of general issues: (a) The Board's rulemaking authority; (b) the procedural nature of the final rule; (c) the justification for any changes to the rules; (d) employers' opportunity to campaign; and (e) effects on employee representation and the economy.

A. Board Authority To Promulgate Election Rules

The Board's rulemaking authority is well established, as recognized by comments both opposing and supporting the proposed rule. For example, NAM states that ''it is undisputed that the Board has the authority to promulgate rules and regulations,'' and the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) states that ''[t]he NLRB has specific and express statutory authority to engage in rule-making to regulate its election process.''

Congress delegated both general and specific rulemaking authority to the Board. Generally, Section 6 of the National Labor Relations Act, 29 U.S.C. 156, provides that the Board ''shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act * * * such rules and regulations as may be necessary to carry out the provisions of this Act.'' In addition, Section 9(c), 29 U.S.C. 159 (c)(1), specifically contemplates election procedure rules, stating that elections will be held ''in accordance with such regulations as may be prescribed by the Board.''

As the Supreme Court unanimously held in *American Hospital Association* v. *NLRB,* 499 U.S. 606, 609–10 (1991), the Act authorizes the Board to adopt both substantive and procedural rules governing representation case proceedings. The Board's rules are entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843–44 (1984); *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 330 (1946). Representation case procedures are uniquely within the Board's expertise and discretion, and Congress has made clear that the Board's control of those procedures is exclusive and complete. *See NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 290 n.21 (1974); *AFL* v. *NLRB,* 308 U.S. 401, 409 (1940). ''The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the

Board alone.'' *NLRB* v. *Waterman S.S. Corp.,* 309 U.S. 206, 226 (1940); see also *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137 (1971).

In *A.J. Tower,* 329 U.S. at 330, the Supreme Court noted that ''Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representative by employees.'' The Act enshrines a democratic framework for employee choice and, within that framework, charges the Board to ''promulgate rules and regulations in order that employees' votes may be recorded *accurately, efficiently and speedily.'' Id.* at 331 (emphasis added). ''[T]he determination of whether a majority in fact voted for the union must be made in accordance with such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion.'' *Id.* at 333. As the Eleventh Circuit stated:

> We draw two lessons from *A.J. Tower:* (1) the Board, as an administrative agency, has general administrative concerns that transcend those of the litigants in a specific proceeding; and, (2) the Board can, indeed must, weigh these other interests in formulating its election standards designed to effectuate majority rule. In *A.J. Tower,* the Court recognized ballot secrecy, certainty and finality of election results, and minimizing dilatory claims as three such competing interests.

Certainteed Corp. v. *NLRB,* 714 F.2d 1042, 1053 (11th Cir. 1983). As explained above, the final rule is based upon just such concerns, specifically finality and the minimizing of dilatory claims.

Some comments allege that the Board lacks authority to issue these rules.[30] As discussed, the Supreme Court's interpretation of Section 6 clearly forecloses this argument.

In sum, the Board clearly has authority to amend its election rules.

B. The Final Rule Is Procedural

Rules of procedure are exempt from the requirement of notice and comment under the APA. See 5 U.S.C. 553(b)(3)(A). In the NPRM, the Board stated that the ''vast majority of the amendments proposed * * * are procedural in nature, and the Board was not required to proceed by notice and comment with respect to them.'' 76 FR 36812, 36828 (proposed June 22, 2011). But see *id.* at 36830 n. 63 (Member Hayes, dissenting). The final rule is wholly procedural. It does not change any substantive law and does not impose any new substantive rules of conduct on parties.

Moreover, the final rule amends rules of procedure applicable only in representation proceedings that are themselves exempt from the requirements of the APA. See 5 U.S.C. 554(a)(6). For both of these reasons, when the Board promulgated the regulations delegating authority under Section 9 of the Act to its regional directors in 1961, it concluded that the rulemaking provisions of the APA did not apply. See *Wallace Shops, Inc.,* 133 NLRB 36, 38–39 (1961).

C. Purpose of the Final Rule

Some comments received in response to the Board's NPRM argue that the Board failed to present sufficient justification for the proposed amendments. For example, SHRM asserts that the Board ''failed to articulate a legitimate justification for the significant changes set forth in the NPRM'' and that the proposed amendments are therefore arbitrary and capricious.[31] As discussed above, however, the amendments the Board has decided to adopt at this time are designed to streamline Board procedures in order to eliminate wholly unnecessary barriers to the expeditious resolution of questions concerning representation. They thus effectuate employee free choice and safeguard commerce from industrial strife. Furthering these statutory goals constitutes a legitimate and substantial justification for the Board's amendments of its representation case procedures. In addition, the amendments will reduce unnecessary litigation and thus the burdens of litigation both on parties and the Board. Finally, the amendments eliminate duplicative regulations. Furtherance of all of these objectives supports issuance of the final rule.

Numerous comments contend more generally that there is no need for revision of the Board's representation procedures because, as argued by NAM, there is no evidence contradicting the Board's own data showing that the present timeframes for processing representation cases are among the most expeditious in the Board's history, and further that the Board currently meets its own internal time targets for processing representation cases.[32] Both Congress and the Board have sought to improve the efficiency of representation case procedures over time, as discussed in detail in the NPRM. The amendments the Board has chosen to adopt represent a continuation of this incremental process, rather than a radical departure from Board practice as asserted by, for example, the CDW and Associated Builders and Contractors (ABC). Past improvements do not and should not preclude the Board's consideration and adoption of further improvements. Likewise, the current time targets set by the Board's General Counsel for the processing of representation petitions reflect the provisions of the Board's current rules. That the Board seeks to, and does, meet those targets in most instances is irrelevant to whether additional improvements may be made by amending the rules.

Many of these same comments, for example, those of Delhaize America, Associated General Contractors of America (AGCA), Society of Independent Gasoline Marketers of America, Indiana Chamber of Commerce, ABC, and Permanent Solutions Labor Consultants, also cite the rate of union success in elections as evidence that the current procedures are fair and not in need of revision. While the Board has considered these comments, so long as election results accurately reflect employees' free choice, the Board views the results as irrelevant to the question of whether its representation case procedures are fulfilling their statutory purpose as fully and efficiently as possible.

Contrasted with the comments endorsing the current system, primarily from employers and associated groups, comments from various labor organizations, including the AFL–CIO, SEIU, Laborers International Union of North America (LIUNA), and the International Brotherhood of Electrical Workers (IBEW), argue that the current system is subject to manipulation, causing significant pre-election delay and leading to petitions being withdrawn prior to an election in over 35 percent of cases, frustration of employee free choice, and avoidance of Board processes altogether. Many labor organizations cited research finding that a longer period between the filing of a petition and an election permits commission of more unfair labor practices with corresponding infringement upon employee free

[30] See, e.g., Testimony of Harold Weinrich; ACC.

[31] Many comments additionally charge that the Board's motives for issuing the rule are improper in that the Board seeks to act as an advocate for unions (rather than as a neutral overseer of the process), to drive up the rates of union representation, and to ''stack the deck'' against employers in union organizing campaigns. Similar concerns were raised by Member Hayes in his dissent to the NPRM. The Board responds that its reasons for issuing the rule are fully set forth in the NPRM and in this preamble.

[32] This point was also advanced by the AHA; American Council on Education (ACE); COLLE; CDW; Associated Oregon Industries; National Marine Manufacturers Association; The Bluegrass Institute; and the Chamber.

choice, while a shorter period leads to fewer unfair labor practices.[33] The National Employment Law Project (NELP) asserts that low-wage workers are particularly susceptible to pre-election misconduct.

These comments reveal that the stakeholders in the Board's representation process have starkly divergent views of its efficiency and fairness. Labor organizations and employee advocacy groups view significant elements of the representation procedure as largely unsatisfactory, while the comments of individual employers and associated groups such as the GAM, the National Mining Association (NMA), and the PCA consistently assert that the current procedures work well.[34]

The Board, having carefully considered these pointedly contrasting comments, adopts neither position. The final rule is intended to continue the Board's course of incrementally improving its procedures in order to better perform its statutory functions within the framework established by Congress. The final rule is not intended to, and does not, alter the basic representation case procedures. Rather, as explained more fully below, each element of the final rule is intended to correct a specific, identified problem in the current procedures. Indeed, it is the Board's statutory duty to adapt and improve its processes based on experience and that is what the final rule accomplishes.

Other comments acknowledge that the Board's procedures have been subject to misuse in some cases, but suggest that such cases were rare and do not form an adequate basis for the Board's proposals. The National Retail Federation (NRF) and Printing Industries of America, Inc. (PIA), for example, suggest that the rules should be amended only to address the more egregious cases. Relatedly, many comments cite the high rate of voluntary election agreements (reached in over 90 percent of cases), which obviate the need for pre-election hearings, as evidence that the representation case procedures are working well in the overwhelming majority of cases. The Board has considered this view, but has concluded that the eight amendments adopted in the final rule address systemic problems in the representation case procedures, which affect not only contested cases that proceed to a pre-election hearing, but also those cases in which the parties enter into election agreements.

For example, without clear regulatory language giving the hearing officer authority to limit the presentation of evidence to that relevant to the existence of a question of representation, the possibility of using unnecessary litigation to gain strategic advantage exists in every case. That specter, sometimes articulated as an express threat according to some comments,[35] hangs over all negotiations of pre-election agreements. In other words, bargaining takes place in the shadow of the law, and so long as the law, as embodied in the Board's regulations, does not limit parties to presenting evidence relevant to the existence of a question of representation, some parties will use the threat of protracted litigation to extract concessions concerning the election details, such as the date, time, and type of election, as well as the definition of the unit itself. Comments by the United Food and Commercial Workers International Union (UFCW), LIUNA, AFT, NELP, and Retired Field Examiner Michael D. Pearson all point to the impact of that specter of unnecessary litigation on negotiations of pre-election agreements. The temptation to use the threat of unnecessary litigation to gain such strategic advantage is heightened by both the right to take up to seven days to file a post-hearing brief and the 25-day waiting period. Every experienced participant in the Board's representation proceedings who wishes to delay the conduct of an election in order to gain strategic advantage knows that once the hearing opens, at least 32 days (seven days after the close of the hearing and 25 days after a decision and direction of election) will pass before the election can be conducted. The incentive to insist on presenting evidence, even though there are no disputes as to facts relevant to the existence of a question of representation, is thus not simply the delay occasioned by the hearing process, but also the additional mandatory 32-day delay, not to mention the amount of time it will take the regional director to review the hearing transcript and write a decision—a task that has added a median of 21 days to the process over the past decade.

Many comments acknowledge that the expeditious resolution of questions concerning representation is a central purpose of the Act, but argue that the Board did not consider other statutory policies in proposing the amendments.[36] In fact, the Board did do so, both in proposing amendments to its rules in the NPRM and in deciding to proceed at this time with the eight amendments in the final rule. The Board considered the statute as a whole, as well as the various policies underlying its enactment and amendment. Most centrally, the Board considered the statutory requirement that the pre-election hearing be an ''appropriate hearing'' and the parties' constitutional, statutory, and regulatory rights in relation to the hearing. As explained in detail below, the final rule makes the hearing more, not less, ''appropriate'' to its statutory purpose. The final rule also fully respects the procedural rights of the parties. In fact, it permits the parties to fully exercise their procedural rights more efficiently and with less burden and expense. Similarly, the Board considered employees' statutory right under Section 7 to ''bargain collectively through representatives of their own choosing'' and ''to refrain from any or all such activities.'' 29 U.S.C. 157. As explained in detail below, the eight amendments adopted in the final rule do not establish inflexible time deadlines or mandate that elections be conducted in a set number of days after the filing of a petition. The time between petition and election will continue to be determined by whether the parties can reach a pre-election agreement, the scheduling of a hearing, the amount of evidence that must be received in order for the regional director to determine if a question of representation exists, the complexity of the issues and extent of the record the regional director must consider in reaching a decision, and the sound discretion of the regional director in setting an election date. Further, the amendments do not in any manner alter existing regulation of parties' campaign conduct or restrict freedom of speech. The amendments apply with equal force to both union-certification proceedings

[33] John Logan, Erin Johansson, & Ryan Lamare, ''New Data: NLRB Process Fails to Ensure A Fair Vote'' (2011), *http://laborcenter.berkeley.edu/laborlaw/NLRB_Process_June2011.pdf.;* Kate Bronfenbrenner & Dorian Warren, ''The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence'' (2011), *http://iserp.columbia.edu/sites/default/files/working_papers/working_paper_cover_2011-01-final.pdf.;* Kate Bronfenbrenner, ''No Holds Barred: The Intensification of Employer Opposition to Organizing'' (2009), *http://www.epi.org/page/-/pdf/bp235.pdf?nocdn=1;* Commission on the Future of Worker-Management Relations, ''The Dunlop Commission on the Future of Worker-Management Relations: Final Report'' (1994), available at *http://digitalcommons.ilr.cornell.edu/key_workplace/2/*(''Dunlop Commission Final Report''). Some comments, for example, from the Chamber and ABC, question the validity of such studies.

[34] Comments received from individuals largely reflect this divide.

[35] See American Federation of Teachers (AFT); IBEW; LIUNA.

[36] See, e.g., Assisted Living Foundation of America (ALFA); COLLE; SHRM; Seyfarth Shaw.

and union-decertification proceedings. The Board has also carefully considered the possibility that the amendments might somehow reduce the time between the filing of the petition and the election so drastically as to threaten the communication, association, and deliberation needed by employees in order to truly exercise freedom of choice. It has concluded the amendments pose no such risk, as more fully explained below.

Finally, many comments argue that the proposed amendments did not address the most serious causes of delay in Board proceedings. Some comments point to delay in the Board's own adjudication of cases.[37] Other comments point to the Board's blocking charge policy.[38] Of course, an administrative agency, like a legislative body, is not required to address all procedural or substantive problems at the same time. It need not ''choose between attacking every aspect of a problem or not attacking the problem at all.'' *Dandridge* v. *Williams,* 397 U.S. 471, 486–487 (1970). Rather, the Board ''may select one phase of one field and apply a remedy there, neglecting the others.'' *FCC* v. *Beach Communications,* 508 U.S. 307, 316 (1993) (quoting *Williamson* v. *Lee Optical of Okla., Inc.,* 348 U.S. 483, 489 (1955)). ''[T]he reform may take one step at a time.'' *Id.*[39]

The Board is aware that, in too many instances, it has taken too long to decide both representation and unfair labor practice cases. The final rule takes steps to address those delays at the Board level by eliminating pre-election requests for review by the Board and making Board review of all regional directors' post-election dispositions discretionary. The first of the amendments will lead to fewer disputes coming before the Board, because many pre-election disputes will be rendered moot by the election or will be resolved by the parties post-election. It will also often permit the remaining pre-election disputes to be presented to the Board together with any post-election disputes and thus to be disposed of more efficiently. Similarly, making Board review of post-election dispositions discretionary will permit the Board to more promptly, and with less expenditure of time and other resources, dispose of post-election requests for review that do not raise substantial issues meriting Board review. The amendments will thus both directly speed Board processing of representation cases and, by reducing the number of such cases coming before the Board for full review, free Board resources to more promptly decide all cases.

The NPRM specifically asked for comments on various proposed revisions of the Board's blocking charge policy. While the Board received some comments relevant to the matter, it has decided to deliberate further before deciding what, if any, changes should be made in the policy, just as it has decided to deliberate further on many of the other proposals contained in the NPRM. As explained in the NPRM, the blocking charge policy is not codified in the current regulations. Rather, it is the product of adjudication and is described in the non-binding Casehandling Manual. See Casehandling Manual Sections 11730 to 11734.

As explained in section 11730 of the Casehandling Manual, ''The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted.'' There are significant exceptions to the general policy of having a charge ''block'' a petition. See Casehandling Manual Section 11731. Accordingly, the filing of an unfair labor practice charge does not automatically cause a petition to be held in abeyance. Furthermore, ''the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition.'' *Id.* at Section 11730.

Some of the comments that point to blocking charges as a serious source of delay argue that incumbent unions file such charges in order to delay decertification elections.[40] The General Counsel has in place procedures requiring the expedited investigation of blocking charges in an effort to ensure that non-meritorious charges do not delay elections. Under the agency's Impact Analysis system for prioritizing the processing of cases, blocking charge cases are designated as Category III (Exceptional) cases, which have the highest priority and the shortest time goals for disposition. See Casehandling Manual Section 11740. Recent improvement in case processing procedures in some regional offices appears to have contributed, at least in part, to a significant reduction in the number of decertification elections blocked by the filing of unfair labor practice charges. Thus, there were 112 decertification elections blocked by unfair labor practice charges in Fiscal Year (FY) 2007, 100 in 2008, 71 in 2009, 64 in 2010, and just 31 to date in 2011. The Board anticipates that there will be a further reduction in the number of decertification elections blocked by unfair labor practice charges, as well as a more expeditious processing of all blocking charges, as these best practices are adopted more uniformly. Nevertheless, the Board intends to continue to deliberate concerning the proposal to revise the blocking charge policy via rulemaking.

D. The Employer's Opportunity To Campaign

Many comments filed by employers and employer organizations argue that the proposed rule changes in the NPRM would drastically shorten the time between the filing of petitions and elections and thereby effectively reduce employers' opportunity to communicate with their employees concerning whether they should choose to be represented for purposes of collective bargaining. These comments make both legal and policy arguments based on that claim.

But many of these comments address the proposed adoption of amendments that have not been adopted as part of this final rule. For instance, most comments raising these arguments focus on the Board's proposals to: (1) Set pre-election hearings to open seven days from the notice of hearing absent special circumstances; (2) shorten the time period for production of a final voter list from seven days to two days following a regional director's approval of an election agreement or direction of an election; and (3) shorten the time period during which the Board's final notice of election must be posted prior to the election. None of the cited proposals is included in the final rule.

However, to the extent that the concerns about the employer's opportunity to campaign are relevant to the rule changes adopted today, the Board has concluded that the final rule will advance the statutory objective of promptly resolving questions of

[37] See, e.g., NAM; PIA.

[38] See, e.g., AHA; PIA; SHRM; Chamber; CDW; Professor Samuel Estreicher.

[39] These same principles have been applied to administrative action. See, e.g., *United Hosp.* v. *Thompson,* 383 F.3d 728, 733 (8th Cir. 2008) (the equal protection clause does not require the government to attack every aspect of the problem or refrain from regulating at all); *Great American Houseboat Co.* v. *U.S.,* 780 F.2d 741, 749 (9th Cir. 1986) (same).

[40] National Right to Work Legal Defense Foundation (NRTWLDF); Chamber. Between 2001 and 2010, the number of decertification elections conducted annually by the Board has ranged from 246 to 488 while the number of certification elections has ranged from 1,335 to 2,645. Of course, when a union files a petition seeking to be certified as the employees' representative, it can simply withdraw the petition if it does not want the election to take place.

representation without in any way compromising employee free choice or any other statutory mandate or policy.

The final rule simply removes unnecessary barriers to prompt resolution of questions of representation by reducing needless litigation. It does not establish any rigid timelines for the conduct of elections. Under the final rule, how fast an election will occur will vary from case to case, just as it did under the prior rules. Variables affecting the timing will include (as in the past) whether the parties are able to reach a pre-election agreement; the scheduling of the pre-election hearing; the length of the hearing; the number and complexity of the issues the regional director must address in order to determine if there is a question of representation; and the regional director's exercise of discretion, considering the preferences of the parties, in setting the election date. Moreover, the final rule will apply to petitions seeking certification of a new representative, petitions seeking decertification of an existing representative, and employer petitions filed after a union requests recognition.

1. NLRA Section 8(c) and the First Amendment

Many employer comments contend that the rule changes reflected in the NPRM would be inconsistent with Section 8(c) of the Act [41] and the First Amendment.[42] But neither the proposed rule nor the more limited final rule in any way restricts the speech of any party.

Section 8(c) of the Act provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. 158(c). On its face, Section 8(c)'s only purpose is to prevent speech from ''constitut[ing] or be[ing] evidence of an unfair labor practice.'' Accordingly, the Board has repeatedly held that Section 8(c) applies only in unfair labor practice and not in representation proceedings. See, e.g., *Hahn Property Management Corp.,* 263 NLRB 586, 586 (1982); *Rosewood Mfg. Co., Inc.,* 263 NLRB 420, 420 (1982); *Dal-Tex Optical Co., Inc.,* 137 NLRB 1782, 1787 fn. 11 (1962). Because the final rule, which addresses representation case procedures, does not in any way permit the use of speech as evidence of an unfair labor practice, Section 8(c) is not implicated.

Nor does the final rule implicate concerns grounded in the First Amendment. Aside from the accurate statement that speech about unions is protected by the First Amendment,[43] the comments do not appear to argue that the proposed amendments would violate the First Amendment. In any event, neither the proposed nor the final rule restricts speech in any manner. The rule does not eliminate the opportunity for the parties to campaign before an election, nor does it impose any restrictions on campaign speech. As under the current rules, employers remain free to express their views on unionization whenever and as often as they desire, both before and after the petition is filed, so long as they refrain from threats or coercion. As the Supreme Court stated in 1941, ''The employer * * * is as free now as ever to take any side it may choose on this controversial issue.'' *NLRB* v. *Virginia Electric & Power Co.,* 314 U.S. 469, 477 (1941). Likewise, the rule does not impose any new limitations on union speech. Accordingly, the Board's effort to simplify and streamline the representation case process does not infringe the speech rights of any party. The comments do not contend that employers will be prevented from expressing their opinions on unionization, but only that, because there may be less time between petition and election in some cases, employers will have fewer opportunities to express their opinions before the Board concludes its investigation under Section 9. 29 U.S.C. 159. This does not rise to the level of an unconstitutional restriction on speech.

2. Congressional Inaction in 1959

ACC points out that Congress, in enacting the Labor-Management Reporting and Disclosure Act (LMRDA) in 1959, rejected a proposal that would have permitted an election to take place before a hearing when there were no issues warranting adjudication, so long as the election was not held sooner than 30 days after the petition was filed. The proposal, contained in the Senate version of the bill, would have permitted a so-called ''pre-hearing election,'' barred by the 1947 Taft-Hartley amendments to the Act. S. 1555, 86th Cong., 1st Sess. 705 (as passed by Senate, Apr. 25, 1959). The Senate Report on the bill in the prior session suggested that a 30-day period would provide a ''safeguard against rushing employees into an election where they are unfamiliar with the issues.'' S. Rep. No. 1684, 85th Cong., 2d Sess. 27–28 (1958). The House bill, however, never contained a parallel provision, and it was not enacted into law.

Nevertheless, ACC argues that the proposed amendments described in the NPRM are inconsistent with congressional intent because they do not guarantee a minimum of 30 days between petition and election. To the extent that ACC's argument bears on the final rule, the Board rejects it. Report language and statements of individual legislators on a provision that was not enacted in 1959 are entitled to little if any weight in assessing the meaning of legislation adopted in 1935 and amended in 1947. In fact, the Supreme Court has clearly stated that ''failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute'' because a bill can be proposed or rejected for any number of reasons.[44] *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159, 169–70 (2001) (internal quotation marks omitted); see also *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187 (1994). Indeed, the rejection of the proposed amendment would more reasonably be understood as an indication that Congress did not believe a minimum time between petition and election is necessary. However, the legislative history of the LMRDA offers no guidance on why the provision was rejected, and Congress imposed no requirements in the LMRDA or at any other time concerning the length of time that must elapse between petition and election. Accordingly, the Board finds no indication in this legislative history that the final rule is in any way contrary to Congress's intent.

3. The Statutory Policy in Favor of Free Debate

Although it is clear that the proposed amendments implicate neither the First Amendment nor Section 8(c) of the Act, many comments nevertheless suggest that the amendments would leave employers with too little time to effectively inform their employees about the choice whether to be represented by

[41] See, e.g., SHRM; Sheppard, Mullin, Richter & Hampton LLP (Sheppard Mullin); and the National Retail Federation (NRF).

[42] See, e.g., NGA; Waste Connections; ALFA.

[43] *Thomas* v. *Collins,* 323 U.S. 516, 537–38 (1945).

[44] For this reason, the Board declines COLLE's similar suggestion to find relevant Congress' failure to pass the 1978 Labor Law Reform Act, versions of which provided for varying time frames for representation elections.

a union.[45] They contend that the consequences of a union vote are longlasting and could significantly affect employees' livelihoods and careers, and therefore that ensuring that employees have sufficient time to hear from all sides is critical to the statutory objective of ensuring employee free choice.[46] Comments in favor of the amendments contend, on the other hand, that employers can and do communicate their views on unions to employees even before a petition has been filed and will continue to have sufficient time to do so after filing under the proposed amendment. Some of these comments also argue that a lengthy election campaign harms the prospects for successful collective bargaining.[47]

a. *NLRB v. Gissel Packing*

The Supreme Court's decision in *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575 (1969), which upheld the Board's authority to order an employer to bargain with a union that had not been certified as the result of an election, is relevant to this issue. In *Gissel,* the employers argued that the Board could not order an employer to bargain with the union, even when the union's majority support was demonstrated through employees' authorization cards and the employer's unfair labor practices had rendered a free and fair election impossible, because a union could solicit such cards before the employer had an adequate opportunity to communicate with employees. The Court rejected this argument:

> The employers argue that their employees cannot make an informed choice because the card drive will be over before the employer has had a chance to present his side of the unionization issues. Normally, however, the union will inform the employer of its organization drive early in order to subject the employer to the unfair labor practice provisions of the Act; the union must be able to show the employer's awareness of the drive in order to prove that his contemporaneous conduct constituted unfair labor practices on which a bargaining order can be based if the drive is ultimately successful. See, e. g., Hunt Oil Co., 157 NLRB 282 (1966); Don Swart Trucking Co., 154 NLRB 1345 (1965). Thus, in all of the cases here but [one,] the employer, whether informed by the union or not, was aware of the union's organizing drive almost at the outset and began its antiunion campaign at that time; and even in the [one] case, where the recognition demand came about a week after the solicitation began, the employer was able to deliver a speech before the union obtained a majority.

Id. at 603. The Supreme Court has thus recognized that the concern expressed in the comments ''normally'' does not arise even when there is no election and the organizing effort does not proceed beyond the signing of authorization cards.

b. *Chamber of Commerce v. Brown*

The Supreme Court recognized in *Chamber of Commerce v. Brown,* 554 U.S. 60 (2008), that the Act embodies a general ''congressional intent to encourage free debate on issues dividing labor and management.''[48] *Id.* at 68 (quoting *Linn v. Plant Guard Workers,* 383 U.S. 53, 62 (1966) (a defamation case)). Some comments contend that this case demonstrates that the Board must now provide a definite period of time after the petition in which parties can campaign prior to the election. In fact, however, *Chamber of Commerce* v. *Brown* held only that the Act preempted a state law that prohibited the use of state funds to encourage or discourage employees from seeking representation. What the Court suggested in the quoted language is that Congress intended to leave speech concerning labor relations unregulated; in the Court's words, to ''shield a zone of activity from regulation.'' *Id.* The Court concluded that the California law at issue in *Brown* ''indirectly regulate[d] such conduct by imposing spending restrictions on the use of state funds.'' *Id.* at 69. In short, the Court held the state law regulated speech and was thus preempted. The final rule in no way regulates speech. It is fully consistent with congressional intent as articulated in *Brown.*

Even adopting the more expansive view of the statutory policy articulated in *Brown* urged by some comments—that Congress intended not only to insulate and protect speech concerning labor relations, but to affirmatively facilitate such speech—the final rule is fully consistent with that objective as explained below.

c. Employer Pre-Petition Knowledge

Numerous comments contend that any shortening of the time period between the petition and election will be detrimental to employers because employers are often unaware that an organizing campaign is underway until the petition is filed.[49] These comments contend that the union will have had a head start in the campaign because it will, necessarily, have already obtained authorization cards from at least 30 percent of employees in the petitioned-for unit, and will have been able to delay filing the petition for whatever amount of time it believed was advantageous in order to communicate with employees.[50] For example, the Chamber comments that union petitions ''catch[] many if not most employers off guard and ill-prepared to immediately respond * * *'' The Board was presented with no reliable empirical evidence, however, suggesting that employers are frequently unaware of an organizing drive before the filing of a petition,[51] and the Board's experience and recent scholarly research suggest the opposite.

First, Board precedent is replete with cases in which there was clear evidence that the employer was aware of the organizing campaign well before the petition was filed. For example, unions often give the employer formal notice of the campaign before filing the petition, either by demanding recognition or by providing the employer with a list of employees on the organizing committee.[52] In other cases, the employer's knowledge of the campaign is apparent from the fact that the employer committed unfair labor practices targeting employees' organizing activity before the filing of the petition.[53]

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[45] See Chamber; COLLE; SHRM; Seyfarth Shaw; Sheppard Mullin; Baker & McKenzie; John Deere Water; and PIA.

[46] See NGA; Retail Industry Leaders Association (RILA); Society of Independent Gasoline Marketers of America (SIGMA); Ranking Member Michael B. Enzi of the U.S. Senate Committee on Health, Education, Labor & Pensions, and Republican Senators; National Meat Association (NMA).

[47] See AFL–CIO and SEIU.

[48] 554 U.S. 60, 68 (2008).

[49] See, e.g., Chamber; CDW; National Ready-Mixed Concrete Association (NRMCA); Greater Raleigh Chamber of Commerce; Landmark Legal Foundation; and Vigilant.

[50] NGA; NMA. See also Spartan Motors, Inc.; Cook Illinois Corporation; Arizona Hospital and Healthcare Association; Constangy, Brooks & Smith, LLP; Sheppard Mullin; Ranking Member Michael B. Enzi of the U.S. Senate Committee on Health, Education, Labor & Pensions, and Republican Senators; Specialty Steel Industry of North America; International Foodservice Distributors Association; NAM; Chamber; NRTWLDF.

[51] COLLE acknowledges this in its comment.

[52] See, e.g., *Flamingo Hilton-Laughlin,* 324 NLRB 72, 76 (1997) (union informed employer of campaign and committee members on January 26 and filed petition on March 26), enf. granted in part, denied in part 148 F.3d 1166 (DC Cir. 1998); *Keco Industries,* 306 NLRB 15, 16 (1992) (union informed employer of campaign in January and filed petition on October 31); *Mariposa Press,* 273 NLRB 528, 533 (1984) (union informed employer of campaign on September 25 and filed petition on October 6); Comet Corp., 261 NLRB 1414, 1418, 1422 (1982) (union informed employer of campaign and committee members on July 23 and filed petition on August 23); *Quebecor Group, Inc.,* 258 NLRB 961, 964 (1981) (union informed employer of campaign on November 17 and filed petition on November 28).

[53] See, e.g., *Ryder Truck Rental,* 341 NLRB 761, 765 fn. 9, 766–67 (2004) (petition filed in December; in November, employer invited employees to report any harassment by union), enfd. 401 F.3d 815 (7th Cir. 2005); *Dlubak Corp.,* 307 NLRB 1138, 1141, 1147 (1992) (threats and discriminatory discharges occurred October 5–13; petition filed October 24),

An empirical study conducted by Professors Kate Bronfenbrenner and Dorian Warren (and submitted with their comment) casts further doubt on the contention that employers are frequently unaware of a union campaign until the petition is filed.[54] The study concluded that in 47 percent of cases involving serious unfair labor practice allegations against employers that resulted in a settlement or a Board finding that the law was violated, the alleged unlawful conduct occurred before the petition was filed; in 60 percent of cases involving allegations of interrogation and harassment, the conduct occurred before the petition; and in 54 percent of cases involving allegations of threats and other coercive statements, the conduct occurred before the petition. Professor Warren testified at the public hearing that the researchers' review of the files in these cases indicated that the conduct resulting in the charge, whether it was actually unlawful or not, evidenced the employer's knowledge of the organizing campaign. Critics of the study contend that it inappropriately focuses on mere allegations of misconduct and that the category of ''charges won'' inappropriately includes settlements. The importance of the study's findings for present purposes, however, does not rest on whether or not the charges had merit, but rather on the fact that they were filed based on pre-petition conduct and that available information in the case files suggests the employer had pre-petition knowledge of the organizing campaign. The study's findings in that regard are consistent with the Board's experience, and no contrary study relying on empirical evidence was presented to the Board.

d. Employer Communications in the Absence of a Campaign

The foregoing authority casts doubt on the contention that ''many if not most'' employers are unaware of an organizing drive prior to the filing of a petition. But even in the absence of an active organizing campaign, employers in nonunionized workplaces may and often do communicate their general views about unionization to both new hires and existing employees.[55] Some comments suggest that, prior to receiving a petition, employers pay little attention to the issue of union representation, and that general efforts to inform and persuade employees about unionization in the absence of a petition would be time-consuming and expensive.[56] Although some employers may choose not to discuss unionization until a petition is filed, the Board's experience suggests that other employers do discuss unionization with their employees beforehand, often as soon as they are hired.[57] For example, some employers distribute employee handbooks or show orientation videos to all new employees that express the employer's view on unions or its desire that employees remain unrepresented.[58]

Several comments contend that an employer's general ability to communicate with employees regarding unions is not a complete substitute for the ability to communicate regarding a specific petition and a known petitioner.[59] The Board concludes that the opportunity for generalized communications together with the opportunities that will continue to exist post-petition under the final rule will ensure employee free choice even in those cases where employers are unaware of the organizing drive until the petition is filed.

Finally, even in the absence of any pre-petition campaign, employees have experience with the existing labor-management regime in their workplace, which informs their choice of whether to alter it. In unionized workplaces in which the incumbent union faces a decertification petition or a rival union petition, the incumbent union will be appropriately judged by its performance to date. Thus, eligible voters have a preexisting base of knowledge and experience with which to evaluate the incumbent. The same is true in workplaces where employees are unrepresented. Employees there have experience with labor-management relations in the absence of union representation. In both cases, employees base their choice, at least in part, on the relationship they are being asked to change.

e. Post-Petition Communication

Although the Board has concluded that the record does not establish that pre-petition employer ignorance of an organizing campaign is the norm, the Board accepts that, in at least some cases, employers may, in fact, be unaware of an organizing campaign until a petition is filed. For example, COLLE cites union campaign strategy

enfd. mem. 5 F.3d 1488 (3d Cir. 1993); *Spring City Knitting Co.,* 285 NLRB 426, 432, 449, 450, 456 (1987) (unfair labor practices occurred March 1, 14, and 29; petition filed May 3); *Well-Bred Loaf, Inc.,* 280 NLRB 306, 308, 317 (1986) (threats, interrogation, and unlawful discharges occurred August 22 and 23, at a time when union activity was already common knowledge; petition filed October 6); *Dilling Mechanical Contractors,* 318 NLRB 1140, 1143, 1156 (1995) (union informed employer of campaign on January 4, but employer had threatened employees with discharge in December if they engaged in union activity), enfd. 107 F.3d 521 (7th Cir. 1997), cert. denied 522 U.S. 862 (1997).

[54] The study was based on a random sample of 1,000 elections during the period 1999 through 2003 and a survey of 562 campaigns from that sample. See Bronfenbrenner & Warren, *supra* at 2.

[55] See comments of John Logan, Ph.D., Erin Johansson, M.P.P., and Ryan Lamare, Ph.D.; Center for American Progress Action Fund.

[56] Fox Rothschild LLP; NMA; NRF.

[57] SHRM suggests that the proposed rule will cause more employers to express their views on employee representation prior to active campaigns. Given the number of petitions filed each year, the Board does not view this as likely. In any event, such expressive activity is consistent with the Act so long as it does not convey a threat or promise of benefit.

[58] See, e.g., *U-Haul Co. of California,* 347 NLRB 375, 378 (2006) (employee handbook, distributed to all new employees, included a section entitled, ''What about Unions?''; the section stated the employer's preference to be union-free and asserted that employees do not need a union or outside third party to resolve workplace issues); *SNE Enterprises,* 347 NLRB 472, 473 (2006) (employee handbook stated, ''The Company believes a union is not necessary and not in the best interest of either the Company or its Team Members.''), enfd. 257 Fed. Appx. 642 (4th Cir. 2007); *Overnite Transportation Co.,* 343 NLRB 1431, 1455 (2004) (employee handbook stated: ''It is important for you to know that the Company values union-free working conditions. We believe that true job security can come only from you and the management of this company working together in harmony to produce a quality product. A union-free environment allows this kind of teamwork to develop.''); *MEMC Electronic Materials, Inc.,* 342 NLRB 1172, 1188 (2004) (employee handbook stated that remaining ''union-free'' is an objective of the company); *Noah's New York Bagels,* 324 NLRB 266, 272 (1997) (section of employee handbook entitled ''Unions'' states: ''At Noah's Bagels we believe that unions are not necessary. We believe this for many reasons[.] First, there is no reason why you should have to pay union initiation fees, union dues, and union assessments for what you already have * * * Second, there is no reason why you or your family should fear loss of income or job because of strikes or other union-dictated activity. Third, we believe that the best way to achieve results is to work and communicate directly with each other without the interference of third parties or unions * * * The Federal government gives employees the right to organize and join unions. It also gives employees the right to say 'no' to union organizers and not join unions. Remember, a union authorization card is a power of attorney which gives a union the right to speak and act *for* you. If you should be asked to sign a union authorization card, we are asking you to say 'no.' ''); *American Wire Products,* 313 NLRB 989, 994 (1994) (employee handbook states, ''Our Company is a non-union organization and it is our desire that we always will be''; the same section also requests employees to direct union-related questions to a supervisor); *Heck's, Inc.,* 293 NLRB 1111, 1119 (1989) (employee handbook's ''Union Policy'' read: ''As a Company, we recognize the right of each individual Employee, their freedom of choice, their individuality and their needs as a worker and a fellow human being. For these reasons and others, we do not want any of our Employees to be represented by a Union * * * When you thoroughly understand Heck's liberal benefit programs, the desire to assist you in your job progress and willingness to discuss your job-related problems, you surely will agree there is no need for a union or any other paid intermediary to stand between you and your company.'') Thus, employees may be well aware of their employer's opposition to unions even before any campaign begins.

[59] See SHRM; COLLE; NAM; Seyfarth Shaw; and ALFA.

documents that allegedly call for ''stealth'' campaigns. In such cases, the union may indeed have a ''head start'' in the campaign, in the sense that it begins communicating its specific message to the unit employees before the employer does so.[60]

In relation to the opportunities for post-petition communication, the Board notes initially that the final rule will apply to decertification elections as well as certification elections, and therefore that incumbent unions will suffer the same disadvantages in relation to a petitioner as will employers.[61] In fact, because unions typically do not have any on-going presence in the workplace, incumbent unions are much less likely to know about the circulation of a decertification petition than employers are to know about a union organizing drive.[62]

The Board finds, moreover, that as a general matter, employers are able to communicate their message to employees quickly and effectively. The median bargaining unit size from 2001 to 2010 was 23 to 26 employees. Given this relatively small size, effective communication with all voters can be accomplished in a short period of time.[63] In addition, some provisions of the Board's rules give a ''head start'' to the employer that, in the Board's view, more than counterbalances any perceived union advantage. For instance, under extant precedent, not altered by the final rule, the employer is not required to provide the union with the names and addresses of eligible voters until seven days after the Regional Director approves the parties' election agreement or issues a Decision and Direction of Election. After the filing of the petition and until that time—which, in contested cases over the last decade, is often at least six weeks—the employer is in many cases the only party that knows who all the eligible voters are likely to be and how to contact them. In addition to having a record of eligible employees' names, phone numbers, and email addresses, the employer knows their work locations and work schedules. Even after it provides the eligibility list to the other parties, the employer often remains the only party with access to all employees' contact information other than their home addresses.

Moreover, as noted in the testimony of Professor Joseph McCartin, the employer has unlimited access to employees during every workday and has the ability to compel employees to attend meetings on working time at the employer's convenience.[64] The employer can also communicate its views to employees while they are working, even in settings where the employees have no choice but to listen. See, e.g., *Frito Lay, Inc.,* 341 NLRB 515, 515 (2004) (''In the 2 months between the filing of the petition and the election, the Employer wanted to provide an opportunity for the employees to obtain information relevant to the drivers' upcoming voting decision. Because the Employer's ability to communicate with its drivers at the facility was constrained, the Employer sent 'guests' along on their runs to provide information and answer any questions the drivers might have. These 'ride-alongs' averaged approximately 10–12 hours, due to the length of the drivers' day runs, and each truckdriver averaged approximately 3 ride-alongs in the 2 months before the election.''). In fact, the employer can even compel such attendance outside employees' normal work hours and locations. See, e.g., *Curtin Matheson Scientific,* 310 NLRB 1090, 1090 (1993) (employer required employees to attend campaign meeting in hotel); *Ideal Elevator Corp.,* 295 NLRB 347, 351 (1989) (employer required all employees to attend meeting after working hours to listen to its president's speech).[65] Under current law, such compelled attendance at meetings at which employees are often expressly urged to vote against representation is generally neither objectionable nor an unfair labor practice.[66] The employer may require individual employees or small groups to attend such meetings at any time up until employees enter the polling area or

[60] See also comment of RILA, contending that ''stealth campaigns'' are common in the retail industry.

[61] SEIU argues that the time frames in the proposed amendments should not apply in cases involving decertification petitions, because employers can withdraw recognition in certain circumstances without having to go through the election process. To the extent that SEIU's comment is still relevant to the limited changes implemented by the final rule, the Board disagrees. Employers can also voluntarily recognize unions as the collective-bargaining representatives of their employees without going through the election process, yet the Board has a duty to expeditiously resolve questions concerning representation when employers will not voluntarily recognize unions. Thus, the NLRA provides a means for employees to engage in collective bargaining with their employer even if their employer would prefer not to do so. Similarly, the NLRA does not require employees to depend on their employer to end unwanted representation. The Board takes seriously its responsibility to expeditiously resolve questions concerning representation in the decertification context just as in an initial organizing context.

[62] Cf. *United Kiser Services,* 355 NLRB No. 55, slip op. at 1 (2010) (union representative only visited the represented shop four times over 17-month period); *Moeller Bros. Body Shop,* 306 NLRB 191, 191 (1992) (union official ''rarely'' visited respondent's body shop, including every three years for contract renewal negotiations); *Pullman Bldg. Co.,* 251 NLRB 1048, 1051–52 (1980) (union official visited worksite to commence investigation only after receiving complaint that employer was violating labor agreement), enfd. 691 F.2d 507 (9th Cir. 1982).

[63] RILA and NRF argue that sufficient time to campaign is particularly critical in the retail industry, where employees work on different shifts, often are seasonal or part-time, are less accessible during the workday because they are on the sales floor, and often are unavailable outside normal working hours due to other commitments. NRF contends, however, that more than 98 percent of all retailers employ fewer than 100 workers, and RILA contends that most petitions seek elections in single-store units and that front-line managers typically constitute 10 to 20 percent of the workforce in each store.

NRMCA makes a similar argument that its industry has unique features such as isolated plant locations, unpredictable delivery hours, and dispersed employees. But it, too, states that the vast majority of employers in the industry are small businesses. Therefore, most bargaining units in the retail and ready-mixed concrete industries are likely to be quite small, which should enable employer communication to take place in a relatively short period of time and, certainly, much more easily than union communication because unions often lack knowledge of all work locations, employee shifts and hours, and even the identity of all employees. In addition, as explained in the text, under extant precedent, these employers (and others) can require all employees to attend a meeting or multiple meetings outside their normal work hours, in a central location, in order to ensure they receive the employer's message prior to the election.

[64] A 1990 study of over 200 representation elections found that employers conducted mandatory meetings prior to 67 percent of the elections. John J. Lawler, Unionization and Deunionization: Strategy, Tactics, and Outcomes 145 (1990). A more recent study found that in 89 percent of campaigns surveyed, employers required employees to attend so-called ''captive audience'' meetings during work time and that the majority of employees attended at least five such meetings during the course of the campaign. Bronfenbrenner & Warren, *supra* at 6.

[65] The Board found the conduct at issue in these cases unlawful or objectionable for reasons unrelated to the time or location of the required meetings. Requiring employees to attend such campaign meetings outside their normal work hours without full compensation may constitute objectionable conduct. See *Comet Electric,* 314 NLRB 1215, 1216 (1994).

[66] See, e.g., *F.W. Woolworth Co.,* 251 NLRB 1111, 1113 (1980) (employer's attempt to further its campaign by conducting a mandatory meeting and by declaring that no questions would be answered in the course thereof was not unlawful), enfd. 655 F.2d 151 (8th Cir. 1981), cert. denied 455 U.S. 989 (1982); *Litton Systems, Inc.,* 173 NLRB 1024, 1030 (1968) (adopting the decision of the administrative law judge, who concluded: ''An employee has no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management's noncoercive antiunion speech designed to influence the outcome of a union election.''); *S & S Corrugated Paper Machinery Co., Inc.,* 89 NLRB 1363, 1364 (1950) (''the 'captive audience' aspect of the Employer's speeches, otherwise protected by Section 8(c) of the amended Act, cannot form the basis for a finding that the Employer * * * *has interfered with the employees' free choice of a bargaining representative''); *Fontaine Converting Works Inc.,* 77 NLRB 1386, 1387 (1948) (employer did not violate the Act by ''compelling its employees to attend and listen to speeches on company time and property'').

are waiting in line to vote.[67] Thus, for example, the Board has held that it is not objectionable for an employer's highest ranking officials to proceed systematically through the workplace less than 24 hours before a vote, urging each individual employee at his or her work station to vote against representation. See *Electro-Wire Products, Inc.* 242 NLRB 960, 960 (1979); *Associated Milk Producers, Inc.,* 237 NLRB 879, 880 (1978). Modern communications technology available in many workplaces permits employers to communicate instantly and on an on-going, even continuous basis with all employees in the voting unit. See, e.g., *Virginia Concrete Corp.,* 338 NLRB 1182, 1182 (2003) (employer sent ''Vote No'' message to ''mobile data units'' in employees' trucks in the final 24 hours before an election).[68] One classic empirical study of representation elections found that ''the employer who uses working time or premises to campaign against the union and denies those facilities to the union effectively communicates with a substantially greater proportion of the employees than does the union.'' Julius G. Getman et al., ''Union Representation Elections: Law and Reality'' 156 (1976). Because those who attend union meetings tend to already be union supporters, the employer, which can convene meetings of *all* employees on working time, ''has a great advantage in communicating with the undecided and those not already committed to it.'' *Id.* at 156–57.

In addition to the employer's earlier, more complete knowledge of voters' identity and whereabouts and ability to convene employees inside and outside the workplace during work and non-work time to campaign, the Board's usual practice is to hold the election itself ''somewhere on the employer's premises,'' unless there is ''good cause'' to do otherwise.[69] Because employers can ordinarily bar union representatives from their property,[70] this practice permits employers to campaign actively among employees on election day while barring the union from doing the same. Thus, the employer not only has greater access to employees throughout the representation process, but also ordinarily has the ''last word'' on election day. The Board has recognized that having the ''last, most telling word'' is a significant advantage in elections. *Peerless Plywood,* 107 NLRB at 429.

For these reasons, the Board does not believe that any reduction of the time between petition and election that results from the final rule will be unfair to any party or infringe on employee free choice.[71]

f. The Current Median Time of 38 Days

Many comments contend that there is no reason to adopt the proposed amendments because the current median time period between petition and election is 38 days. That time period, however, is simply a historical fact, and does not represent a considered judgment on the optimal duration of a campaign. It is not the result of a deliberate choice by Congress or any prior Board.

Moreover, because the 38 days is a median, the actual time from petition to election varies greatly from one case to another. By definition, a median of 38 days means that, in half of all cases, the time between petition and election is longer than 38 days. Most importantly for present purposes, the median time between petition and election in cases that proceed to hearing (the only cases directly affected by the final rule) has varied between 64 and 70 days over the past five years.

As explained in the NPRM, the current median reflects prior reforms enacted by Congress and adopted by the Board altering the procedures for resolving questions of representation. See 76 FR at 36813–14. Each of those changes had the effect of shortening the time period between the filing of the petition and the holding of an election. Thus, the length of the so-called ''critical period'' has never been static, and prior changes have not proven to be detrimental to employee free choice.

In other words, the current median period between petition and election is tied to factors having nothing to do with informing employees about unionization. To the extent current procedures impair the Board's ability to expeditiously resolve questions of representation and are not necessary to the fair and accurate performance of the Board's statutory duties to determine if a question of representation exists and, if so, to direct an election in order to answer the question, the Board has concluded that the procedures should be amended.

g. Other Issues Affecting the Appropriate Time Period between Petition and Election

Some comments, including that of Professor Samuel Estreicher, suggest that the employer needs sufficient time not only to campaign, but to retain counsel so that the employer understands the legal constraints on its campaign activity and does not violate the law or engage in objectionable conduct.[72] A number of comments specifically argue that any compression of the time period between the petition and election will be particularly difficult for small businesses, which do not have in-house legal departments and may not have ready access to either in-house or outside labor attorneys or consultants to counsel them on how to handle the campaign.[73] Similarly, some comments suggest that, to the extent the amendments result in a shorter period of time between the petition and the election, they will increase objections and unfair labor practice litigation, because employers will not have an opportunity to train managers on how to avoid objectionable and unlawful conduct. See Con-way Inc.; Bluegrass Institute; ATA.[74]

The Board believes that most of the rules governing campaign conduct are matters of common sense that are intuitively understood by employers and employees—the prohibition of threats and bribes, for example. Moreover, when the petition is served on the employer by the regional office, it is accompanied by a Notice to Employees, Form NLRB 666, which sets forth in understandable terms the central rules governing campaign conduct. In any event, the Board does not believe that any shortening of the

[67] An exception exists for ''massed assemblies,'' which are prohibited during the 24 hours before the election under *Peerless Plywood,* 107 NLRB 427, 429 (1953).

[68] As described in the NPRM, the Board's experience suggests employers are also increasingly using email to send campaign communications to their employees. 76 FR 36812, 36820 (June 22, 2011).

[69] See Casehandling Manual Section 11302.2.

[70] See *Lechmere, Inc.* v. *NLRB,* 502 U.S. 527, 538 (1992); *NLRB* v. *Babcock & Wilcox* Co., 351 U.S. 105, 112 (1956).

[71] The bipartisan Commission on the Future of Worker-Management Relations, U.S., concluded as follows after extensive study in 1994: ''The Commission believes the NLRB should conduct representation elections as promptly as administratively feasible. * * * Each side would continue to have ample time to express its views if the process were much shorter.'' Dunlop Commission Final Report, *supra* at 41.

[72] See also testimony of former Board Member Marshall Babson (emphasizing that the rules must balance the various competing interests).

[73] NRMCA; Indiana Chamber of Commerce; National Automobile Dealers Association; T&W Block Company; York Society for Human Resource Management; National Marine Manufacturers Association; Council of Smaller Enterprises; Bluegrass Institute; Landmark Legal Foundation; American Trucking Associations; testimony of Steve Jones; American Fire Sprinkler Association.

[74] Other comments, however, cite evidence indicating a positive correlation between the length of a campaign and unfair labor practice allegations. See SEIU; NELP; Ranking Member George Miller and Democratic Members of the U.S. House of Representatives Committee on Education and the Workforce; John Logan, Ph.D., Erin Johansson, M.P.P., and Ryan Lamare, Ph.D. See also testimony of Professor Ethan Daniel Kaplan (citing similar results from a study in Canada).

time between petition and election that results from the final rule will impair employers' ability to retain counsel in a timely manner.[75] In this regard, Russ Brown, an experienced labor-relations consultant, testified at the public hearing that his firm routinely monitors petitions filed in the regional offices and promptly offers its services to employers named in those petitions. In general, the well-documented growth of the labor-relations consulting industry undermines the contention that small businesses are unable to obtain advice quickly. Comments, such as the one cited above, indicate that it is a routine practice for labor-relations consultants to monitor petitions filed with the regional offices, so that the consultants may then approach the employers to offer their services.[76]

Other comments propose that the Board set a minimum number of days between the petition and the election. Cook-Illinois Corporation suggests a minimum of 21 days, subject to expansion or contraction by agreement of the parties. The Heritage Foundation proposes a minimum of 40 days.[77] In contrast, Professor Samuel Estreicher stated that he would not favor specifying a particular time period within which the election must be held. No such minimum exists in the Act or under the current rules.

For the same reasons that the Board has not set a maximum number of days between the petition and the election, it has declined to set a minimum. Congress provided that the Board should conduct ''an appropriate hearing upon due notice'' and determine if a question of representation exists prior to directing an election, but did not otherwise specify when the Board should conduct the election. Under the amended rules, as under the existing rules, the time it will take for the Board to perform that statutory function will vary. The Board believes that its duty is to perform its statutory functions as promptly as possible consistent with employee free choice. The Board has amended its rules in order to facilitate that objective, but even under the amended rules, which leave the ultimate decision about the setting of the election date within the sound discretion of the regional director after consultation with the parties, the Board does not believe it is likely or even feasible that it could perform its statutory functions in such a short period, and a regional director would set an election so promptly, that employee free choice would be undermined. The Board has thus decided to maintain the current practice of not setting either a maximum or a minimum number of days between petition and election via its rules.

Citing Member Hayes's dissent from the NPRM, some comments suggest that the amendments will provide for elections in as little as 10 days after the filing of the petition.[78] But neither the proposed amendments nor the more limited final rule contains any such requirement and, in practice, the final rule cannot lead to elections taking place within 10 days of the petition in a contested case. Moreover, the Board believes it is highly unlikely that, in any significant number of cases, the required procedural steps will be taken so quickly that a regional director could even have discretion to schedule an election close to 10 days after the filing of the petition.[79]

The Board discounts the argument made in some comments that the proposed rule improperly fails to give the employer sufficient time to refute unrealistic promises or ''correct any mischaracterizations or errors'' by union organizers.[80] For three decades, Board law has been settled that campaign misstatements—regardless of their timing—are generally insufficient to interfere with an election, unless they involve forged documents that render employees unable to evaluate the statements as propaganda. See *Midland National Life Insurance Co.,* 263 NLRB 127, 132 (1982) (noting that employees are capable of ''recognizing campaign propaganda for what it is and discounting it''). The Midland rule applies even if the misrepresentation takes place only a few days before the election. See, e.g., U-*Haul Co. of Nevada, Inc.,* 341 NLRB 195, 195 (2004) (document circulated by union two days before election did not amount to objectionable misrepresentation under *Midland*).

The Board also rejects the argument of Vigilant that a shorter period between petition and election will result in a greater number of mail-ballot elections and an accompanying increase in the potential for fraud and coercion. Nothing in the proposed or adopted rules alters the standard for determining when an election should be conducted by mail ballot. A regional director's determination of whether an election should be held manually or by mail is not informed by the number of days between the petition and the election. Rather, it is based on factors such as the desires of the parties and whether employees are ''scattered'' due to their geographic locations or work hours and whether there is a strike, lockout, or picketing in progress. See *San Diego Gas & Electric,* 325 NLRB 1143, 1145 (1998); Casehandling Manual Section 11301.2.

Baker & McKenzie contends that, to the extent the amendments will result in elections being held within 10 to 25 days after the petition, they are inconsistent with the Board's other notice provisions, which provide longer periods. For example, Baker & McKenzie notes that a respondent must post a remedial notice in an unfair labor practice case for 60 days or longer, and that the Board recently promulgated a

[75] Ranking Member Michael B. Enzi of the U.S. Senate Committee on Health, Education, Labor, and Pensions and Republican Senators assert that employers will significantly limit their use of legal counsel during organizing campaigns due to the Department of Labor's recent NPRM interpreting the advice exemption to the ''persuader'' disclosure requirement under the Labor-Management Reporting and Disclosure Act. See 76 FR 36178 (proposed June 21, 2011). However, the DOL's stated goal is publicizing the interactions between employers and covered entities, not stopping those interactions from taking place. See *id.* at 36182, 36190. In any event, the Board views such concerns as more properly directed to the DOL. The Board also wishes to make clear that—contrary to COLLE's suggestion—its actions have been in no way influenced by any actions of the DOL.

[76] See testimony of Russ Brown of the Labor Relations Institute (LRI), noting that the Labor Relations Institute's Web site ''is probably one of the leading sources of keeping up with just about every scrap of paper you guys push.'' The Web site, www.lrionline.com, includes a section entitled ''union avoidance'' and advertises online libraries that include a ''daily petition library'' with ''supplemental petition information available daily'' and an ''organizing library'' tracking ''union organizing activity.'' See also testimony of Michael D. Pearson, former field examiner (noting that consultants check the public filings of RC petitions on a daily basis to solicit business from employers); testimony of Professor Joseph McCartin (noting that a ''thriving industry of consultants has emerged'').

[77] CDW draws an analogy to the Older Workers Benefit Protection Act, 29 U.S.C. 626, which provides 45 days for employees to sign releases regarding age discrimination claims. CDW argues that this provision demonstrates the impropriety of forcing employees to make a decision on representation in less time than the current 38-day median. The Board does not find it instructive to compare an individual employee's permanent waiver of rights under a completely different statutory scheme with the election procedures at issue here involving groups of employees and, typically, an active campaign by several parties.

[78] See Chamber; COLLE.

[79] Even assuming that an election were to occur close to 10 days after the petition, under existing precedent, the union is only entitled to obtain the *Excelsior* list 10 days before the election. See *Mod Interiors,* 324 NLRB 164, 164 (1997); Casehandling Manual Section 11302.1. Thus, existing Board precedent contemplates that a union may only have the ability to contact all eligible voters for 10 days.

[80] Vigilant; Indiana Chamber of Commerce; John Deere Water; PIA; Greater Raleigh Chamber of Commerce; NMMA; Associated Oregon Industries; NAM; testimony of Michael Prendergast. T&W Block Company makes a related argument, contending that the failure to allow sufficient time would destabilize labor relations because employees would enter bargaining with unrealistic expectations.

rule requiring employers to continuously post in the workplace a notice of employee rights under the Act. The Board does not agree that these other posting requirements are in any way inconsistent with the final rule. The notice postings required by the Board serve different purposes in different contexts—to inform employees of their general rights or to alleviate the impact of unlawful acts by an employer or union, rather than to communicate about a specific petition in a specific unit. Moreover, the time reasonably necessary for employees to obtain the message from a posted notice, and for that message to dissipate the effects of unfair labor practices, is different from the time needed for employees to receive information from employers and unions actively campaigning for their support. Finally, the existing notice-posting provision for elections, which is not altered by the final rule, requires that the notice be posted for only three days before the election. See NLRB Rules and Regulations Section 103.20(a). The Board thus rejects the ''one size fits all'' suggestion for time periods under the Act.

In addition to arguing that the rule fails to give employers sufficient time to deliver their campaign message, some comments contend that the rules do not give employees sufficient time to receive and evaluate that message and, if they so choose, to organize themselves to oppose union representation.[81] The comments argue that the final rule therefore runs afoul of the Act's policies of protecting employees' right to ''full freedom of association'' and ''encourag[ing] free debate'' on labor issues. 29 U.S.C. 151; *Chamber of Commerce* v. *Brown,* 554 U.S. at 68. They further argue that the final rule violates employees' Section 7 right to refrain from union activity, because this right ''implies an underlying right to receive information opposing unionization.'' *Chamber of Commerce* v. *Brown,* 554 U.S. at 68.

As explained above in the discussion of Section 8(c) and the First Amendment, *Chamber of Commerce* v. *Brown* did not involve the question of the appropriate time period between a petition and election, nor did the Court's general observations regarding speech indicate that any particular period of time is necessary for employees to receive information about the union. And the procedural rule adopted here does not police speech or limit employees' freedom of association. It also will not, as explained above, cause such a significant reduction in the time employers have to campaign or employees have to process campaign messages and organize for or against representation as to interfere with employees' freedom of choice or association.

A number of comments asserted that a lengthy election campaign tends to disserve the interests of both employees and employers. AFT cites anecdotal evidence from a lengthy campaign that demoralized workers and resulted in significant expenditures by the employer.[82] Several comments also note a correlation between the length of the campaign and the number of unfair labor practice complaints issued against the employer.[83] Another study indicated that protracted campaigns lead to a more conflict-ridden, adversarial work environment.[84] SEIU argues that the contentious pre-election environment often associated with long campaigns harms the prospects for future bargaining. NELP argues that low-wage workers stand to make significant improvements in their working conditions through unionization, yet these same workers are particularly vulnerable to retaliation for union activity, rendered more likely by long campaigns, and are also likely to become discouraged by complex bureaucratic processes.[85] The Board did not rely on any such assertions in proposing the amendments and does not do so in adopting the final rule.

Other comments suggest that the amendments will generate litigation because, if a party has less time to campaign between the petition and election, the party will ''assert as many defenses as possible'' or try to obtain a hearing simply to ''buy * * * more time'' before the election. AHA. SEIU's reply comment notes that there was no significant drop in the consent or stipulation rate following former General Counsel Fred Feinstein's initiative aimed at commencing all pre-election hearings between 10 and 14 days after the filing of the petition. Rather than undermining the rationale for the proposals, the suggestion that parties might use the pre-election hearing to delay the conduct of an election reinforces the need for the final rule. Both the ability and incentive for parties to attempt to raise issues and engage in litigation in order to delay the conduct of an election are reduced by the final rule.

E. Effects on Employee Representation and the Economy

Many comments do not address the substance of the proposed amendments, but instead speak generally in favor of, or in opposition to, labor unions and the process of collective bargaining. The Board observes that, by passing and amending the NLRA, Congress has already made the policy judgment concerning the value of the collective-bargaining process; the Board is not free to ignore or revisit that judgment. Rather, as explained in the NPRM, the amendments are intended to carry out the Board's statutory mandate to establish fair and efficient procedures for determining if a question of representation exists and for conducting secret-ballot elections. Accordingly, the Board will not engage in an analysis, invited by these comments, concerning the general utility of labor unions and the collective-bargaining process.

Other comments assert that the proposed amendments would lead to increased union representation and question the wisdom of adopting rules that would have such an effect in the middle of an economic recession. Again, the Board views these comments as questioning policy decisions already made by Congress.[86] Neither the

[81] See NRTWLDF; Seyfarth Shaw; ALFA; American Council on Education; CDW; NRMCA; Indiana Chamber of Commerce; Con-way; Specialty Steel; Americans for Limited Government; International Foodservice; testimony of Steve Jones; testimony of Charles I. Cohen; testimony of David Kadela; testimony of Harold Weinrich; testimony of Brett McMahon.

Some comments include a related argument that employees who are considered likely to oppose the union, and therefore were not involved in the pre-petition organizing campaign, may not know about the organizing drive until the petition is filed. See Seyfarth Shaw; ALFA.

[82] See also comment of Professor Paula Voos, contending, based on her 2010 study, that campaigns longer than 60 days resulted in a decline in shareholder wealth (as measured by changes in stock prices plus disbursement of dividends), but campaigns of 60 days or fewer did not.

[83] See John Logan, Ph.D., Erin Johansson, M.P.P., and Ryan Lamare, Ph.D. (summarizing their study, ''New Data: NLRB Process Fails to Ensure a Fair Vote,'' supra). See also SEIU; NELP; and Ranking Member George Miller and Democratic Members of the U.S. House of Representatives Committee on Education and the Workforce (citing Logan, Johanson, and Lamare study).

[84] See Dunlop Commission Final Report, *supra* at 38–41, cited in comment of SEIU. Another comment contends, but offers no supporting argument or empirical evidence, that elections on short notice will foster bad feelings between pro- and anti-union employees and between the union and management. See Norman Owen.

[85] See testimony of Professor Paul F. Clark (noting that employee organizing has become a ''minefield and a marathon'' due to sophisticated anti-union campaigns and delays).

[86] To the extent that comments suggest that the Board failed to consider the proposed rule's potential to increase the costs on small employers associated with increased unionization as part of its obligations under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* those comments are addressed in the Regulatory Flexibility Act section below.

proposed amendments nor the final rule reflects a judgment concerning whether increased employee representation would benefit or harm the national economy. As explained in the NPRM and above, increasing the rate of employee representation is not the goal of the Board's proposed or final rule.

IV. Comments on Particular Sections

Part 101, Subpart C—Representation Cases Under Sec. 9(c) of the Act and Petitions for Clarification of Bargaining Units and for Amendment of Certifications Under Sec. 9(b) of the Act

In the NPRM, the Board proposed to eliminate redundant sections of its regulations contained in Subpart C of Part 101 describing representation case procedures. The relevant sections of Subpart C of Part 101 currently include an essentially complete restatement of the representation case procedure established in Subpart C of Part 102. As the Board noted in the NPRM, ''Describing the same representation procedures in two separate parts of the regulations may create confusion.'' 76 FR at 36819.

The final rule eliminates Subpart C of Part 101. A few, non-redundant portions are moved into Part 102. For example, the description of the pre-election conference is moved to § 102.69(a).

The Board received no significant comments opposing this proposal. Comments from a variety of viewpoints supported the Board's effort to eliminate redundant regulations.

As noted in the NPRM, § 101.1 states that the purpose of Part 101 is to provide the public with a statement of ''the general course and method by which the Board's functions are channeled and determined.'' [87] The purpose of a separate statement of the general course ''is to assist the public in dealing with administrative agencies,'' but should not be ''carried to so logical an extreme as to inconvenience the public.'' [88] The NPRM stated that codifying this statement in the Code of Federal Regulations risked confusing the public. Instead, the Board proposed to publish the statement in the **Federal Register** without codification. This accords with general administrative practice.[89] The NPRM contained an uncodified statement of the general course, 76 FR at 36817–18, and proposed that any final rule that might issue would also include an uncodified statement of the general course. A Statement of the General Course of Proceedings Under Section 9(c) of the Act is provided below.[90]

Prior § 101.18 provided, ''The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.'' ALFA submits that revised § 102.61 should explicitly state that a proper showing of interest must include authorization cards or signatures from 30 percent of the employees in an appropriate unit. The final rule, however, does not revise § 102.61 as proposed or in any respect. To the extent that ALFA would still have the Board amend § 102.61 to specify the 30 percent figure, the Board declines to adopt this proposal. The Board's current rules and regulations set forth in Part 102 do not specify a precise threshold for the administratively required showing of interest. As explained in former § 101.18, the purpose of the showing of interest on the part of labor organizations and individual petitioners that initiate or seek to participate in a representation case is merely to determine whether there is sufficient employee interest in selecting, changing or decertifying a representative to warrant the expenditure of the agency's time, effort, and resources in conducting an election. See also Casehandling Manual Section 11020. As such, the purpose of the showing of interest is purely an administrative one; the size of the showing of interest in support of certification and decertification petitions that the Board currently requires is not compelled by the Act. As an administrative matter it is not litigable. *The Borden Co.,* 101 NLRB 203, 203 n.3 (1952); Casehandling Manual Section 11028.3. However, at this time, the Board has no intention of changing the size of the required showing of interest and the uncodified statement of the general course that follows states that the required showing remains 30 percent.[91]

Part 101, Subparts D and E—Unfair Labor Practice and Representation Cases Under Secs. 8(b)(7) and 9(c) of the Act and Referendum Cases Under Sec. 9(e)(1) and (2) of the Act

In the NPRM, the Board also proposed to eliminate its statement of procedures contained in Subparts D and E of Part 101 regarding unfair labor practice and representation cases arising under Sections 8(b)(7) and 9(c) of the Act and referendum cases arising under Section 9(e)(1) and (2) of the Act. The Board has decided to deliberate further regarding its proposal to eliminate these subparts that describe procedures for two specialized types of representation cases. Instead of eliminating these two subparts entirely, the final rule conforms the procedures described therein to the amendments set forth below.

Part 102, Subpart C—Procedure Under Sec. 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Sec. 9(b) of the Act

Sec. 102.62 Election Agreements

In the NPRM, the Board proposed a number of amendments to § 102.62. The amendments were intended to clarify the terms used to describe the three types of pre-election agreements, to eliminate mandatory Board resolution of post-election disputes under a stipulated election agreement, to codify the requirement of the *Excelsior* list and to alter the content and timing of its provision to the petitioner,[92] and to alter the means of transmittal of the final notice of election. The Board has decided at this time to adopt only the proposed amendments to § 102.62 clarifying the terms used to describe pre-election agreements and eliminating mandatory Board resolution of post-

[87] See 5 U.S.C. 552(a)(1)(B). The original language of this provision stated that the section would ''amplify and supplement the[] rules of procedure.'' 12 FR 5651 (August 22, 1947).

[88] Tom C. Clark, Attorney General's Manual on the Administrative Procedure Act, 17, 19 (August 27, 1947).

[89] See, e.g., 26 CFR 601.702(a)(1)(ii) (''[T]he Commissioner publishes in the **Federal Register** from time to time a statement, which is not codified in this chapter, on the organization and functions of the IRS.'').

[90] The Board will also continue to publish, update, and make available on its Web site the detailed statement of representation case procedures set forth in its Casehandling Manual.

[91] The Board's form petition, Form NLRB 502 also states, and will continue to state, that the required showing of interest is 30 percent (see Form section 6(b)).

In response to comments that erroneously suggest that 30 percent is the threshold for resolving a question of representation, the Board reiterates here that if a question of representation exists, it is resolved by a majority of valid votes cast in an election.

[92] See *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966) (establishing requirement that employers must file a list of the names and addresses of all eligible voters with the regional director within seven days after a Board election has been agreed to or directed; the regional director then makes the information available to all parties in the case).

election disputes under a stipulated election agreement.

The final rule's amendments to § 102.62(b) revise the contents of the stipulated election agreement. The revision eliminates parties' ability to agree to have post-election disputes resolved by the Board. The amendments provide instead that, if the parties enter into what is commonly referred to as a ''stipulated election agreement,'' [93] the regional director will resolve any post-election disputes subject to discretionary Board review. This procedure is consistent with the changes to § 102.69 described below making all Board review of regional directors' dispositions of post-election disputes discretionary in cases where parties have not addressed the matter in a pre-election agreement.[94]

As explained in the NPRM, the amendment makes the process for obtaining Board review of regional directors' dispositions of *post*-election disputes fully parallel to that for obtaining Board review of regional directors' dispositions of *pre*-election disputes. The Board perceived no reason why pre- and post-election dispositions should be treated differently in this regard, and the comments on this proposal offered no convincing reason.

The Board affirms the vast majority of post-election decisions made at the regional level, and many present no issue meriting full consideration by the Board. In some cases, for example, parties seek review of post-election decisions based on mere formulaic assertions of error below and without pointing to any facts or law in dispute.[95] Review as of right should not be granted in those situations. Others cases present only circumscribed, purely factual issues concerning which the Board is in no better position to reach a correct finding than the hearing officer (who heard the evidence) or the regional director.[96] Given the highly deferential standard that the Board employs in reviewing a hearing officer's post-election factual findings,[97] it is reasonable for the Board to require the party seeking review of such a finding to justify that review by showing that the standard for obtaining discretionary review is satisfied. There are other cases in which the regional director assumes the facts asserted by the objecting party but finds that no objectionable conduct occurred,[98] or where there is no dispute about the facts at all.[99] A discretionary system of review will provide parties with a full opportunity to contest those determinations. Another group of cases represent parties' efforts to seek reconsideration, extension, or novel application of existing Board law,[100] and there is equally no reason why a discretionary system of review will not fully provide that opportunity. Still other cases simply involve the application of well-settled law to very specific facts.[101] In short, for a variety of reasons, a substantial percentage of Board decisions in post-election proceedings are unlikely to be of precedential value because no significant question of policy is at issue. The final rule requires the party seeking review to identify a significant, prejudicial error by the regional director or some other compelling reason for Board review, just as the current rules require a party to do when seeking Board review of a regional director's pre-election decision.[102] The final rule will enable the Board to separate the wheat from the chaff, and to devote its limited time to cases of particular importance. Based on those considerations, the Board concludes that making review of regional directors' post-election decisions available on a discretionary basis, as is currently the case with pre-election review and some post-election review, will assist the Board in fulfilling its statutory mandate to promptly resolve questions concerning representation.

Several comments argue that if the Board were to adopt these amendments, it would be abdicating its statutory responsibility and function.[103] For example, SHRM argues that only Board Members, because they are appointed by the President and confirmed by the Senate, can make final decisions about these matters and that the regional directors, who are career civil servants, lack comparable authority and political legitimacy. Others state that denying aggrieved parties the right to appeal adverse determinations to the Board undermines due process protections. NAM contends that the Board is required to review conduct affecting election outcomes in order to safeguard employees' Section 7 rights. Similarly, other comments argue that conduct that could be the basis for setting aside an election goes to the essence of employee free choice and deserves de novo Board review.[104] Still other comments contend that, although Section 3(b) of the Act permits Board delegation to the regional directors of decisions pertaining to representation issues, those decisions must be reviewed by the Board upon request.

The Board is not persuaded by these comments. The arguments they advance apply equally to pre-election disputes, and yet the Board has since 1961 afforded only discretionary review of regional directors' dispositions of pre-election disputes even though a failure to request review pre-election or a denial of review precludes a party from raising the matter with the Board post-election. 29 CFR 102.67(f). Moreover, even under the current rules, specifically § 102.69(c)(4), if the regional director issues a decision concerning challenges or objections instead of a report in cases involving directed elections, an aggrieved party's only recourse is a request for review. Thus, the comments' objections apply to the current regulations as well as to the final rule.

Moreover, Section 3(b) of the NLRA does not support the conclusion expressed in those comments. Section 3(b) provides in part:

[93] Casehandling Manual Section 11084.

[94] The current rules governing Board review of regional directors' dispositions of post-election disputes appear on their face to provide for both mandatory and discretionary review depending on how the regional office processes the case. See 29 CFR 102.69(c)(3) and (4).

[95] See, e.g., *C&G Heating,* 356 NLRB No. 133, slip op. at 1 (2011).

[96] See, e.g., *Ruan Transport Corp.,* 13–RC–21909 (Nov. 30, 2010) (resolving intent of voter who marked an X in two boxes on ballot but ''nearly obliterated'' one of them with pen markings in lieu of erasure); *Multiband, Inc.,* 2011 WL 5101459, slip op. at n.2 (Oct. 26, 2011) (credibility).

[97] See *Stretch-Tex Co.,* 118 NLRB 1359, 1361 (1957).

[98] See, e.g., *Care Enterprises,* 306 NLRB 491 n.2 (1992).

[99] See, e.g., *CEVA Logistics U.S., Inc.,* 357 NLRB No. 60 (2011) (consequences of regional delay in forwarding Excelsior list).

[100] See, e.g., *1621 Route 22 West Operating Co., LLC d/b/a Somerset Valley Rehabilitation & Nursing Ctr.,* 357 NLRB No. 71 (2011); *Ace Car & Limousine Service, Inc.,* 357 NLRB No. 43 (2011).

[101] *Mental Health Ass'n, Inc.,* 356 NLRB No. 151 (2011) (whether employer's particular statements about bonuses constituted objectionable promise of benefit); *G&K Services, Inc.,* 357 NLRB No. 109 (2011) (whether employer's letter about health coverage constituted objectionable promise of benefit).

[102] See § 102.67(c), providing:

The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

[103] See Chamber; SHRM; CDW; COLLE; NACCO Materials Handling Group; Dassault Falcon Jet; Bluegrass Institute; John Deere Water.

[104] See, e.g., Dassault Falcon Jet.

The Board is * * * authorized to delegate to its regional directors its powers * * * to determine [issues arising in representation proceedings], except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him * * *, but such review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

29 U.S.C. 153(b).

Since Congress adopted this provision in 1959 and the Board exercised its authority to delegate these functions to its regional directors in 1961, the Board's rules have provided that regional directors' dispositions of pre-election disputes are subject only to discretionary Board review. None of the comments suggest that the current rule as to pre-election disputes violates Section 3(b) or is otherwise improper.

In fact, the Supreme Court has upheld the Board's decision not to provide parties with a right to Board review of regional director's pre-election determinations, in a holding that clearly permits the Board to adopt the final rule's amendments concerning post-election review. In *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137 (1971), the employer filed a request for review of the regional director's decision and direction of election holding that certain individuals were properly included in the unit. The Board denied the petition on the ground that it did not raise substantial issues. In the subsequent ''technical 8(a)(5)'' unfair labor practice proceeding, the employer asserted that ''plenary review by the Board of the regional director's unit determination is necessary at some point,'' i.e., before the Board finds that the employer committed an unfair labor practice based on the employer's refusal to bargain with the union certified as the employees' representative in the representation proceeding. 401 U.S. at 140–41. However, the Court rejected the contention that Section 3(b) requires the Board to review regional directors' determinations before they become final and binding. Citing Congress's authorization of the Board to delegate decision-making in this area to its regional directors and the use of the clearly permissive word ''may'' in the clause describing the possibility of Board review, the Court held, ''Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination.'' *Id.* at 142. Consistent with the purpose of the final rule here, the Supreme Court quoted Senator Goldwater, a Conference Committee member, explaining that Section 3(b)'s authorization of the Board's delegation of its decision-making authority to the regional directors was to ''expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination.'' *Id.* at 141 (citing 105 Cong. Rec. 19770). And undermining the comments' suggestion that regional directors lack authority, status, or expertise to render final decisions in this area, the Court further explained that the enactment of section 3(b) ''reflect[s] the considered judgment of Congress that the regional directors have an expertise concerning unit determinations.'' *Id.* [105]

The Board concludes that the language of Section 3(b), its legislative history, and the Supreme Court's decision in *Magnesium Casting* are dispositive of the statutory objections to the proposed amendment.

Some comments suggest that providing only discretionary review of regional directors' decisions will undermine the uniformity of election jurisprudence, with different regional directors issuing divergent opinions in similar cases and under similar circumstances. The comments contend that if those decisions are not reviewed by the Board as a matter of right, there is a risk that the regional office in which the employer's operations reside, rather than the merits of the parties' positions, will govern how the dispute is resolved. For example, Bluegrass Institute contends that discretionary Board review will result in less uniformity, the denial of due process, and diminished legitimacy in election processes. The Board disagrees.

Constitutional due process requires only one fair hearing and does not require an opportunity to appeal. The Supreme Court has so held even with respect to criminal cases. See *Evitts* v. *Lucey,* 469 U.S. 387, 393 (1985) (''Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. *McKane* v. *Durston,* 153 U.S. 684 * * * (1894).'').

Since 1961, regional directors have made pre-election determinations, and their decisions have been subject to only discretionary review through the request for review procedure. The same has been true of post-election determinations processed under § 102.69(c)(3)(ii). There is no indication that the quality of decision-making has been compromised by this procedure or that regional directors have reached inconsistent conclusions. Under the final rule, the same review process will apply to all cases involving post-election objections and challenges except where they are consolidated with unfair labor practice allegations before an administrative law judge. As it has done for over 50 years in respect to pre-election disputes, the Board will scrutinize regional directors' post-election decisions where proper requests for review are filed. One purpose of that review will be to determine if there is an ''absence of'' or ''a departure from, officially reported Board precedent,'' i.e., to ensure uniformity via adherence to Board precedent. See 29 CFR 102.67(c)(1). Thus, the discretionary review provided for in the final rule parallels that used by the Supreme Court to ensure uniformity among the circuit courts of appeals. See Supreme Court Rule 10. For these reasons, the Board does not believe that the final rule will lead to a lack of uniformity.

A few comments question the competence of regional personnel. For example, COLLE argues that ''Regional Directors can be dictatorial and imprudent to the rights of private parties in disputes before them'' and ''can exhibit irrational and unfair behavior and deprive parties of their rights to go to hearing and litigate legitimate issues under the Act.'' GM Life suggests that regional directors are unfamiliar with the legal process and will not follow proper procedures. Other comments contend that because hearing officers report directly to regional directors, appeal to the regional directors does not constitute meaningful review.

The Board's experience in reviewing the work of and supervising its regional directors gives no credence to these comments. Moreover, Congress expressed confidence in the regional directors' abilities when it enacted Section 3(b). As one comment in favor of the rule (Professor Joel Cutcher-Gershenfeld) noted, empowering regional directors to make final post-election rulings, as they now do in respect to pre-election matters, locates decisions with the individuals who have the greatest knowledge about and experience with representation case

[105] See also *St. Margaret Memorial Hosp.* v. *NLRB,* 991 F.2d 1146, 1154 (3d Cir. 1993); *Beth Israel Hosp. and Geriatric Ctr.* v. *NLRB,* 688 F.2d 697, 700–01 (10th Cir. 1982) (en banc); *Transportation Enterprises, Inc.* v. *NLRB,* 630 F.2d 421, 426 (5th Cir. 1980) (finding that ''decisions rendered by the regional offices of the NLRB which are not reviewed by the Board, for whatever reasons, are entitled to the same weight and deference as Board decisions, and will be given such unless and until the Board acts in a dispositive manner.'').

procedures.[106] Similarly, the Chamber, although it generally opposes the proposals, notes the ''professionalism, experience and integrity'' of the regional directors and their staffs. Rather than detracting from their authority and legitimacy, the Board concludes that the regional directors' career status guarantees their neutrality and, in almost all cases, their extended service at the Board and thus extensive experience with and knowledge about representation case procedures and rules.

ALFA argues specifically that regional directors tend to uphold election results, and therefore a right to Board review should be retained if the Board wishes to discourage litigation via refusals to bargain. As noted above, the Board rejects the suggestions that regional directors are systematically biased in this or any other way, and repeats that it will scrutinize regional decisions' decisions when proper requests for review are filed.

Some comments contend that, if the proposals are adopted, employers will increasingly refuse to bargain with newly certified representatives in order to obtain judicial review of regional directors' determinations.[107] This argument is, at best, highly speculative. There is no evidence that this happened after the Board delegated adjudication of pre-election disputes to its regional directors in 1961 subject to only discretionary review by the Board, and the Board can see no reason why an increase in refusals to bargain would be more likely if Board review of post-election decisions is similarly made discretionary. The Board does not believe that judicial review through technical refusal to bargain will be more frequent when the Board denies review of a regional director's post-election decision than it is when the Board summarily affirms the same regional decision, as it often does now. See, e.g., *The Geist Co.,* 8–RC–17056 (Dec. 1, 2011); *The Memorial Hospital of Salem County,* 4–RC–21697 (Aug. 3, 2011); *Ashland Nursing & Rehabilitation Center,* 5–RC–16580 (May 31, 2011); *Banner Services Corp.,* 13–RC–21983 (May 25, 2011).

Several comments argue that the rule is contrary to the preferences of both employers and unions, as shown by the high rate of stipulated election agreements—providing for adjudication of post-election disputes by the Board—and the comparative rarity of consent election agreements—providing for a final decision by the regional director. AHA, SHRM, and ACE contend that parties prefer this form of pre-election agreement because it provides for Board disposition of post-election issues. As a corollary to this argument, some comments argue that eliminating automatic Board review will result in fewer pre-election agreements and thus more litigation.[108]

The Board believes for several reasons that the final rule will not create a disincentive for parties to enter into consent or stipulated election agreements. The final rule makes post-election Board review discretionary whether the parties enter into a stipulated election agreement or proceed to a hearing resulting in a decision and direction of election. Thus, parties who prefer Board review of post-election disputes will have no incentive to litigate concerning pre-election issues in order to gain such review. The Board believes that if parties genuinely prefer agreements that permit Board review, they will continue to enter into stipulated rather than consent election agreements in order to preserve their right to seek such review. Whether parties enter into any pre-election agreement or litigate disputes at a pre-election hearing under the final rule will depend on the same calculus of the likelihood of success, the importance of the issue, and the cost of litigation, that it does at present. In addition to avoiding the time and expense associated with a pre-election hearing, parties also gain certainty with respect to the unit description and the election date by entering into a stipulated election agreement. In short, parties will continue to have ample reason to enter into stipulated election agreements under the final rule, even though the final rule makes Board review of regional directors' dispositions of post-election disputes discretionary.

Some comments, such as that of Sheppard Mullin, express confusion about the rule and the request-for-review procedure. The grounds for granting a request for review under § 102.69(d)(3) of the final rule are identical to the grounds set forth in § 102.67(c) of the existing rules. The Board will continue to review cases involving issues of ''first impression'' or where there is ''conflicting or unsettled'' law in the same manner that it currently does under the pre-election request-for-review procedure. The Board is not aware of any concerns about the way it has evaluated requests for review in representation proceedings, and does not anticipate any in the future.

One comment questions whether ''the denial of review'' is subject to appeal to the federal courts. The Board's denial of review of a post-election request for review will be the final order in a representation proceeding under the final rule, as it is currently. However, orders in representation cases are not final orders for purposes of judicial review. Rather, an employer must refuse to bargain and commit a ''technical 8(a)(5)'' violation to secure court review of the Board's representation decisions. See 29 U.S.C. 159(d); *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 476–79 (1964). Under the current rules, if an employer refuses to bargain, it may obtain review of a regional director's pre-election rulings even if the Board denied review thereof, and the same will be true of post-election rulings under the final rule. Thus, there are no open questions about the Board's discretionary review process that will undermine confidence in its decisional processes.

Similarly, comments misinterpret the rule with respect to how regional decisions will be reviewed and how that review will affect the law. The final rule simply makes post-election dispositions reviewable under a discretionary standard, rather than as of right. The Board's rulings on post-election requests for review will be public and will be published on the Board's Web site, as will the underlying regional directors' decisions, just as rulings on pre-election requests for review are now. Thus, the public and labor law community will have full access to the Board's rulings.

In sum, the amendments to § 102.62(b) conform the review provisions of the stipulated election agreement to the amended review provisions for directed elections. Parties should not be able to get greater post-election Board review simply by virtue of the fact that there are no pre-election

[106] The Board also notes that regional directors make decisions concerning whether to prosecute charges of unfair labor practices under the Act, and those prosecutorial decisions often involve questions of employee status and questions of whether certain conduct is unlawful, both of which often parallel questions that arise in post-election representation proceedings. The courts have recognized that regional directors have expertise in determining what constitutes objectionable conduct. See, e.g., *NLRB* v. *Chicago Tribune Co.,* 943 F.2d 791, 794 (7th Cir. 1991), cert. denied, 504 U.S. 955 (1992).

[107] See Chamber; AHA; CDW; Baker & McKenzie.

[108] See, e.g., ALFA; SHRM. Constangy, Brooks & Smith (Constangy) contends that an employer entering into a stipulation will lose any rights to appeal pre-election unit issues and that this will have a negative effect on the Board's stipulation rate. The Board notes, however, that under current procedures, parties who enter into stipulated election agreements, by definition, agree about pre-election issues, and therefore waive any right to bring pre-election issues to the Board. Thus, the final rule does not change that aspect of stipulated election agreements.

disputes. Under the final rule, all Board review of regional directors' dispositions of challenges and objections will be discretionary under the existing request-for-review procedure.

Sec. 102.63 Investigation of Petition by Regional Director; Notice of Hearing; Service of Notice; Withdrawal of Notice

In the NPRM, the Board proposed a number of amendments to § 102.63. The Board proposed that absent special circumstances, the regional director would set the pre-election hearing to begin seven days after service of the notice of hearing. The Board also proposed to require the employer to post an initial election notice to employees. The Board further proposed to require non-petitioning parties to complete Statements of Position. The Board has decided to take no action at this time on those proposals in order to permit more time for deliberation.

The amendments to § 102.63 conform this section to the remainder of the amendments.

Sec. 102.64 Conduct of Hearing

As explained in the NPRM, the proposed amendments to § 102.64 were intended to ensure that the pre-election hearing is conducted efficiently and is no longer than necessary to serve the statutory purpose of determining if there is a question of representation. The final rule largely embodies the proposed amendment to § 102.64(a).

In amended § 102.64(a), the Board expressly construes Section 9(c) of the Act, which specifies the purpose of the pre-election hearing. The statutory purpose of the pre-election hearing is to determine if there is a question of representation. A question of representation exists if a petition has been filed, as described in Section 9(c)(1) of the Act and § 102.60 of the Board's rules, concerning a unit appropriate for the purpose of collective bargaining or, in the case of a petition filed under Section 9(c)(1)(A)(ii), concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative.[109] If the regional director concludes, based on the record created at the hearing, that such a question of representation exists, the regional director should direct an election in order to resolve the question. If any party contends that an election is barred, under the terms of the Act or Board precedent, and that contention is contested, the regional director must also rule on the existence of such a bar prior to directing an election. [110]

Amended § 102.64(a) makes clear that disputes concerning individual employees' eligibility to vote and inclusion in the unit ordinarily need not be litigated or resolved before an election is conducted. Such disputes can be raised through challenges interposed during the election, if the disputed individuals attempt to cast a ballot, and both litigated and resolved, if necessary, post-election. The proposed rule provided:

> If, upon the record of the hearing, the regional director finds that such a question of representation exists and there is no bar to an election, he shall direct an election to resolve the question and, subsequent to that election, unless specifically provided otherwise in these rules, resolve any disputes concerning the eligibility or inclusion of voters that might affect the results of the election.

The final rule provides:

> Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the regional director finds that a question of representation exists and there is no bar to an election, he shall direct an election to resolve the question.

The change in language is due to the final rule not adopting the ''20-percent rule'' as discussed below in relation to § 102.66. For that reason, the language, ''unless specifically provided otherwise in these rules,'' has been removed. As more fully explained in relation to § 102.66 below, the amendment expressly preserves the regional director's discretion to resolve or not to resolve disputes concerning individuals' eligibility to vote or inclusion in the unit until after the election. It also grants the hearing officer authority to exclude evidence concerning such disputes on the grounds that such evidence is not relevant to the existence of a question of representation.

The final rule defers, in order to permit further deliberation, a final decision concerning the proposed amendments to subsections (b) and (c) of § 102.64. Therefore, amended § 102.64(b) will provide, as is now provided in § 102.64(a), ''It shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act.'' However, amended § 102.64(a) more clearly specifies the Board's or regional director's ''duties under Section 9(c) of the Act'' and thus gives clear guidance to hearing officers concerning what evidence is and is not necessary to develop a ''full and complete record'' upon which the Board or regional director can discharge those duties.

Few comments address the proposed amendment of § 102.64(a). Those that do question the construction of Section 9(c) of the Act on the grounds that litigation of disputes concerning individual employees' eligibility to vote and inclusion in the unit should be permitted pre-election. These comments are addressed below in relation to § 102.66.

Sec. 102.65 Motions; Interventions

The final rule adopts the proposed amendments of § 102.65(c) specifying the grounds for a request for special permission to appeal a ruling of the hearing officer or regional director to the Board. However, the final rule does not apply the new, narrower standard to requests for special permission to appeal a ruling of the hearing officer to the regional director.

The existing rules set forth no standard for the grant of a request for special permission to appeal. Consistent with the effort to avoid piecemeal appeal to the Board, as discussed above in relation to § 102.62 and below in relation to § 102.67, the amendments to § 102.65(c) specify narrow circumstances under which a request for special permission to appeal to the Board will be granted. The final rule specifies that special permission to appeal will be granted only under ''extraordinary circumstances where it appears that the issue will otherwise evade review.'' To further discourage piecemeal appeal, the final rule makes clear that a party need not seek special permission to appeal in order to preserve an issue for review post-election.

Consistent with Congress's intent as evidenced in Section 3(b) as well as

[109] A proper petition cannot be filed under Section 9(c)(1) and a question of representation cannot arise under the Act unless the employees in the unit are employed by an employer covered by the Act. Thus, if any party contests the Board's statutory jurisdiction or contends that the Board has declined to exercise its full, statutory jurisdiction over the employer, the regional director must resolve the resulting dispute based on the record of the pre-election hearing. Similarly, a proper petition under Section 9(c)(1)(A) can be filed by ''an employee or group of employees or any individual or labor organization.'' Thus, if a petition is filed by an entity and any party contends that the entity is not a labor organization, the regional director must resolve the resulting dispute based on the record of the pre-election hearing.

[110] The hearing officer will retain authority to develop the record relevant to any such contention using the ordinary procedures already in use, which are designed to avoid burdening the record with unnecessary evidence. For example, current rules give the hearing officer discretion to require a party to make an offer of proof before admitting evidence.

ordinary practice in the courts and before administrative agencies, the final rule further specifies that neither the filing of a request for nor the grant of special permission to appeal will automatically stay proceedings or require the impounding of ballots unless specifically ordered by the regional director or the Board.

Few comments were submitted on this proposal. The American Health Care Association and the National Center for Assisted Living (jointly, AHCA) contend that the Board provides no examples of issues that would meet the standard for ''otherwise evades review.'' Constangy argues that limiting appeals to extraordinary circumstances, combined with preventing regional directors from staying proceedings to consider motions for reconsideration, will effectively result in the total preclusion of review of pre-election rulings, preventing appeal of legitimate disputes.

The Board disagrees with these concerns. ''Extraordinary circumstances'' is not the same as ''no circumstances.'' Cf. § 103.30(b) (''Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.''). The general rule in adjudication before both courts and agencies is that interlocutory appeals are not favored, and should be permitted only when the issues raised would evade review if not resolved before review of a final judgment. See 28 U.S.C. 1291, 1292(b) (2006); *Mohawk Industries, Inc.* v. *Carpenter,* 130 S. Ct. 599, 604–605 (2009); *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 468–469 (1978).

As discussed above, Section 3(b) of the Act authorizes the Board to delegate to its regional directors power to resolve issues arising in representation proceedings, and the final rule is intended to further that delegation while maintaining appropriate procedures for those unusual cases that require interlocutory intervention.

AHCA and ALFA argue that special permission to appeal serves little purpose because it will not stay proceedings. But the final rule does not preclude a stay. Rather, it merely provides that neither the filing nor grant of a request for special permission to appeal shall result in an automatic stay. The regional director and Board remain free to grant a stay, either on their own or on request, under appropriate circumstances.

After deliberation, the Board has decided not to approve the application of this new, narrow standard for special permission to appeal to requests to appeal rulings of a hearing officer to the regional director. In the pre-election hearing, the hearing officer is developing a record upon which the regional director can make a decision. Moreover, the relation between hearing officers and regional director is, in practice, more informal than that between a trial and appellate court or between a regional director and the Board, with hearing officers not infrequently seeking advice from the regional director during a hearing. For these reasons, the final rule does not apply the new, narrow standard to requests for special permission to appeal rulings of hearing officers to the regional director.

The final rule also adopts the proposed amendment to § 102.65(e)(3). The Casehandling Manual provides in Section 11338.7 that a Board agent should exercise discretion in deciding whether to allow a vote under challenge when a party claims that changed circumstances justify a challenge to voters specifically excluded, or included, by the decision and direction of election. Accordingly, the final rule adopts the proposal in the NPRM that if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending.

Sec. 102.66 Introduction of Evidence: Rights of Parties at Hearing; Subpoenas

In the NPRM, the Board proposed a number of amendments to § 102.66. The proposed amendments were designed to ensure that issues in dispute would be more promptly and clearly identified and that hearing officers could limit the evidence offered at the pre-election hearing to that which is necessary for the regional director to determine whether a question of representation exists. The NPRM proposed that hearing officers would follow a specified process to identify relevant issues in dispute. Thus, the NPRM provided that the hearing officer would open the hearing by reviewing, or assisting non-petitioning parties to complete, statements of position, and then would require the petitioner to respond to any issues raised in the statements of positions, thereby joining the issues. The NPRM further proposed that after the issues were joined, the hearing officer would require the parties to make offers of proof concerning any relevant issues in dispute, and would not proceed to take evidence unless the parties' offers created a genuine dispute concerning a material fact.

The Board also proposed that a party would be precluded from raising any issue that it failed to raise in its timely statement of position or to place in dispute in response to another party's statement, subject to specified exceptions.

The proposed amendments further provided that if, at any time during the hearing, the hearing officer determined that the only genuine issue remaining in dispute concerned the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer would close the hearing, and the director would permit those individuals to vote subject to challenge.

The Board also proposed in the NPRM that parties be permitted to file post-hearing briefs only with the permission of the hearing officer.

Finally, the NPRM proposed, consistent with existing practice, that a party that has been served with a subpoena may be required to file or orally present a motion to quash prior to the five days provided in Section 11(1) of the Act.

The Board received a great number of comments about the proposed amendments to § 102.66, particularly with respect to the statement of position form and the consequences of failing to complete it, the joinder and offer-of-proof procedure, and the so-called ''20-percent rule.'' The Board has decided to take no action at this time on those proposals or the proposal regarding subpoenas in order to permit more time for deliberation. The final rule adopts the proposals to amend § 102.66(a) and (d) to ensure that hearing officers presiding over pre-election hearings have authority to limit the presentation of evidence to that which is relevant to the existence of a question of representation and to give the hearing officer discretion in regard to the filing of post-hearing briefs.

Subsec. 102.66(a)

The proposed rule provided:

Rights of parties at hearing. Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other

evidence relevant to any genuine dispute as to a material fact. The hearing officer shall identify such disputes as follows: * * *

The final rule provides:

Rights of parties at hearing. Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence so long as such examination, cross-examination, and other evidence supports its contentions and is relevant to the existence of a question of representation or a bar to an election. The hearing officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.[111]

The Board removed the language drawn from Federal Rule of Civil Procedure 56 in order to avoid the confusion evident in some comments concerning the role of the hearing officer. The substitute language makes clear that the hearing officer's role is the traditional one of admitting only evidence relevant to the matter at issue. The last sentence as well as the subsections of proposed § 102.66(a) and subsections (b), (c), and (d) are deleted because the final rule does not adopt the offer-of-proof, joinder, statement of position, or 20 percent rule provisions.

As explained in the NPRM, the final rule's amendment of § 102.66(a) together with the elimination of § 101.20(c) removes the basis of the Board's holding in *Barre National, Inc.,* 316 NLRB 877 (1995), that a hearing officer must permit full litigation of all eligibility issues in dispute prior to a direction of an election, even though the regional director and the Board need not resolve the issues prior to the election. Together with the amendment of § 102.64(a), the amendment of § 102.66(a) makes clear that, while the regional director must determine that a proper petition has been filed in an appropriate unit in order to find that a question of representation exists, the regional director need not decide all individual eligibility and inclusion questions (so long as they do not affect the type of election that must be conducted) and the hearing officer need not permit introduction of evidence relevant only to disputes concerning the eligibility and inclusion of individuals.

In its comment, Baker & McKenzie questioned how a hearing officer would determine whether proffered evidence was relevant to voter eligibility or voter inclusion as opposed to unit appropriateness. The same question arises under current procedures when both the regional director and the Board defer ruling on eligibility or inclusion questions until after the election. Thus, existing case law in which both regional directors and the Board have deferred deciding individual eligibility and inclusion questions until after an election will provide considerable guidance to hearing officers. Generally, individual eligibility and inclusion issues concern: (1) Whether individuals or groups of individuals, otherwise falling within the terms used to describe an appropriate unit, are nevertheless ineligible because they are excluded from the Act's definition of employee and (2) whether individuals or groups of individuals fall within the terms used to describe the unit. For example, if the petition calls for a unit including ''production employees'' and excluding the typical ''professional employees, guards and supervisors as defined in the Act,'' then the following would all be eligibility or inclusion questions: (1) Whether production foremen are supervisors, see, e.g., *United States Gypsum Co.,* 111 NLRB 551, 552 (1955); (2) whether production employee Jane Doe is a supervisor, see, e.g., *PECO Energy Co.,*322 NLRB 1074, 1083 (1997); (3) whether workers who perform quality control functions are production employees, see, e.g., *Lundy Packing Co.,* 314 NLRB 1042 (1994); and (4) whether Joe Smith is a production employee, see, e.g., *Allegany Aggregates, Inc.,* 327 NLRB 658 (1999).

For different reasons, the hearing officer must take evidence and the regional director must determine, prior to the election, whether any employees in an otherwise appropriate unit containing nonprofessionals are professionals. Under Section 9(b)(1) of the Act, any professionals in a unit containing both professional and nonprofessional employees must be given the choice of whether they wish to be represented in such a mixed unit. Because this requires special balloting procedures, see *Sonotone Corp.,* 90 NLRB 1236 (1950), the question of whether any employees included in the otherwise appropriate unit are professionals must be answered prior to the election.[112] Similarly, if a party contends that, under Board precedent, an eligibility standard different than the Board's ordinary standard should be used, the hearing officer may take such evidence as may be necessary to resolve that question since its resolution is a prerequisite to the conduct of the election.

Some comments on the proposed amendments argue that limiting evidence to that which is relevant to whether a question of representation exists is inconsistent with the statute's requirement that, absent an election agreement, the Board must hold an ''appropriate hearing'' prior to conducting an election.[113] The Board disagrees. Section 9(c)(1) of the Act provides in pertinent part:

Whenever a petition shall have been filed, * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Thus, as explained above in relation to § 102.64, the statutory purpose of the pre-election hearing is to determine whether a question of representation exists. The amendments to §§ 102.64(a) and 102.66(a) are entirely consistent with Section 9(c)'s requirement that ''an appropriate hearing'' be held before the election is conducted. The two amendments are consistent with Section 9(c) because both permit parties to introduce all evidence at the pre-election hearing that is relevant to whether a question of representation exists. Indeed, the amendment to § 102.66(a) expressly vests parties with a right to present evidence ''so long as such examination, cross-examination, and other evidence supports its contentions and is relevant to the existence of a question of representation or a bar to an election.'' Nothing in Section 9(c) or any other section of the Act requires the Board to permit parties

[111] In the proposed rule, the last two sentences were in a separate subsection (e).

[112] Although some comments argue the same would be true of the question of whether any employees in a unit containing non-guards are guards, the Board disagrees. The Act does not require any special election procedures for guards equivalent to what Section 9(b)(1) requires for professionals. While Section 9(b)(3) precludes the Board from finding that a ''mixed unit,'' i.e., one containing both guards and nonguards, is appropriate, if any party contends that an individual in an otherwise appropriate unit of nonguards is a guard, the regional director can find the unit excluding guards appropriate and, if the individual attempts to cast a ballot, he or she can be permitted to vote subject to challenge and the question can be resolved after the election.

[113] See Americans for Limited Government; Constangy. Other comments argue generally that Section 9(c) requires the Board to conduct a pre-election hearing on issues concerning eligibility and inclusion. See GAM; AHA; ALFA; COLLE; CDW; NMA.

to introduce evidence at a pre-election hearing that is not relevant to whether a question of representation exists.

The final rule's amendment of §§ 102.64(a) and 102.66(a) is also consistent with the final sentence of current § 102.64(a), which the final rule does not amend, though the sentence will now appear in § 102.64(b). That sentence provides that the hearing officer's duty is ''to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director *may discharge their duties under section 9(c) of the Act.''* (Emphasis added.) A hearing officer ensures ''a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act'' when he or she permits parties to present evidence which is relevant to the existence of a question of representation. The Board's duty under Section 9(c) is to conduct a hearing to determine if a question of representation exists and, if such a question exists, to direct an election to answer the question and to certify the results. The final rule expressly allows the hearing officer to create a record permitting the regional director to do precisely that.

In short, the effect of the amendments is simply to permit the hearing officer to prevent the introduction of evidence that is not needed in order to determine if a question of representation exists. By definition, if the hearing officer excludes evidence that is not relevant to whether a question of representation exists, the hearing officer is not impeding the ability of the regional director or the Board to discharge their respective duties under Section 9(c) of the Act.

SHRM argues that ''[u]nder current NLRB procedural rules, a party is guaranteed the right to submit evidence in support of its position at the hearing.'' The Board acknowledges that the current language in §§ 102.66(a) and 101.20(c), when read in isolation, could have been construed to mean that parties have a right to present evidence regarding issues that do not relate to whether a question of representation exists. But that is why the Board is amending § 102.66(a) and eliminating § 101.20(c). Put simply, it is administratively irrational to require the hearing officer at a pre-election hearing to permit parties to present evidence that relates to matters that need not be addressed in order for the hearing to fulfill its statutory function of creating a record upon which the regional director can determine if a question of representation exists. In other words, it is administratively irrational to require the hearing officer to permit the introduction of irrelevant evidence.

SHRM cites *Barre-National, Inc.,* 316 NLRB 877 (1995), in which the Board relied on §§ 102.66(a) and 101.20(c) in holding that the hearing officer erred by preventing an employer from presenting evidence at a pre-election hearing regarding the eligibility of 24 line and group leaders to vote in an election directed in a unit of production, maintenance, and warehouse employees.[114] The employer sought to present evidence that the line and group leaders were supervisors. In support of its conclusions that the hearing officer erred by excluding the evidence and the regional director erred by permitting the disputed employees to vote subject to challenge, the Board quoted the portion of § 102.66(a), which then read:

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross examine witnesses and to introduce into the record documentary and other evidence.

The Board also quoted the portion of § 101.20(c), which then read:

> The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions.

Based on its reading of these two provisions, the Board concluded, ''Section 102.66(a) of the Board's Rules and Section 101.20(c) of the Board's Statements of Procedure entitle parties at such hearings to present witnesses and documentary evidence in support of their positions.'' 316 NLRB at 878.[115] The Board held in *Barre-National,* ''Under all the circumstances, the pre-election hearing held in this case did not meet the requirements of the Act and the Board's rules and Statements of Procedures.'' *Id.* Because of the use of the conjunctive ''and'' rather than the disjunctive ''or'' and the fact that nothing in Section 9(c) of the Act can possibly be understood to give parties a right to litigate questions of individual eligibility or inclusion prior to an election,[116] *Barre-National* cannot be read to rest on a construction of the Act, but only on the Board's reading of §§ 102.66(a) and 101.20(c). The final rule's amendment of § 102.66(a) and elimination of § 101.20(c) make clear that parties are entitled to present evidence in support of their contentions only if the evidence is relevant to the existence of a question of representation, which it was not in *Barre-National.* The Board will no longer follow *Barre-National* under the amended rules.

Moreover, as explained in the NPRM, the result in *Barre-National* is even less administratively rational given the Board's acknowledgement in that case that an entitlement to litigate issues at the pre-election hearing is distinct from any claim of entitlement to a decision on all issues litigated at the hearing, and that ''reviewing courts have held that there is no general requirement that the Board decide all voter eligibility issues prior to an election.'' *Id.* at 879 n.9. The United States Court of Appeals for the Second Circuit similarly held that ''the determination of a unit's composition need not be made before the election.'' *Sears, Roebuck & Co.* v. *NLRB,* 957 F.2d 52, 55 (2d Cir. 1992). As stated in the NPRM, the Board has consistently sustained regional directors' decisions to defer resolution of individual employees' eligibility to vote until after an election (in which the disputed employees may cast challenged ballots). See, e.g., *Sears, Roebuck,* 957 F.2d at 54–55. The Second Circuit has explained that the regional director has ''the prerogative of withholding a determination of the unit placement of [a classification] of employees until after the election.'' *Id.* at 56. In *Northeast Iowa Telephone Co.,* 341 NLRB 670, 671

[114] The 24 disputed individuals would have constituted 8–9 percent of the unit if included. 316 NLRB at 878.

[115] The Board also cited the second sentence of § 102.64(a), but, as explained above, that sentence provides no support for the holding in *Barre-National.*

[116] After the vote on the Taft-Hartley amendments in 1947, Senator Taft placed in the record a ''Supplementary Analysis of the Labor Bill as Passed.'' 93 Cong. Rec. 7000 (June, 12, 1947). In that analysis, Senator Taft explained that the Conference Committee had revised the amendments of Section 9(c)(4) of the Act to eliminate a provision permitting ''pre-hearing elections.'' *Id.* at 7002. The Supplementary Analysis then stated, ''That omission has brought forth the charge that we have thereby greatly impeded the Board in its disposition of representation matters. We have not changed the words of existing law providing a hearing in every case unless waived by stipulation of the parties. It is the function of hearings in representation cases to determine whether an election may properly be held at the time, and if so, to decide questions of unit and eligibility to vote.'' *Id.* The Board does not believe that Senator Taft's vague reference to ''eligibility to vote'' was intended to encompass the types of questions concerning individual eligibility or inclusion discussed above as opposed, for example, to the general eligibility formula to be used in an election. See, e.g., *Alaska Salmon Industry,* 61 NLRB 1508, 1511–12 (1945) (changing eligibility formula for seasonal industries). In any event, the statement of a single legislator, even the Act's principal sponsor, made after the dispositive vote, cannot alter the plain meaning of the language in Section 9(c)(1), particularly in light of the Board's longstanding construction of the Act not to require that it ''decide'' such individual eligibility questions prior to an election. See *Barre-National,* 316 NLRB at 878 n. 9.

(2004), the Board characterized this procedure as the ''tried-and-true 'vote under challenge procedure.' '' See also *HeartShare Human Services of New York, Inc.,* 320 NLRB 1 (1995), enforced, 108 F.3d 467 (2d Cir. 1997). The Eighth Circuit has stated that ''deferring the question of voter eligibility until after an election is an accepted NLRB practice.'' *Bituma Corp.* v. *NLRB,* 23 F.3d 1432, 1436 (8th Cir. 1994). Even when a regional director resolves such a dispute pre-election, the Board, when a request for review is filed, often defers review of the resolution, permitting the disputed individuals to vote subject to challenge. See, e.g., *Silver Cross Hospital,* 350 NLRB 114, 116 n.10 (2007); *Medlar Elec., Inc.,* 337 NLRB 796, 796 (2002); *Interstate Warehousing of Ohio, LLC,* 333 NLRB 682, 682–83 (2001); *Orson E. Coe Pontiac-GMC Truck, Inc.,* 328 NLRB 688, 688 n.1 (1999); *American Standard, Inc.,* 237 NLRB 45, 45 (1978). In short, the Board has concluded that it serves no statutory or administrative purpose to require the hearing officer to permit pre-election litigation of issues that both the regional director and the Board are entitled to, and often do, defer deciding until after the election and that are often rendered moot by the election results. The final rule thus eliminates wholly unnecessary litigation that serves as a barrier to the expeditious resolution of questions of representation.

Some comments argue that permitting the hearing officer to exclude evidence related to individual eligibility and inclusion issues will deprive the decision-makers of an adequate record.[117] The Board does not believe that the final rule will deprive the regional director, the Board, or the courts of appeals of an adequate record to review. It is true that the record will not include evidence that the hearing officer found was not relevant, but that is the case now and is the case with respect to any hearing or trial court record developed in front of an officer or judge who applies ordinary rules of relevance. The final rule does not amend Section 102.68 of the Board's Rules and regulations, which provides that:

> The record in a proceeding conducted pursuant to the foregoing section shall consist of: the petition, notice of hearing with affidavit of service thereof, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the regional director, stipulations, exhibits, affidavits of service, and any briefs or other legal memoranda submitted by the parties to the regional director or to the Board, and the decision of the regional director, if any.

Moreover, if the regional director finds that the record is not sufficient to determine whether a question of representation exists or any other matter that must be addressed prior to directing an election, the regional director can reopen the record and remand the proceeding to the hearing officer.

Some comments make a more specific point concerning the need for an adequate record upon which the regional director can determine whether the petitioned-for unit is an appropriate unit as required by the Act.[118] These comments suggest that if an employer declines to take a position on the appropriateness of the petitioned-for unit and the hearing officer exercises the authority to limit the employer's examination, cross-examination, and introduction of evidence to that which ''supports its contentions'' under § 102.66(a), the regional director and Board may be deprived of an adequate record upon which to fulfill their statutory duty to determine if the proposed unit is appropriate. The Board believes that these comments misunderstand the effect of the amendment. First, as explained in the NPRM, hearing officers have this same authority to limit parties' participation in the hearing under the current rules. See 76 FR 36823; *Bennett Industries Inc.,* 313 NLRB 1363 (1994); *Allen Health Care Services,* 332 NLRB 1308 (2000); Casehandling Manual Section 11217. Second, even if the hearing officer exercises the authority to limit an employer's presentation of evidence under these circumstances, both the petitioner and the hearing officer will retain the right to introduce the evidence needed to make the required determination concerning the unit. That evidence may include testimony adduced from the employer's owners, managers, or supervisors as witnesses, called under subpoena or otherwise, and documents obtained from the employer. Third, the final rule, like the current rules, merely vests the hearing officer with discretion to limit a party's participation in the hearing as it relates to issues concerning which the party has not taken a position. The hearing officer remains free to permit such participation if the officer concludes it is necessary to develop a complete record. The Board has concluded that employers who are unable or unwilling to take a position concerning the appropriateness of a proposed unit of their own employees are unlikely to provide assistance to the hearing officer in the development of an adequate record upon which to address that question. The Board has further concluded that not vesting hearing officers with clear authority to limit such employers' participation in the hearing under those circumstances threatens the hearing officer's ability to control the proceedings and avoid burdening the record.

Some comments criticize the Board's statement of position, joinder, offer-of-proof, preclusion, and 20-percent proposals on the ground that assigning the hearing officer to manage the revised process would be inconsistent with the limits on the role of the hearing officer contained in Section 9(c)(1) of the Act or beyond the capacity of the Board's current hearing officers.[119] The Board does not respond to these comments at length because the Board is taking no action on those proposals at this time.

To the extent the authors of the comments would criticize the final rule on the same grounds, the Board would find them to be unpersuasive. The hearing officer's role under the amendments is limited to the traditional one of controlling the hearing and preventing the record from being burdened by irrelevant evidence. *See Mariah, Inc.,* 322 NLRB 586, 586 n.1 (1996) (hearing officer acted consistent with his role of ensuring that the record is both complete and concise in refusing to permit the introduction of irrelevant evidence at the pre-election hearing). The hearing officer may limit the presentation of evidence based on relevance but cannot render a decision or make any form of recommendation. Thus, the final rule is fully consistent with Section 9(c)(1). Moreover, if upon transmission of the record to the regional director, the director believes the record is insufficient to render a decision on a particular issue relevant to determining whether a question of representation exists or in any other respect, the director may reopen the record for presentation of additional evidence before the hearing officer relevant to that issue.[120]

The Board is also confident that its hearing officers can fully and competently perform their role under the final rule. Currently, the regional

[117] See, e.g., AHA.

[118] AHA argues that it would be unfair to preclude employers from introducing evidence given that some evidence must be accepted concerning this issue.

[119] ALFA; SHRM; Bluegrass Institute; NMA; ACE; AHCA; NAM; Center on National Labor Policy (CNLP).

[120] The Board also notes in this regard that, as explained in relation to § 102.65(c), the final rule does not adopt the narrowed standard for special permission to appeal rulings of the hearing officer to the regional director.

directors assign either field attorneys or field examiners as hearing officers. Field attorneys must possess a J.D. degree and be an active member of a bar. Field examiners must possess a B.A. degree. The Board has traditionally provided written guidance to hearing officers as well as periodic training. Hearing officers also participate in a video training program that covers the subject of conducting a hearing as well as relevant professional development programs. There is also an almost 500-page publication entitled *Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings,*[121] which is periodically updated and made available to hearing officers (and the public on the Board's Web site). Hearing officers are also routinely given feedback on their conduct of hearings by the staff members assigned to assist the regional director in drafting the resulting decision as well as by the regional director. The Board intends to continue to provide these types of assistance, feedback, and training. Finally, the qualifications of hearings officers are not set by statute or regulation. To the extent the regional directors or the Board find that the existing hearing officers cannot competently perform the role assigned them under the final rule, the Board will provide necessary training or alter the qualifications for service as a hearing officer.

Some comments criticize the Board's statement of position, joinder, offer-of-proof, preclusion, and 20-percent proposals on the ground that the proposals would violate the parties' rights to due process of law by limiting the evidence they could introduce at the pre-election hearing.[122] The Board does not respond to these comments at length because the Board is taking no action on those proposals at this time.

To the extent the authors of the comments would criticize the final rule on the same grounds, the Board would find them to be unpersuasive. Most importantly, the final rule does not limit any party's right to present evidence, but merely gives the hearing officer and regional director discretion to defer introduction of such evidence until after the election. Moreover, a party has no right to present irrelevant evidence under the Act, the APA, or the Constitution. *See Mariah, Inc.,* 322 NLRB at 586 n.1 (hearing officer acted consistent with his role in ensuring that the record is both complete and concise in refusing to permit the introduction of irrelevant evidence at the pre-election hearing); *National Mining Ass'n* v. *DOL,* 292 F.3d 849, 873–74 (DC Cir. 2002) (the APA ''empowers agencies to 'exclu[de] * * * irrelevant, immaterial, or unduly repetitive evidence' as 'a matter of policy' '') (citation omitted); *U.S.* v. *Maxwell,* 254 F.3d 21, 26 (1st Cir. 2001) (although a criminal defendant ''has a wide-ranging right to present a defense, * * * this does not give him a right to present irrelevant evidence''); *U.S.* v. *Vazquez-Botet,* 532 F.3d 37, 51 (1st Cir. 2008) (same). Accordingly, parties have no right to present irrelevant evidence at a pre-election hearing, which is not governed by the APA's formal adjudication provisions. See 5 U.S.C. 554 (a)(6); In *re Bel Air Chateau Hospital, Inc.,* 611 F.2d 1248, 1252–1253 (9th Cir. 1979) (representation case proceedings exempt from APA formal adjudication requirements); *NLRB* v. *Champa Linen Service Co.,* 437 F.2d 1259, 1262 (10th Cir. 1971) (same). The Board believes that the final rule merely codifies evidentiary limits that trial court judges routinely apply and thus is fully consistent with the requirement of an ''appropriate hearing,'' the APA, and the due process clause.

A number of comments suggest that Section 9(c) requires a hearing regardless of whether material facts are in dispute.[123] But, as under the current rules, the final rule provides for a pre-election hearing in all cases where the parties have not entered into an election agreement resolving all possible pre-election disputes. Section 9(c) does not require an evidentiary hearing in every case. Rather, it requires ''an appropriate hearing.'' If the parties come to the hearing and the hearing officer determines that there are no disputes that must be resolved prior to the election (because, for example, all parties agree on the record that the Board has jurisdiction and that the only dispute concerns the supervisory status of one individual in a unit that all parties agree on the record is appropriate), an appropriate hearing does not require introduction of further evidence. See *United States* v. *Storer Broadcasting,* 351 U.S. 192, 205 (1956); *accord American Airlines, Inc.* v. *Civil Aeronautics Board,* 359 F.2d 624, 628 (en banc), *cert. denied,* 385 U.S. 843 (1966). In fact, the Board concludes that a hearing where irrelevant evidence is introduced is an inappropriate hearing.

Several comments criticize the proposed 20-percent rule on policy grounds. For example, some comments argue that it is unfair to defer resolution of supervisory status questions, because employers need to know who their supervisors are so they know who they can require to campaign against employee representation.[124] Similarly, comments argue that employers need to know which employees are eligible to vote so they know whom to address concerning the question of representation.[125] Numerous comments additionally express the position that deferral of eligibility questions under the 20-percent rule would impair employee rights. More specifically, many comments assert that deferral would deprive employees of knowledge about the precise parameters of the bargaining unit, thereby depriving them of the right to cast an informed ballot,[126] or impeding their ability to determine whether they share a community of interest with the other voters.[127] Similarly, a number of comments express the view that deferral of eligibility issues would engender confusion among the voting employees.[128] Other comments generally suggest that the deferral of eligibility issues would increase the likelihood that disputed individuals would refrain from voting in an election. For example, a number of comments express the position that employees, faced with the prospect of having their votes challenged, might simply refrain from voting,[129] some as a result of a concern that—particularly in smaller units—they could be easily identified as the individuals whose votes determined the outcome of the

[121] Office of the General Counsel, National Labor Relations Board, *Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings* (Sept. 2003).

[122] Constangy; SHRM; Sheppard Mullins; NRF; Kuryakyn Holding LLC (Kuryakyn); NMMA; CNLP.

[123] See SHRM; CNLP.

[124] Seyfarth Shaw; Council of Smaller Enterprises (COSE); Constangy; Indiana Chamber of Commerce; COLLE; RILA. SHRM also suggests that deferring resolution of supervisory status questions might somehow threaten attorney-client communications if counsel communicates with an individual the employer believes is a supervisor who is later held not to be a supervisor. This same concern exists under the current procedures as explained above. Moreover, the test the Board uses to determine who is a supervisor under the Act is not and need not be the same as the various tests used to determine if attorney communications to an individual employed by the attorney's client are privileged.

[125] See, e.g., PIA.

[126] See, e.g., Testimony of Eric Schweitzer; Testimony of David Burton; GAM; Constangy; ACC; Anchor Planning Group; Kruchko & Fries; NRF; Baker & McKenzie; COLLE; Indiana Chamber of Commerce. IBEW, in contrast, states that, in its experience, employee voters are motivated primarily by whether they desire representation and not by precisely which employees will be in the unit.

[127] See, e.g., Associated Oregon Industries; COSE; Seyfarth Shaw; Kuryakyn; NMMA; John Deere Water; NACCO Materials Handling Group; Graphtec America; Baker & McKenzie.

[128] See, e.g., SHRM; Seyfarth Shaw; ACE; AHA; ALFA; Spartan Motors.

[129] See, e.g., Pinnacle Health Systems; PIA; Arizona Hospital and Healthcare Association.

election.[130] Finally, with respect specifically to the deferral of supervisory status questions, several comments generally express concern that employees with disputed supervisory status would not know whether they could appropriately speak in favor of or against union representation, attend union meetings, or sign authorization cards,[131] and SHRM asserts that employees would be chilled in the exercise of their Section 7 and First Amendment rights.

However, in this final rule the Board has determined not to adopt the 20-percent rule at this time, or make any change to the status quo concerning the regional director's or Board's discretion to defer deciding or the parties' right to agree to defer litigation concerning such questions until after the election. Prior to the amendments, regional directors were free to decide individual eligibility questions if they wished to do so or to defer such decisions until after the election and direct that disputed individuals vote subject to challenge. The same is true under the final rule. Although the amendments permit the hearing officer to exclude evidence that is not relevant to determining whether a question of representation exists–and thereby permit the hearing officer to exclude evidence regarding individual eligibility questions–the hearing officer is free to permit the introduction of such evidence and the regional director is free to direct that such evidence be admitted if he or she resolves to decide the individual eligibility questions at issue.

In any event, the Board is not persuaded by the policy argument that it should permit litigation of all individual supervisory status questions—even though such questions are ordinarily irrelevant to the statutory purpose of the hearing—on the grounds that resolution of such questions is necessary for an employer effectively to campaign against union representation. Most fundamentally, while the question of whether particular individuals are supervisors as defined in the Act has generated considerable litigation, the question exists only at the margin. In the Board's experience, in virtually every case, even where there is uncertainty concerning the supervisory status of individual employees, the employer nevertheless has in its employ managers and supervisors whose status is not disputed and is undisputable.[132]

The policy argument contained in these comments is also based on a set of faulty premises. First, as explained above and in the NPRM, employers have no right to a pre-election decision concerning individual eligibility under the current rules. Second, even under the current rules, a regional director cannot issue a decision on any eligibility question until well after the filing of the petition because a hearing must be noticed (no sooner than five business days after the notice), the hearing must be completed, and the regional director must issue a decision. Thus, for a substantial part of any campaign, including a substantial part of the ''critical period'' between the filing of the petition and the election, employers will not yet have a regional director's decision even in those cases where one issues pre-election. Third, again under the current rules, even if the regional director makes a decision concerning an individual eligibility question, it is subject to a request for review by the Board. The Board rarely rules on such requests until shortly before the election and, sometimes, not until after the election. See, e.g., *Mercedes-Benz of Anaheim,* Case 21–RC–21275 (May 18, 2011) (day before the election); *Caritas Carney Hospital,* Case 1–RC–22525 (May 18, 2011) (after the election); *Columbus Symphony Orchestra, Inc.,* 350 NLRB 523, 523 n.1 (2007) (same); *Harbor City Volunteer Ambulance Squad, Inc.,* 318 NLRB 764, 764 (1995) (same); *Heatcraft, Div. of Lennox Indus., Inc.,* 250 NLRB 58, 58 n.1 (1980) (same). Fourth, the problem identified by the employer comments is even more acute for unions, which must obtain a showing of interest prior to filing a petition. If the union asks employees to help gather a showing of interest and the employees are later determined to be supervisors, the Board may hold the showing of interest to be tainted and overturn election results favoring union representation on that ground. See *Harborside Healthcare Inc.,* 343 NLRB 906 (2004). That problem cannot possibly be solved through any form of post-petition, pre-election hearing. Fifth, under the Act itself, even if a regional director's decision and final Board decision are rendered prior to an election, the Board decision is potentially subject to review in the courts of appeals and the court of appeals' decision cannot be rendered pre-election. See 29 U.S.C. 159(d) and 160(e); *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 476–79 (1964).[133] Thus, the uncertainty with which the comments are concerned exists under the current rules and cannot be fully eliminated.

Nor does the Board agree that the proposed amendments improperly deprive employees of the ability to make an informed choice in the election. As explained above, under the amendments, as under the current rules, the regional director must determine the unit's scope and appropriateness prior to the direction of the election. Accordingly, at the time they cast their ballots, the voting employees will be fully informed as to the scope of the unit, and will be able to fully assess the extent to which their interests may align with, or diverge from, other unit employees. Although the employees may not know whether particular individuals ultimately will be deemed eligible or included and therefore a part of the bargaining unit, that is also the case under the Board's current rules, as explained above, and when the parties agree to permit disputed employees to vote subject to challenge. In addition, as pointed out by SEIU in its comments, a similar choice has confronted voters in mixed professional/non-professional units since 1947, when Congress amended the Act to provide that a majority of the professional employees must vote separately to be part of such a mixed unit and the results of that separate vote, which takes place simultaneously with the vote in the entire unit, are not known when employees cast their ballots. See Section 9(b)(1); *Sonotone Corp.,* 90 NLRB at 1241–42. In that context, the Board has held, ''Such a procedure * * * presents the employees with an informed choice.'' *Pratt & Whitney,* 327 NLRB 1213, 1218 (1999).

Many comments cite the courts of appeals' decisions in *NLRB* v. *Beverly Health and Rehabilitation Services,* 120 F.3d 262 (4th Cir. 1997) (unpublished per curiam opinion), and *NLRB* v. *Parsons School of Design,* 793 F.2d 503 (2d Cir. 1986). As explained in the NPRM, those two decisions represent the minority view in the courts. The

[130] See, e.g., LRI; Anchor Planning Group; Bluegrass Institute.

[131] See, e.g., Seyfarth Shaw; ACE; Sheppard Mullin.

[132] See, e.g., *McAlester General Hospital,* 233 NLRB 589, 589–90 (1977) (noting that even without considering employees whose supervisory status was in dispute, employer employed one supervisor for every eight unit employees and, if the employer filled open supervisory positions, it would employ one supervisor for every three unit employees).

[133] ALFA expressed concern that if an alleged supervisor is permitted to vote subject to challenge, the results of the election might be set aside pursuant to an objection citing the presence of a supervisor in the polling area if the individual is found to be a supervisor after a post-election hearing. As explained above, this scenario can arise under the current procedures. See, e.g., *Sorenson Lighted Controls,* 286 NLRB 969, 989 (1987). The Board is not aware of any case holding such conduct *per se* objectionable under these circumstances and the existence of the new rules would be a factor the Board would consider if such an objection arises in the future.

majority of the courts of appeals have upheld the Board's vote-and-impound procedures and upheld election results even when the eligibility or inclusion of certain employees was not resolved until after the election.[134] Moreover, under the final rule, the hearing officer and regional director have discretion to permit litigation and to resolve eligibility and inclusion questions that might significantly change the size or character of the unit, thus addressing the courts' concerns in both *Beverly* and *Parsons.* In addition, as explained in the NPRM, the courts' concern in both of those cases was that voters were somehow misled when the regional director defined the unit in one way prior to the election and the Board revised the definition after the election. The final rule would actually prevent exactly that form of change in unit definition from occurring, by deferring both a regional director's decision, in most instances, and a Board decision until after the election and permitting disputed employees to vote subject to challenge. Thus, employees will not in any manner be misled about the unit. Rather, they will cast their ballots understanding that the eligibility or inclusion of a small number of individuals in the unit has not yet been determined. Finally, as proposed in the NPRM, the Board could, even prior to or without adopting the relevant proposed rule, revise its final notice of election to inform employees that specified employees are voting subject to challenge, what that means, and how their status will be resolved. See *Sears, Roebuck,* 957 F.2d at 55 (regional director permitted employees in one classification to vote subject to challenge and included section in notice which ''detailed the special voting posture of the automotive floor sales employees and the circumstances for including their votes'').

PIA and Bluegrass Institute suggest that deferring resolution of individual eligibility questions until after the election threatens the secrecy of the ballot and that employees who are permitted to vote subject to challenge are less likely to vote because they fear that the parties will learn how they voted. However, even if the amendments to §§ 102.64(a) and 102.66(a) and the elimination of § 101.20(c) lead to more disputes concerning individual eligibility being deferred until after the election, the Board is not persuaded that the final rule threatens the secrecy of the ballot or voter turnout. The courts have upheld the Board's current practice of deferring individual eligibility questions under most circumstances. Moreover, the ballots cast by the employees directed to vote subject to challenge are not counted if they are not determinative. Accordingly, ballot secrecy is preserved in those cases. Even if challenged ballots are determinative, the ballots are not counted if the employees who cast them are ultimately found to be ineligible after the post-election hearing. And, even if the ballots cast by such individuals are determinative and a post-election hearing results in the individuals who cast them being found eligible, the ballots are not opened and counted one by one, but rather the ballots of all individuals found to be eligible are ''thoroughly mixed'' before being opened and counted. *See* Casehandling Manual Section 11378. Accordingly, the Board believes that it is only in cases where there is just one determinative challenge or where all of the potentially determinative challenged ballots are marked in the same way that the parties will learn how the employees voted. However, that is both rare and inherent in any system that permits challenges, including the current system. Thus, even if regional directors were prohibited from deferring individual eligibility issues, which is not the case currently, parties would still have a right to challenge voters for good cause at the polls and the commenters' concern would remain.[135]

Finally, the Board is unaware of any significant differences between the turnout of employees whose eligibility to vote has not been disputed or has been resolved prior to the election and employees permitted to vote subject to challenge. The case law demonstrates that even in cases where only a single individual is permitted to vote subject to challenge, the individual is not necessarily deterred from voting. See, e.g., *NLRB* v. *Cal-Western Transport,* 870 F.2d 1481, 1483, 1486 (9th Cir. 1989) (regional director permitted single employee to vote subject to challenge and he did so); *NLRB* v. *Staiman Brothers,* 466 F.2d 564, 565 (3d Cir. 1972) (deciding vote cast by single employee permitted to vote subject to challenge by agreement of the parties).

Finally, balanced against any asserted employer or employee interests in pre-election litigation of individual eligibility or inclusion questions is the statutory interest in prompt resolution of questions of representation. As explained above and in the NPRM, permitting the litigation of such matters imposes serious costs, and no comments on the NPRM convinced the Board otherwise. It plainly frustrates the statutory goal of expeditiously resolving questions of representation, and it frequently imposes unnecessary costs on the parties and the government. As explained in the NPRM, it often results in unnecessary litigation and a waste of administrative resources as the eligibility of potential voters is litigated (and in some cases decided), even when their votes end up not affecting the outcome of the election. If a majority of employees votes against representation, even assuming all the disputed votes were cast in favor of representation, the disputed eligibility questions become moot. If, on the other hand, a majority of employees chooses to be represented, even assuming all the disputed votes were cast against representation, the Board's experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining once they are free of the tactical considerations that exist pre-election and, if they cannot do so, either party may file a unit clarification petition to bring the issue back before the Board. See *New York Law Publishing Co.,* 336 NLRB No. 93, slip op. at 2 (2001) (''The parties may agree through the course of collective bargaining on whether the classification should be included or excluded. Alternatively, in the absence of such an agreement, the matter can be resolved in a timely invoked unit clarification petition.''). As the Eighth Circuit observed, ''The NLRB's practice of deferring the eligibility decision saves agency resources for those cases in which eligibility actually becomes an issue.'' *Bituma Corp.* v. *NLRB,* 23 F.3d 1432, 1436 (8th Cir. 1994). The Sixth Circuit similarly found that ''[s]uch a practice enables the Board to conduct an immediate election.'' *Medical Center at Bowling Green* v. *NLRB,* 712 F.2d 1091, 1093 (6th Cir. 1983).

NRTWLDF argues that application of the 20-percent rule at the hearing might cast into question the regional office's earlier, administrative determination that the petition was accompanied by an adequate showing of interest. Whether or not that is the case, the final rule does not adopt the 20-percent rule. Moreover, the concern expressed in the comment

[134] See, e.g., *Sears, Roebuck & Co.* v. *NLRB,* 957 F.2d 52 (2d Cir. 1992); *Nightingale Oil Co.* v. *NLRB,* 905 F.2d 528, 533–34 (1st Cir. 1990); *NLRB* v. *Clark Distributing,* 917 F.2d 24 (6th Cir. 1990) (unpublished); *Prudential Ins. Co. of America* v. *NLRB,* 832 F.2d 857, 861 (4th Cir. 1987).

[135] The Board also notes that to the extent the amendments do result in more individuals casting challenged ballots than under the current rules, the amendments may well have the effect of making it less likely that parties will be able to discover how particular individuals voted.

could equally be expressed about the current procedures under which regional directors and the Board routinely defer ruling on eligibility questions without revisiting the adequacy of the showing of interest. In addition, the final rule leaves the hearing officer and regional director with discretion, respectively, to permit introduction of evidence and to rule pre-election if the eligibility questions involve a large percentage of the unit. When the deferred questions concern only a small percentage of the unit, the concern expressed by NRTWLDF is unlikely to arise. Furthermore, the required showing of interest is purely an internal administrative matter, as explained in current § 102.18(a): ''it being the Board's experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.'' The adequacy of the showing is non-litigable. *The Borden Co.,* 101 NLRB 203, 203 n. 3 (1952) (''the question of the sufficiency of the showing of interest * * * [is a matter] for administrative determination and not subject to litigation by the parties); Casehandling Manual Section 11028.3. Finally, given that the only consequence of the possible scenario envisioned by NRTWLDF is, in rare cases, the conduct of an election which would not otherwise have been conducted, the Board does not believe that that possibility weighs heavily against the efficiencies gained by affording the hearing officer discretion not to take evidence concerning individual eligibility and inclusion questions.

Some comments criticize the 20-percent rule on the grounds that it will lead to more post-election litigation and result in more overturned elections as a result of post-election rulings concerning the eligibility of employees.[136] Similarly, two comments raise the concern that because the bargaining obligation attaches at the time of the tally, employers will be required to invest time and money in bargaining with a union that has questionable representative status.[137] These comments misunderstand the proposals. As under the current rules, if decisions concerning individuals' eligibility or inclusion are deferred until after the election, the individuals will vote subject to challenge. If their votes are not potentially outcome determinative, the matter will not be litigated, thus decreasing the total amount of litigation. If their votes are potentially outcome determinative, the matter will be litigated and the resolution may affect the results of the election, but it will not lead to the results of the election being overturned. As under the current procedures, post-election proceedings concerning challenged ballots will proceed and conclude promptly at the regional level. As explained above and below in relation to §§ 102.62(b) and 102.69, any Board review of the disposition will be expedited by the final rule.

Finally, a few comments argue that deferral of voter eligibility questions will create more issues for the parties to address during first contract negotiations. As explained above, this already happens under the current rules, when the regional director or the Board defers decision on the questions and does not decide them post-election because the votes of the disputed individuals were not potentially outcome determinative. The Board does not believe addressing such questions will complicate bargaining, particularly when the parties can file a timely unit clarification petition if they are unwilling or unable to resolve the matter.

Subsection 102.66(d)

The NPRM proposed amending §§ 102.67 and 102.66(d) to vest the hearing officer with discretion to control the filing, subjects, and timing of any post-hearing briefs. The final rule adopts this proposal.

The NPRM explained that, given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs are not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions. Yet under existing §§ 102.67(a) and 101.21(b), in nearly all cases parties are afforded a right to file briefs at any time up to seven days after the close of the hearing.[138] By exercising that right or even by simply declining to expressly waive that right until after the running of the seven-day period, parties can potentially delay the issuance of a decision and direction of election and the conduct of an election for purely tactical reasons.

Various comments, including those of SHRM, AHA, AHCA and ALFA, oppose the proposed amendment on the ground that briefs are needed to sum up the evidence presented at the pre-election hearing. SHRM and ACE point out that this cannot be done as effectively in oral argument at the close of the hearing because the full transcript is ordinarily not yet available. Bruce E. Buchanan argued that briefs serve to narrow the issues in dispute and identify relevant case law. The AFL–CIO points out that the current Casehandling Manual recognizes that briefs are not necessary or even of assistance in every case. Section 11242 provides, ''Before the close of the hearing, the hearing officer should encourage the parties to argue orally on the record rather than to file briefs.''[139]

Having considered these comments, the Board has concluded that post-hearing briefing is not required or even helpful in every case. In this regard, it is important to note that amended § 102.66(d) does not prevent parties from filing post-hearing briefs. Rather, it simply vests the hearing officer with discretion to permit or not permit such filings and to otherwise control the content and timing of any post-hearing briefs. Moreover, in every case, parties aggrieved by a decision of the regional director will have a right to file a brief in support of their request for review. Thus, in every representation case that proceeds to a pre-election hearing, a party aggrieved by a ruling of a hearing officer or decision of the regional director will have had the opportunity to file at least one and sometimes two briefs before the close of the case. Finally, in relation to the need for a transcript before parties can adequately sum up the evidence, the Board notes that the average pre-election hearing lasts for less than one day.

It also bears mentioning that, even under the current rules, parties do not enjoy a right to file post-hearing briefs in certain kinds of representation cases. For example, the Board's current rules do not permit the filing of briefs absent ''special permission'' after a pre-election hearing conducted under Sections 8(b)(7) and 9 of the Act. See 29 CFR 101.23(c). Similarly, there is no right to file post-hearing briefs after a hearing on challenges or objections. See Casehandling Manual Section 11430;

[136] See Associated Oregon Industries; Kuryakyn; Bluegrass Institute; NMMA.

[137] See COSE; Constangy.

[138] Despite the current regulations, the Board has denied review of a direction of election when one argument made by the party requesting review was that the hearing officer had refused to permit post-hearing briefs. *Unifirst Corp.,* Case 5–RC–15052 (Aug. 16, 2000). The Board reasoned that the party had showed no prejudice and was able to fully present its substantive argument in the request for review. *Id.* at n.1.

[139] The AFL–CIO also points out that a preference for oral argument in lieu of briefing was among the ''best practices'' identified by the Board's General Counsel in a 1997 report. See G.C. Memo. 98–1, ''Report of Best Practices Committee—Representation Cases December 1997,'' at 10, 28 (''It is considered a best practice that the hearing officer should solicit oral argument in lieu of briefs in appropriate cases since in some cases briefs are little, if any, assistance to the Regions and may delay issuance of the decision.'').

Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings at 167 (''In a hearing on objections/challenges, the parties do not have a right to file briefs. To the extent that briefs are not necessary and would interfere with the prompt issuance of a decision, they should not be permitted.'').

GAM argues that the proposal denies due process. In response, the Board points out that the final rule does not deny any party's right to file at least one post-hearing brief with the Board before the close of the representation proceeding. Moreover, the rule permits the filing of a post-hearing brief with the regional director with leave of the hearing officer. Combined with the right to file a pre-hearing brief or to file a hearing brief before the close of the hearing and to present closing, oral argument in every case, the opportunities for the filing of post-hearing briefs provided in the final rule do not deprive any party of due process nor are they inconsistent with the statutory requirement of an ''appropriate hearing.'' In *Morgan* v. *United States,* 298 U.S. 468 (1936), the Supreme Court considered the essential element of the ''full hearing'' required by the Packers and Stockyards Act, 7 U.S.C. 310. The Court held that the requirement of a full hearing was not met if the decision-maker was an individual ''who has not considered evidence or argument.'' *Id.* at 481. However, the Court also made clear that the ''requirements are not technical,'' that ''[e]vidence may be taken by an examiner,'' and that [a]rgument may be oral or written.'' *Id.* See also *Abbott Laboratories* v. *NLRB,* 540 F.2d 662, 665 n.1 (4th Cir. 1976) (''With respect to proceedings before the hearing officer, the Board ruled that its hearing officer was not required, either by statute or the due process clause, to accept posthearing briefs since the parties had the opportunity to express their views in writing both before and after the case was referred to the hearing officer * * * We see no error of fact or law in these rulings.''); *Lim* v. *District of Columbia Taxicab Commission,* 564 A.2d 720, 726 (DC App. 1989) (''there exists no due process right * * * to file a brief'').

The APA and its legislative history contain evidence of Congress's intent not to require that the Board permit post-hearing briefing after every pre-election hearing. Enacted in 1946, Section 8 of the APA, 5 U.S.C. 557(c), provides that in formal agency adjudication:

> Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
>
> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions.

But Section 5(6) of the APA, 5 U.S.C. 554(a)(6), specifically exempts from the category of formal adjudication those cases involving ''the certification of worker representatives.'' The courts have held that this exemption applies to both pre- and post-election hearings. See *In re Bel Air Chateau Hospital, Inc.,* 611 F.2d 1248, 1252–1253 (9th Cir. 1979); *NLRB* v. *Champa Linen Service Co.,* 437 F.2d 1259, 1262 (10th Cir. 1971). The Senate Committee Report explained that the exemption was inserted into the APA because the Board's ''determinations rest so largely upon an election or the availability of an election.'' S. Rep. No. 752, 79th Cong., 1st Sess. 16 (1945). The committee also pointed to ''the simplicity of the issues, the great number of cases, and the exceptional need for expedition.'' Senate Committee on the Judiciary Comparative Print on Revision of S. 7, 79th Cong., 1st Sess. 7 (1945).

While Section 9 of the NLRA was amended in 1947 to adopt the current version of Section 9(c), the APA was not amended and continues to exempt representation cases from its formal adjudication requirements. In fact, between 1964 and 1966, Congress considered removing all the exceptions contained in Section 5 from the APA, but decided not to do so. In 1965, the Board's Solicitor wrote to the Chairman of the Senate Subcommittee on Administrative Practice and Procedure objecting strenuously to removal of the exemption for representation cases. The Solicitor specifically objected that ''election case handling would be newly freighted and greatly retarded by * * * [s]ubmission to the hearing officer of proposed findings of fact and conclusions of law.'' Administrative Procedure Act: Hearings on S. 1663 Before the Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary, 88th Cong., 2d Sess. 532 (1964) (letter submitted by William Feldesman, NLRB Solicitor, May 11, 1965). The Solicitor concluded, ''After Congress has done so much to help speed the processing of election cases to avoid the dangers of delay, this would hardly be the time to inaugurate procedural changes which serve dilatory ends and have the potential to cause that bottleneck the Board has for years been attempting to prevent.'' *Id.* at 534. In 1966, the Senate Committee on the Judiciary reported out a bill containing a provision, not ultimately enacted, that would have removed all the exemptions. But the Committee Report carefully explained, ''It should be noted, however, that nonadversary investigative proceedings which Congress may have specified must be conducted with a hearing, are not to be construed as coming within the provisions of section 5(a) because of the deletion of the exemptions. An example of such a proceeding would be certification of employee representatives proceedings conducted by the National Labor Relations Board.'' S. Rep. No. 1234, 89 Cong., 2d Sess. 12–13 (1966).

SEIU suggests amending the proposed rule to require that any briefing be completed within 14 days of the close of the hearing. The Board has considered this suggestion and decided that the hearing officer who has heard the evidence introduced at the hearing and considered the parties' request to file a post-hearing brief is in the best position to determine if briefing should be permitted, what subjects any briefing should address, and when briefs should be filed.

Sec. 102.67 Proceedings Before the Regional Director; Further Hearing; Action by the Regional Director; Review of Action by the Regional Director; Statement in Opposition; Transfer of Case to the Board; Board Action

In the NPRM, the Board proposed a number of amendments to § 102.67. The Board proposed that the regional director defer deciding eligibility questions involving less than 20 percent of the unit and instead permit the disputed individuals to vote subject to challenge. The Board also proposed to give the regional director discretion to issue a direction of election with findings and a statement of reasons to follow no later than the tally of the ballots. The Board further proposed to make changes with respect to the *Excelsior* list and the final notice of the election, and to eliminate the regional director's authority to transfer a case to the Board for decision at any time. The Board has decided to take no action at this time on those proposals in order to permit more time for deliberation.

In the NPRM, the Board also proposed amendments to the current pre-election request-for-review procedure and the accompanying 25-day waiting period. Under the current rules, the parties are required to request Board review within 14 days of a regional director's decision

and direction of election or be deemed to have waived any arguments that were or could have been made concerning rulings at the pre-election hearing or the decision and direction of election. § 102.67(f); see, e.g., *A.S. Horner, Inc.,* 246 NLRB 393, 394–95 (1979). In addition, the regional director generally schedules the election no sooner than 25 days after the direction of election so that the Board has an opportunity to rule on any request for review that may be filed. § 101.21(d). But a request does not automatically stay the election, which proceeds as scheduled in almost all cases. If the Board has not yet ruled on the request at the time of the election, as is not infrequently the case, the election is held and the ballots impounded until the Board can rule. Even if the Board grants the request, the Board almost never stays the election and the same vote-and-impound procedure is used.

The Board proposed to eliminate the pre-election request-for-review procedure in the NPRM and instead permit parties to file any such request after the election, when it could be consolidated with any request for review of the director's disposition of post-election disputes arising out of challenges or objections. In the NPRM, the Board explained that the amendment would eliminate unnecessary litigation because many issues raised through pre-election requests for review are either rendered moot by the election results or are resolved by agreement of the parties post-election. In addition, the Board explained, permitting parties to consolidate, in a single filing, requests that the Board review pre- and post-election rulings will result in efficiencies for the parties and the Board.

The Board also proposed eliminating the 25-day waiting period because, even under the current rules, it serves little purpose in light of the vote-and-impound procedure, and its stated purpose is eliminated by the elimination of the pre-election request for review.

The final rule adopts both these proposals.

The final rule's elimination of the pre-election request for review and consolidation of all Board review (except via a request for special permission to appeal) post-election conforms Board procedures with the ordinary rules in both federal and state courts. As the Supreme Court has explained, consolidating appellate review in a single proceeding subsequent to a final order avoids unnecessary litigation and expense. ''Trial court errors become moot if the aggrieved party nonetheless obtains a final judgment in his favor, and appellate courts need not waste time familiarizing themselves anew with a case each time a partial appeal is taken.'' *Mitchell* v. *Forsyth,* 472 U.S. 511, 544 (1985). In contrast, the Court explained in a later decision, ''An interlocutory appeal * * * risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.'' *Johnson* v. *Jones,* 515 U.S. 304, 309 (1995). Countless court of appeals decisions contain the same reasoning for limiting interlocutory appeal. See, e.g., *Armendariz* v. *Penman,* 75 F.3d 1311, 1316 (9th Cir. 1996) (''[P]iecemeal litigation * * * risks the creation of unnecessary appellate work by presenting issues for review which could have been avoided entirely if trial had proceeded.'').

Relatively few comments took issue with the proposed elimination of the pre-election request for review, as noted by SEIU in its reply comment. Those that did—for example, SHRM, AHA, and ACE—generally commented that in cases where review would otherwise have been granted, the proposed rule would result in elections being run unnecessarily, causing both the Board and the parties to incur unnecessary expense. The comments pose the example of a regional director failing to find a bar to the conduct of an election, and thereby erroneously directing an election. But this example aptly illustrates the flaw in the argument. Even under the current rules, if a regional director finds no contract bar and directs an election, and a party files a request for review that the Board grants, the election will typically be held and the ballots impounded prior to Board resolution of the issue. See, e.g., *VFL Technology Corp.,* 329 NLRB 458, 458 (1999); *Western Pipeline, Inc.,* 328 NLRB 925, 925 n.1 (1999). Thus, the same expenses may be unnecessarily incurred under current procedures. See, e.g., *Mercy General Health Partners Amicare Homecare,* 331 NLRB 783, 785–86 (2000) (Board directed that impounded ballots not be counted and that second election be held after ruling on pre-election request for review post-election). Moreover, given the small number of requests for review filed each year, and the extraordinarily small percentage of regional directors' decisions that are ultimately reversed,[140] the number of cases of the type described in these comments is likely to be insignificant. Finally, under the final rule a party may file a request for special permission to appeal and request a stay under appropriate circumstances.

Some comments argue that deferring review of issues that were previously raised in a pre-election request for review until after the election will result in the Board addressing more issues subsequent to the opening of the ballots.[141] However, this is no different from current practice when the regional director and the Board rule on challenged ballots or objections. Moreover, it is a necessary correlate of waiting to see if the dispute is rendered moot by the election results. Thus, it is parallel to the situation in appellate courts that consider evidentiary and other interlocutory rulings only as part of an appeal from a final order, i.e., knowing how the case was decided.

Some comments contend that the proposed rule will not expedite commencement of bargaining but will simply shift review until after the election.[142] The Board disagrees. In the Board's experience, many pre-election disputes are either rendered moot by the election results or can be resolved by the parties after the election and without litigation once the strategic considerations related to the impending election are removed from consideration. Accordingly, the Board believes that the current system is inefficient and imposes unnecessary costs on the parties and the government by requiring parties to litigate, and the Board to rule on, issues that are frequently rendered moot by the election results. In sum, the Board believes that the final rule will not simply shift litigation from before elections to after, but rather will significantly reduce the total amount of litigation.

AHA comments that the Board's own failings in timely processing requests is not a basis for eliminating the right of parties to review. But the final rule does not eliminate any party's right to request review. The rule simply eliminates the obligation to request review pre-election in order to preserve an issue, and permits any issue that would previously have been raised pre-election to be raised through a single, more efficient, post-election request for review.

[140] From 2004 to 2009, review was granted pursuant to less than 12 percent of requests, and less than 5 percent of regional directors' decisions were reversed.

[141] See, e.g., PIA; COLLE; ACE.

[142] See, e.g., Testimony of Michael Prendergast; AHA; Seyfarth Shaw.

Moreover, if a party believes that pre-election review is essential to preserve an issue for review, it can file a request for special permission to appeal. Finally, the Board is entitled to and must consider its own adjudicative and administrative capacities and past performance in evaluating its procedural rules. The elimination of pre-election request for review will, as explained above, reduce the number of disputes reaching the Board. The Board will, therefore, be able to dispose of those disputes that do reach it more promptly.

Others suggest that limiting pre-election review will mean that the parties will be unsure who is a supervisor during the pre-election campaign.[143] This objection is addressed at length above in relation to § 102.66. But the current pre-election review procedures do not entitle the parties to a final Board determination on such matters prior to the election and rarely result in such a determination. Even in the very rare cases where the Board both grants review and rules on the merits prior to the election, as explained above, the ruling typically is issued only days before the election, i.e., well into the critical period between petition and election, and thus does not serve the purpose the comments suggest will be thwarted if the pre-election request for review is eliminated.

Very few comments specifically object to the elimination of the 25-day waiting period. Indeed, there is near consensus that this period serves little purpose.[144] In support of the proposed rule, several comments observe that parties typically do not use the waiting period to request review and that a single post-election review process eliminates use of the Board's processes to achieve tactical delays.[145]

Some comments, such as the hearing testimony of Jay P. Krupin, maintain that the 25-day period serves an important purpose because the ''rules of the game'' are not set until the decision and direction of election, so the parties are not sure which voters they need to persuade or which employees can speak on behalf of the employer until the decision issues. However, the stated purpose of the 25-day period is not to give parties an opportunity to campaign. Section 101.21(d) states only that the 25-day waiting period is ''to permit the Board to rule on any request for review which may be filed.'' Moreover, the concern raised in this comment is addressed at length above in § 102.66. Finally, the regional director retains discretion to consider any significant changes in the scope of the unit that result from the decision and direction of election in setting the election date.

A few comments observe that the waiting period serves a purpose in the small minority of cases where the Board finds that a request for review has merit. These comments suggest that a waiting period would be appropriate where a pre-election request for review is actually filed. AHCA and ALFA suggest an alternative to the proposed rule, whereby the Board would ask parties whether they intend to file a request for review. If they answer affirmatively, then and only then would the regional director wait at least 25 days to hold the election. If adopted, however, that proposal would give parties the ability to delay elections for tactical purposes. Moreover, in many cases, the delay would still be wholly unnecessary when the issue raised in the pre-election request for review is rendered moot by the election results. Finally, even where a request for review is granted and eventually found to have merit, there is little reason that the request should be filed pre-election or that the election should be delayed so that the Board can consider it, because the election almost always proceeds using the vote-and-impound procedures before the Board's decision on the merits issues.

Some comments argue that the elimination of the 25-day waiting period, combined with other proposed amendments, interferes with employers' right to free speech under Section 8(c) of the Act and the First Amendment and undermines the free discussion of the question of representation essential to employee free choice. As explained above, these objections have little continuing relevance now that the Board has determined to deliberate further about several of the other proposed amendments. To the extent the objections still have force, they are addressed at length above in Section III, D.

Sec. 102.69 Election Procedure; Tally of Ballots; Objections; Certification by the Regional Director; Requests for Review of Directions of Elections; Hearings; Hearing Officer Reports on Objections and Challenges; Exceptions to Hearing Officer Reports; Requests for Review of Regional Director Decisions in Stipulated or Directed Elections

In the NPRM, the Board proposed to amend § 102.69 to (1) require that a party filing objections simultaneously file a description of the evidence supporting its objections, (2) require that the regional director set any hearing on determinative challenged ballots or objections to begin 14 days after the tally or as soon thereafter as practicable, (3) codify the regional director's discretion to dispose of both determinative challenges and objections through an investigation without a hearing when they raise no substantial and material factual issues, (4) establish a uniform procedure when a hearing is conducted, and (5) make Board review of regional directors' post-election dispositions discretionary. The final rule adopts proposals (3), (4), and (5).

The final rule codifies existing practice permitting the regional director to investigate determinative challenges and objections by examining evidence offered in support thereof to determine if a hearing is warranted.[146] The final rule also creates a uniform procedure in those cases in which there are potentially outcome-determinative challenges or objections which the regional director determines raise substantial and material factual issues that require a hearing. Adopting the procedure currently contained in § 102.69(d) and (e), the final rule provides that, in such cases, the regional director shall provide for a hearing before a hearing officer who shall, after such hearing, issue a report containing recommendations as to the disposition of the issues. Within 14 days after issuance of such a report, any party may file exceptions with the regional director and the regional director will dispose of the exceptions. If no exceptions are filed to such report, the

[143] See, e.g., Testimony of Harold Weinrich.

[144] See Testimony of Professor Samuel Estreicher; SEIU reply.

[145] See Professor Joel Cutcher-Gershenfeld; Ranking Member George Miller and Democratic Members of the U.S. House of Representatives Committee on Education and Workforce; IBEW; Thomas Meiklejohn.

[146] At least one comment argues that the amendments improperly permit regional directors to administratively dismiss objections without a hearing, thereby denying parties the right to a hearing and the ability to create a record for subsequent review. However, regional directors may administratively dismiss objections and challenges without a hearing under the current rules where they do not raise substantial and material issues that would warrant setting aside the election. 29 CFR 102.69(d). This well-settled practice avoids wasteful litigation, is no different from a trial court granting a motion to dismiss, and has been approved by the courts of appeals. See *NLRB* v. *Bata Shoe Co.,* 377 F.2d 821, 826 (4th Cir. 1967); *NLRB* v. *Air Control Products of St. Petersburg, Inc.,* 335 F.2d 245, 249 (5th Cir. 1964); *Puerto Rico Aqueduct & Sewer Auth.* v. *EPA,* 35 F. 3d 600, 605–06 (1st Cir. 1994) (''To force an agency fully to adjudicate a dispute that is patently frivolous, or that can be resolved in only one way, or that can have no bearing on the disposition of the case, would be mindless * * *.''); Fenn C. Horton III, *The Requirements of Due Process in the Resolution of Objections to NLRB Representation Elections,* 10 J. Corp. L. 493, 495–509 (1985). The amendments specify in § 102.69(e) what constitutes the record in such no-hearing cases, just as they specify what constitutes the record in cases that proceed to a hearing.

regional director decides the matter upon the expiration of the period for filing such exceptions. Consistent with the changes described above in relation to § 102.62(b), the final rule makes Board review of regional directors' resolutions of post-election disputes discretionary in cases involving directed elections as well as those involving stipulated elections, unless challenges and objections are consolidated with unfair labor practice charges for hearing before an administrative law judge.[147] The Board anticipates that this change will leave a higher percentage of final decisions concerning disputes arising out of representation proceedings with the Board's regional directors, who are members of the career civil service.

Finally, the amendments clarify in § 102.69(e)(1)(ii) that in a proceeding conducted pursuant to § 102.69 in which no hearing is held, the record will include any decision and direction of election and the record previously made as defined in § 102.68. As discussed above, pursuant to the amendments to § 102.69, parties may file requests for review of the regional director's decision and direction of election after the election, but the timing depends on whether there are also objections and challenges. In a case involving objections or determinative challenges, the request for review is due 14 days after the regional director issues his decision resolving them. Section 102.69(g)(1)(i) currently provides that in cases where a hearing is held on objections and challenges, the record includes the record previously made as defined in § 102.68. Absent objections and challenges, the amendments provide that the request for review of the decision and direction of election is due 14 days after the tally of ballots is prepared. Because there may be no post-election hearing, either because there were no objections or determinative challenges or because the director disposed of them without a hearing, the amendments clarify in § 102.69(e)(1)(ii) that if a party files a request for review of the decision and direction of election but no post-election hearing on objections and challenges is held, the record will similarly include the decision and direction of election and the record made at the pre-election hearing as defined in § 102.68.

Some comments question whether the Board will resolve nondeterminative challenges post-election. The final rule maintains the status quo in this regard: the Board will not address nondeterminative challenge ballots at a post-election hearing, though parties may bring the matter to the Board by filing a timely unit clarification petition if they are unable to resolve the resulting question of whether particular employees are in the bargaining unit (''unit placement'' questions) by agreement. See, e.g., *Orson E. Coe Pontiac-GMC Truck, Inc.,* 328 NLRB 688, 688 n.1 (1999):

> Under standard Board practice, when a classification of employees votes under challenge and their challenged ballots would not be determinative of the election results, the ensuing certification contains a footnote to the effect that they are neither included nor excluded. Casehandling Manual section 11474. Even though there was no occasion to resolve the issue in a ballot challenge hearing, the issue need not stay unresolved. If the parties do not subsequently agree on whether to add the car prep/finisher technician to the unit, the matter can be resolved in a timely invoked unit clarification proceeding. *See Kirkhill Rubber Co.,* 306 NLRB 559 (1992); *NLRB* v. *Dickerson-Chapman, Inc.,* 964 F.2d 493, 496–497, 500 fn. 7 (5th Cir. 1992).

AHA argues that permitting parties to resolve such issues in bargaining is ''disrespectful'' of employee Section 7 rights because it makes eligibility a ''bargaining chip.'' Yet, as many of the comments in support of the amendments indicate, parties currently engage in precisely such bargaining regarding the inclusion or exclusion of particular individuals and classifications before the election, when they negotiate an election agreement defining the appropriate unit, and after the election, when they often resolve both determinative and nondeterminative challenges by agreement.[148] In relation to AHA's concern that deferring such matters to bargaining runs counter to the goal of promoting labor peace, the Board believes that labor peace is more likely to be promoted if parties are permitted to voluntarily resolve their differences, particularly when the parties remain free to bring a timely unit clarification petition before the Board if they do not reach agreement.

Many comments criticize the proposal to make Board review of regional directors' post-election determinations discretionary in cases involving directed elections. These comments are fully addressed above in relation to § 102.62.

Bluegrass Institute suggests, however, that the 20-percent rule renders discretionary Board review of the regional directors' post-election determinations inappropriate. It argues that the Board's current rules guarantee parties Board review of eligibility questions deferred in the pre-election decision, and therefore the provision making Board review of the director's post-election determinations discretionary constitutes a material change. The Board disagrees. Under the final rule, if eligibility disputes are deferred using the vote-and-challenge procedures, the hearing officer's recommendations on determinative challenges will in all cases be subject to exceptions to the director, and a party may thereafter file a request for review with the Board. This parallels how such matters are handled under the current rules when a hearing officer's recommendations go to the director. Thus, Section 11366.2 of the Board's Casehandling Manual provides with respect to challenges to voters in the context of a directed election, ''If the Regional Director directs that the hearing officer's recommendations be made to the Regional Director, then exceptions to the hearing officer's report will be filed with him/her * * *. The Regional Director must thereafter rule in a supplemental decision upon the hearing officer's report and such exceptions as may be filed. The Regional Director's supplemental decision is subject to a request for review to the Board.''[149] Moreover, under the current rules, if a regional director resolves eligibility questions on the merits in his or her decision and direction of election, the parties are able to challenge the decision only by filing a request for review with the Board. The comment does not explain why a party should have a greater right to Board review if the regional director decides

[147] The final rule clarifies that when objections and challenges have been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to a stipulated election agreement or a direction of election, (1) any request for review of the regional director's decision and direction of election is due within 14 days after issuance of the administrative law judge's decision; and (2) the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision. The final rule also clarifies that if the election was conducted pursuant to a consent or full consent agreement, and the objections and challenges have been consolidated with an unfair labor practice proceeding for purposes of hearing, the administrative law judge shall, after issuing his decision, sever the representation case and transfer it to the regional director for further processing, as is done currently.

The final rule uses the single term, ''decision,'' to describe the regional director's disposition of challenges and/or objections in place of the two terms, ''report'' and ''decision,'' used in the current rules.

[148] Even after certification, the scope of the bargaining unit remains a permissible subject of bargaining. See *The Idaho Statesman* v. *NLRB,* 836 F.2d 1396, 1405 (D.C. Cir. 1988).

[149] It is only when regional directors direct that hearing officer reports go to the Board that parties currently have the right to Board review. See Casehandling Manual Section 11366.2.

eligibility questions after the election than if the regional director decides them prior to the election, and the final rule corrects this anomaly.

Citing Member Hayes' dissent to the NPRM, PIA and others argue that the deferral of litigation from the pre-election phase to the post-election phase is likely to lengthen the period between the election and final certification, which will lengthen the period during which the employer is uncertain whether it can unilaterally change its employees' working conditions. See *Mike O'Connor Chevrolet,* 209 NLRB 701, 703 (1974). As shown, however, the Board believes that the final rule will not simply shift litigation from before the election to after the election. Rather, the Board believes that the amendments will significantly reduce the total amount of litigation, because the current rules require parties to litigate issues that are often rendered moot by the election results. Moreover, the Board anticipates that permitting it to deny review of regional directors' resolution of post-election disputes, i.e., when a party's request raises no compelling grounds for granting such review, will eliminate the most significant source of administrative delay in the finality of election results. The Board anticipates that the final rule will thus reduce the period of time between the tally of votes and certification of the results and thus the period during which employers are uncertain about their duty to bargain.

Subparts D and E, §§ 102.73 Through 102.88, Procedures for Unfair Labor Practice and Representation Cases Under Sec. 8(b)(7) and 9(c) of the Act and Procedures for Referendum Under Sec. 9(e) of the Act

The amendments in these two subparts merely conform their provisions to the amendments in Subpart C described above.

V. Comments on Other Statutory Requirements

A. The Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (''RFA''), 5 U.S.C. 601 *et seq.,* requires agencies promulgating proposed rules to prepare an initial and final regulatory flexibility analysis and to develop alternatives, wherever possible, when the regulations will have a significant impact on a substantial number of small entities. The purpose of the RFA is to ensure that agencies ''review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].'' E.O. 13272, 67 FR 53461 (''Proper Consideration of Small Entities in Agency Rulemaking''). An agency is not required to prepare an initial regulatory flexibility analysis or a final regulatory flexibility analysis for a proposed rule if the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).[150] To so certify, the agency must publish the certification in the **Federal Register** and include ''a statement providing the factual basis for such certification.'' *Id.* Based on the factual statement and analysis below, the Board concludes that the final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the Board's Chairman has certified to the Chief Counsel for Advocacy of the Small Business Administration (''SBA'') that the proposed amendments will not have a significant economic impact on a substantial number of small entities.

The RFA does not define either ''significant economic impact'' or ''substantial'' as it relates to the number of regulated entities. 5 U.S.C. 601. In the absence of specific definitions, ''what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact. The agency is in the best position to gauge the small entity impacts of its regulation.'' SBA Office of Advocacy, ''A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act'' at 17 (available at *http://www.sba.gov/sites/default/files/rfaguide.pdf*) (''SBA Guide'').

The Board determined that the proposed rule would not have an impact on a substantial number of small entities within the meaning of 5 U.S.C. 605(b). 76 FR 36833–34. The same is true for the final rule. According to the United States Census Bureau, there were approximately 6 million businesses in the United States with employees in 2007. Of those, the Small Business Administration's Office of Advocacy estimates that all but some 18,300 were small businesses with fewer than 500 employees.[151] Nearly all of those 5,981,700 small employers are subject to the Board's jurisdiction.[152] However, the Board concludes that the final rule will not have an impact on the vast majority of the small employers because only entities that are actually parties to representation proceedings under the NLRA are subject to the rule. Fewer than 4,000 representation proceedings were initiated during each of the past five years, and the Board has conducted fewer than 2,500 elections during each of those years.[153] Thus, between 2006 and 2010, the final rule would have applied to fewer than 4,000 small entities per year.[154] The Board believes that this pattern will continue into the foreseeable future. The final rule is thus likely to have an impact on fewer than 4,000 small entities per year, which is less than one-tenth of one percent of the small employers in the country.[155] Moreover, the affected entities are not concentrated in one or a few sectors, but are distributed among every sector and industry subject to the Board's jurisdiction.[156] Because one-tenth of one

[150] The RFA requires analysis of a final agency rule only where notice and comment rulemaking was required. 5 U.S.C. 604(a). As explained above, the final rule is a procedural rule for which notice and comment rulemaking was not required under the APA, 5 U.S.C. 553(b)(3)(A). Therefore, no analysis under the RFA need be performed. Nevertheless, the Board chose to undertake the threshold analysis contemplated by Section 605 of the RFA.

[151] U.S. Small Business Administration, FAQs, *http://web.sba.gov/faqs* (select ''Advocacy Small Business Statistics and Research'') (SBA Office of Advocacy estimates based on data from the U.S. Department of Commerce, Bureau of the Census, and trends from the U.S. Department of Labor, Bureau of Labor Statistics, Business Employment Dynamics).

[152] The principal private sector employers exempt from the Board's jurisdiction are employers of agricultural laborers and firms covered by the Railway Labor Act, 45 U.S.C. 151. See 29 U.S.C. 152(2) & (3). Employers whose connection to interstate commerce is so slight that they do not satisfy the Board's discretionary jurisdictional standards are also treated as exempt. *See* 29 U.S.C. 164(c); NLRB, *An Outline of Law and Procedure in Representation Cases, http://www.nlrb.gov/sites/default/files/documents/44/rc_outline_2008_full.pdf.*

[153] *See* NLRB Graphs & Data, Petitions and Elections, *http://www.nlrb.gov/graphs-data* (including charts documenting that the total number of election petitions filed between the years of 2006 and 2010 is 3359, 3064, 3170, 2725, and 2977 and the total number of elections is 2159, 1913, 1938, 1621, and 1817).

[154] Although the number of petitions has fluctuated over the last 10 years, rising to as many as 5,347 in 2002, even that number constitutes only a very small percentage of the total number of small entities, and so would also fail to reach the significant number threshold in the statute. *See id.*

[155] CNLP comments that the Board failed to properly define small entities. It argues that the median size of petitioned-for units is 23–26 employees, and therefore half of the Board's elections involve employers with 25 or fewer employees. But a unit does not necessarily and does not typically include all the employees of the employer. Moreover, CNLP misunderstands the proper inquiry for certification under the RFA. The question is whether the rule has a significant impact on a substantial number of small entities, not whether most of the entities so affected (no matter how few in number) are small entities. Finally, the Board has used an extremely inclusive definition of small entity, including all employers not excluded by the Small Business Administration's definition.

[156] Following the recommendation of the SBA Office of Advocacy, the Board identified the total

Continued

percent of small entities is not a substantial number of small entities, the Board concludes that the final rule will not impact a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

In response to the Board's proposed rule, some of the comments argue that the rule would affect many more than the approximately 4,000 small entities estimated by the Board. The comments argue that the rule imposes burdens on all employers, because each must, for example, read and understand the rules, train human resources and management staff concerning the rules, educate their employees about the rules, and find or hire labor counsel to provide advice concerning the rules. Comments of this type were submitted by the Chamber, NAM, and NRF, among others. NAM also opined that the rule will lead to increased numbers of election petitions, and NRF posited that the rule would change employers' typical reactive approach to election petitions to proactive employee education about unionization.

The Board disagrees with these comments. First, the comments are based primarily on elements of the proposed rule not adopted in the final rule. Thus, the final rule does not impose any reporting or recordkeeping requirements on employers. Second, the RFA does not require an agency to consider these types of speculative and wholly discretionary employer expenditures. Rather, the RFA requires an agency to consider the direct burden that compliance with a new regulation will likely impose on small entities. *See Mid-Tex Elec. Co-op* v. *FERC,* 773 F.2d 327, 342 (D.C. Cir. 1985) (''[I]t is clear that Congress envisioned that the relevant 'economic impact' as the impact of compliance with the proposed rule on regulated small entities''); *accord White Eagle Co-op. Ass'n* v. *Conner,* 553 F.3d 467, 478 (7th Cir. 2009); *Colorado State Banking Bd.* v. *Resolution Trust Corp.,* 926 F.2d 931, 948 (10th Cir. 1991). This construction of the RFA is supported by Section 603 of the RFA, which lists the items to be included in an initial regulatory flexibility analysis (if one is required). Section 603 states that such an analysis ''shall describe the impact of the proposed rule on small entities.'' 5 U.S.C. 603(a). And Section 603(b) describes the ''impact'' by stating that ''[e]ach initial regulatory flexibility analysis * * * shall contain * * * a description of the projected *reporting, recordkeeping and other compliance requirements* of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record[.]'' 5 U.S.C. 603(b)(4) (emphasis added). Section 604 further corroborates the Board's conclusion, as it contains an identical list of requirements for a final regulatory analysis (if one is required). 5 U.S.C. 604(a)(4). Guidance from the Small Business Administration also supports this construction of the RFA because it cites only direct, compliance-based costs as examples of financial burdens that agencies must consider:

> (a) Capital costs for equipment needed to meet the regulatory requirements; (b) costs of modifying existing processes and procedures to comply with the proposed rule; (c) lost sales and profits resulting from the proposed rule; (d) changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; (e) extra costs associated with the payment of taxes or fees associated with the proposed rule; and (f) hiring employees dedicated to compliance with regulatory requirements.

SBA Guide at 34.

Thus, nothing in the RFA, its prior construction, or SBA guidance suggests that the Board must consider the speculative and wholly discretionary expenditures that an employer which is not party to a representation proceeding may choose to incur. Instead, the ''impact'' analysis required under the RFA must consider only direct compliance costs. The final rule imposes no such costs on small entities not party to a representation proceeding. There will be no ''reporting, recordkeeping and other compliance requirements'' for these small entities. *See* 5 U.S.C. 603(b)(4) & 604(a)(4). And the final rule imposes on them no mandatory capital costs, mandatory costs of modifying existing processes, no costs of lost sales or profits, and no costs of changed market competition. SBA Guide at 34. For small entities not party to representation proceedings, there are no costs associated with taxes or fees and no costs for additional employees dedicated to compliance, as no compliance requirements exist. *Id.* Finally, there is no reason why a small entity not party to a representation proceeding would hire or otherwise retain employees dedicated to compliance with the final rule any more than it would have done so under the prior rules. Of course, employers may train their managerial and supervisory staff and educate their employees as they wish, but compliance with the final rule does not require such action.[157] For all of these reasons, the Board reaffirms its certification on the grounds that the final rule will not have an impact on a substantial number of small entities.

Moreover, even if the Board assumed that the final rule would have an impact on a substantial number of small entities, the final rule will not have a significant economic impact within the meaning of 5 U.S.C. 605(b). 76 FR 36833–34.

In the NPRM, the Board explained, ''the Board estimates that the net effect of the proposed amendments could be to decrease costs for small entities. While certain of the proposed amendments—when viewed in isolation—could result in small cost increases, those costs should be more than offset by the many efficiencies in the Board's representation procedures created by the proposed amendments.'' 76 FR 36833. The final rule adopts none of the proposed amendments that could have resulted in small cost increases for parties to representation proceedings. Therefore, as shown below, each of the amendments adopted in the final rule will either reduce the cost of being a party to a representation proceeding or have no economic impact on such parties.

First, the final rule amends § 102.64 in order to expressly construe Section 9(c) of the NLRA and state that the statutory purpose of a pre-election hearing is to determine if a question of representation exists. That amendment has no economic impact except in relation to the amendment of § 102.66(a), infra.

Second, the final rule amends § 102.66(a) and eliminates § 101.20(c) (along with all of Part 101, Subpart C) in order to ensure that hearing officers presiding over pre-election hearings have the authority to limit the presentation of evidence to that supporting a party's contentions and relevant to the existence of a question

number of affected employers within each industry using the NAICS categories. In no category did the percentage of affected employers rise above half of one percent. In the largest category, utilities, only 0.28 percent of all employers were parties to a representation proceeding. *See* Seventy Fourth Annual Report of the NLRB, *https://www.nlrb.gov/sites/default/files/documents/119/nlrb2009.pdf* (NLRB data); U.S. Census Bureau, North American Industry Classification System. *http://censtats.census.gov/cbpnaic/cbpnaic.shtml* (select ''United States'' in the first drop down box for national data).

[157] The Chamber states that it does ''not know how many employers would undertake such [education] efforts.'' Other similar comments also lack factual support, including NRF's assertion that this rule will require employers to preemptively educate their employees. Similarly, the suggestion of COLLE, that the Board must prove that employers will not engage in additional training in response to the final rule, is misguided, because any such activity would be undertaken voluntarily and is not required by the final rule.

concerning representation. These amendments will lower the cost of participating in representation proceedings by reducing litigation at the pre-election hearing. While some disputes that would have been litigated at the pre-election hearing will still be litigated at the post-election hearing, many will be rendered moot by the results of the election or resolved by the parties once they are free of the tactical consideration of the impending election.

Third, the final rule amends § 102.66(d) to afford hearing officers presiding over pre-election hearings discretion over the filing of post-hearing briefs, including over the subjects addressed and the time for filing. Presenting oral argument in lieu of a post-hearing brief will reduce the cost of participating in representation proceedings.

Fourth, the final rule amends §§ 102.67 and 102.69 to eliminate the requirement that parties' file a pre-election request for review of a regional director's decision and direction of election in order to preserve issues for review, and defer all requests for Board review until after the election, when any such request can be consolidated with a request for review of any post-election rulings. Because many issues concerning which parties would previously have filed a pre-election request for review are rendered moot by the election results and because, even when they are not, filing a single consolidated request for review when a party wishes to seek review concerning both pre- and post-election rulings results in efficiencies, eliminating the pre-election request for review will reduce the cost of participating in representation proceedings.

Fifth, the final rule eliminates the regulatory direction in § 101.21(d) (again, along with all of Part 101, Subpart C) that the regional director should ordinarily not schedule an election sooner than 25 days after the decision and direction of election in order to give the Board an opportunity to rule on a pre-election request for review. This will have no direct impact on the cost of participating in representation proceedings.

Sixth, the final rule amends § 102.65 to make explicit and to narrow the circumstances under which a request for special permission to appeal to the Board will be granted. For the same reasons explained above in relation to eliminating the pre-election request for review, limiting this form of interlocutory appeal will reduce the cost of participating in representation proceedings.

Seventh, the final rule amends §§ 102.62(b) and 102.69 to create a uniform procedure for resolving potentially outcome-determinative challenges and election objections in stipulated and directed election cases and to provide that Board review of regional directors' resolution of such disputes is discretionary. This will have no direct impact on the cost of participating in representation proceedings.

Eighth, the final rule eliminates redundant part 101, subpart C of its regulations. This will have no direct impact on the cost of participating in representation proceedings.

The remainder of the final rule's amendments conform other sections of the Board's Rules and Regulations to the eight amendments described above. This will have no direct impact on the cost of participating in representation proceedings.

The Chamber asserts that the Board failed to calculate the costs of compliance with the proposed rule with sufficient particularity. The Chamber's comment focuses on the costs of the proposed notice posting, completion of the statement-of-position form, and the shortening of certain deadlines within the representation case process. It suggests that these costs would constitute a significant economic impact. The comment does not include numerical estimates of such costs, and, in any event, the final rule largely does not adopt the proposals pointed to in the Chamber's comment. Moreover, under the RFA Section 607, ''an agency may provide * * * more general descriptive statements if quantification is not practicable or reliable.'' [158] Administrative guidance explains that, ''[s]uch a standard is not required for section 605 certifications, but some agencies use section 607 as a model for preparing certifications.'' [159] Because quantification was not practical or reliable in relation to most of the proposed amendments, the Board followed § 607 and provided a general descriptive statement in the NPRM and has done the same here.

For the two separate reasons explained above, the Board concludes the final rule will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

In the NPRM, the Board explained that the ''proposed amendments would not impose any information collection requirements'' and, accordingly, the proposed amendments ''are not subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq.'' No substantive comments were received relevant to the Board's analysis of its obligations under the PRA.

The final rule does not adopt any of the proposed amendments regarding the contents of petitions, notice postings, the statement of position, or employee or eligibility lists, and so there are no longer any even arguable information collection requirements in the final rule. The Board therefore concludes that the final rule is not subject to the PRA.

C. Congressional Review Act

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act). This rule will not result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. The Board has, in any event, determined that the effective date of the rule will be 120 days after the rule is published in the **Federal Register**.

VI. Statement of the General Course of Proceedings Under Section 9(c) of the Act

A. Representation Case Petitions

Petitions may be filed in representation cases for many different reasons. For example, a union may file a petition for certification because it seeks to become the collective-bargaining representative of an employer's employees. An employer may file a petition to determine the majority status of the union demanding recognition as the representative of the employer's employees. If there is already a certified or currently recognized representative, an employee may file a decertification petition to oust the incumbent representative. Or, a party may file a petition for clarification of the bargaining unit or for amendment to reflect changed circumstances, such as changes in the incumbent representative's name or affiliation.

Petition forms are available on the Board's Web site and in the Board's regional offices. The petition must be in writing and signed, and must either be notarized or contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are

[158] 5 U.S.C. 607; see also *Alenco Communications, Inc.* v. *FCC,* 201 F.3d 608, 625 (5th Cir. 2000).

[159] SBA Guide, supra, at 10 n. 34.

true and correct to the best of his or her knowledge and belief. The petition is filed with the regional director for the regional office in which the proposed or actual bargaining unit exists. Petition forms provide, among other things, for a description of the contemplated or existing appropriate bargaining unit, the approximate number of employees involved, and the names of all labor organizations that claim to represent the employees. A petitioner seeking certification as the collective-bargaining representative or seeking to decertify an incumbent representative must supply, within 48 hours after filing but in no event later than the last day on which the petition might timely be filed, evidence of employee interest in an election. Such evidence is usually in the form of cards, which must be dated, authorizing the labor organization to represent the employees or authorizing the petitioner to file a decertification petition. If a petition is filed by an employer, the petitioner must supply, within 48 hours after filing, proof of a demand for recognition by the labor organization named in the petition and, in the event the labor organization named is the incumbent representative of the unit involved, a statement of the objective considerations demonstrating reasonable grounds for believing that the labor organization has lost its majority status.

The petitioner may file the petition by fax, by mail, or in person at one of the NLRB's regional offices.

B. Pre-Hearing Withdrawals and Dismissals; Notice of Hearing

Upon receipt of the petition in the Regional Office, it is docketed and assigned to a Board agent to investigate (1) whether the employer's operations affect commerce within the meaning of the Act, (2) the existence of a bona fide question concerning representation in a unit of employees appropriate for the purposes of collective bargaining within the meaning of the Act, (3) whether the election would effectuate the policies of the Act and reflect the free choice of employees in the appropriate unit, and (4) whether, if the petitioner is a labor organization seeking recognition or an employee seeking decertification of an incumbent representative, there is sufficient evidence of employee interest in an election. The evidence of interest submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have demonstrated interest, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has demonstrated interest among at least 30 percent of the employees. However, in the case of a petition by an employer, no proof of representation on the part of the labor organization claiming a majority is required, and the regional director proceeds with the case if other factors require it unless the labor organization withdraws its claim to majority representation. The Board agent attempts to ascertain from all interested parties whether the grouping or unit of employees described in the petition constitutes an appropriate bargaining unit. The petition may be amended at any time prior to hearing and may be amended during the hearing in the discretion of the hearing officer upon such terms as he or she deems just.

The petitioner may request to withdraw its petition if the investigation discloses, for example, that the petitioner lacks an adequate showing of interest. The regional director may request that the petitioner withdraw the petition if further processing at that time is inappropriate because, for example, a written contract covering the petitioned-for unit is currently in effect. If, despite the regional director's recommendations, the petitioner refuses to withdraw the petition, the regional director may dismiss it. The petitioner may within 14 days request review of the regional director's dismissal by filing such request with the Board in Washington, DC; if it accepts review, the Board may sustain the dismissal, stating the grounds of its affirmance, or may direct the regional director to take further action.

If, however, the regional director determines that the petition and supporting documentation establish reasonable cause to believe that a question of representation affecting commerce exists and that the policies of the Act will be effectuated, then the regional director issues a notice of a pre-election hearing at a time and place fixed therein to the parties named in the petition. Along with the notice of hearing, the regional director serves a copy of the petition on the unions and employer filing or named in the petition and on other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

C. Voluntary Election Agreements

Elections can occur either by agreement of the parties or by direction of the regional director or the Board. In many cases, the parties, with Board agent assistance, are able to reach agreement regarding the election details, thereby eliminating the need for the regional director or the Board to issue a formal decision and direction of election. By entering into an election agreement, the parties may, depending upon when the agreement is reached, avoid the time and expense of participating in a hearing.

The Board has devised and makes available to the parties three types of informal voluntary procedures through which representation issues can be resolved without recourse to formal procedures. Forms for use in these informal procedures are available in the regional offices. One type of informal procedure is the consent election agreement with final regional determination of post-election disputes. Here, the parties agree with respect to the appropriate unit, the payroll period to be used in determining which employees in the appropriate unit shall be eligible to vote in the election, and the type, place, date, and hours of balloting. The consent election is conducted under the direction and supervision of the regional director. This form of agreement provides that the rulings of the regional director on all questions relating to the election, such as the validity of challenges and objections, are final and binding. The regional director issues to the parties a certification of the results of the election, including a certification of representative where appropriate, with the same force and effect as if issued by the Board.

A second type of informal procedure is commonly referred to as the stipulated election agreement with discretionary Board review. Like the consent agreement above, the parties agree on the unit, payroll period to be used in determining voter eligibility, and election details, but provide that they may request Board review of the regional director's resolution of post-election disputes. The stipulated election is conducted under the direction and supervision of the regional director.

The third type of informal procedure is referred to as the full consent-election agreement with final regional director determination of pre- and post-election disputes. Here, the parties agree that all pre-election and post-election disputes will be resolved with finality by the regional director. For example, the parties agree that if they are unable to informally resolve disputes arising with respect to the appropriate unit or other election details, those issues will be presented to, and decided with finality by, the regional director after a hearing. Upon the close of the hearing, the entire

record in the case is forwarded to the regional director. After review of the record, the regional director issues a final decision, either dismissing the petition or directing that an election be held. In the latter event, the election is conducted under the supervision of the regional director. Similarly, all matters arising after the election, including determinative challenged ballots and objections to the conduct of the election, are decided with finality by the regional director. The regional director issues to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board.

D. Formal hearing

If the parties have not entered into a voluntary election agreement, a hearing must be held to determine if a question of representation affecting commerce exists before a regional director or the Board may direct an election to resolve that question. The regional director may at any time transfer the case to the Board for decision, but until such action is taken, it will be presumed that the regional director will decide the case. In the event the regional director decides the issues in a case, the decision is final subject to the review procedure set forth in the Board's Rules and Regulations.

The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified agency employee. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the hearing officer is to ensure that the record contains as full a statement of the pertinent facts as may be necessary for determination of whether a question of representation exists. A question of representation exists if a petition as described in Section 9(c) of the Act has been filed concerning a unit appropriate for the purposes of collective bargaining or, in the case of a petition filed under Section 9(c)(1)(A)(ii), concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. Each party is afforded full opportunity to present its respective positions and to prove the significant facts supporting its positions, so long as the evidence a party seeks to introduce supports its contentions and is relevant to the existence of a question of representation or a bar to an election. In most cases a substantial number of the relevant facts are undisputed and stipulated.

Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection is waived by further participation in the hearing. A party need not seek special permission to appeal a hearing officer's ruling to preserve an issue for review after the election. The filing of a request for special permission to appeal does not stay an election and does not result in impounding of ballots unless specifically ordered by the Board.

At the close of the hearing, parties are permitted to make oral arguments on the record. Parties are permitted to file post-hearing briefs only with special permission of the hearing officer. The hearing officer specifies the time for filing such briefs, and may limit the subjects to be addressed in post-hearing briefs. If the regional director transfers the case to the Board for decision, parties may file post-hearing briefs with the permission of the Board.

Upon the close of the hearing, the entire record in the case is forwarded to the regional director or, upon issuance by the regional director of an order transferring the case, to the Board in Washington, DC. The hearing officer also transmits an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the issues.

E. Regional Director Pre-Election Determinations; Requests for Review

After the pre-election hearing closes, the regional director may proceed to review the record of the hearing and any post-hearing briefs to determine whether a question of representation affecting commerce exists concerning a unit appropriate for the purposes of collective bargaining or, in the decertification context, concerning a unit with an incumbent representative. The regional director may decide either to direct an election, dismiss the petition, or reopen the hearing. Or, in cases involving novel or complex issues, the regional director may transfer the case to the Board for decision. In that event, the record is forwarded to the Board, and if the Board directs an election, the election is held under the supervision of the regional director in the same manner as if the regional director had directed the election.

If the regional director directs an election, a party may request review of the direction after the election in the manner described below. If the regional director dismisses a petition, a party may file a request for review with the Board within 14 days after service of the decision dismissing the petition in the manner specified in the Board's Rules and Regulations. Any party may file with the Board a statement in opposition to a request for review, within the time periods and in manner specified in the Board's Rules and Regulations. The Board will grant a request for review only where there are compelling reasons to do so. The parties may, at any time, waive their right to request review. Failure to request review precludes such parties from relitigating, in any subsequent related unfair labor practice proceeding, any issue that was, or could have been, raised in the representation proceeding. Denial of a request for review constitutes an affirmance of the regional director's action, which also precludes relitigating any such issues in any subsequent related unfair labor practice proceeding.

F. Election Procedure; Challenges and Election Objections; Requests for Review of Directions of Elections; Requests for Review of Regional Director Dispositions of Challenges and Objections

1. Election Procedure; Challenges; and Objections

Unless otherwise directed by the Board, all elections are conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot. The regional director determines the details incident to the conduct of the election. A Board agent usually arranges a pre-election conference at which the parties check the list of voters and attempt to resolve any questions of eligibility. Also, prior to the date of election, the holding of such election is publicized by the posting of official notices in the employer's facility whenever possible or in other places, or by the use of other means considered appropriate and effective. These notices reproduce a sample ballot and outline such election details as the date of the election, location of polls, time of voting, and eligibility rules. When an election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe, and the ballots are marked in the secrecy of a voting booth. The

parties' authorized observers and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. If such a person is permitted to vote, his or her ballot is segregated, and, if the challenge is not resolved before the tally, impounded. Board agents, in the presence and with the assistance of the parties' authorized representatives, count and tabulate the ballots promptly after the closing of the polls. Elections are decided by a majority of the valid votes cast. Voter challenges may be resolved by agreement before the tally. A complete tally of the ballots is made available to the parties upon the conclusion of the count. If the number of unresolved challenged ballots is insufficient to affect the results of an election in which an individual or labor organization is certified, the unit placement of any such individuals may be resolved by the parties in the course of collective bargaining or may be determined by the Board if a timely unit clarification petition is filed.

Within seven days after the tally of ballots has been prepared, a party may file objections to the conduct of the election or to conduct affecting the results of the election. Parties have an additional seven days to file their evidence in support of objections. A party must timely file objections and the supporting evidence even if there are determinative challenges.

2. Requests for Review of Decisions and Directions of Elections

If the election has been conducted pursuant to a regional director's decision and direction of election, any party may file a request for review of that decision with the Board in the manner specified in the Board's Rules and Regulations. In the absence of election objections or potentially determinative challenges, the request for review of the decision and direction of election must be filed within 14 days after the tally of ballots has been prepared. In a case involving election objections or potentially determinative challenges, the request for review must be filed within 14 days after the regional director's decision on challenged ballots and/or objections, and may be combined with a request for review of that decision as described below, unless the hearing on objections and determinative challenges has been consolidated with an unfair labor practice proceeding before an administrative law judge. In such cases, the request for review of the decision and direction of election must be filed within 14 days after issuance of the administrative law judge's decision. Any party may file with the Board a statement in opposition to the request for review within the time periods and in the manner specified in the Board's Rules and Regulations. The Board will grant a request for review only where there are compelling reasons to do so. If no request for review is filed, the decision and direction of election is final and shall have the same effect as if issued by the Board. A party may, at any time, waive its right to request review. Failure to request review precludes such a party from relitigating, in any subsequent related unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review constitutes an affirmance of the regional director's action, which also precludes relitigating any such issues in any subsequent related unfair labor practice proceeding.

3. Certification in Absence of Objections, Determinative Challenges and Requests for Review

If no timely objections are filed, if the challenged ballots are insufficient in number to affect the results of the election, if no runoff election is to be held, and if no request for review of any decision and direction of election is filed, the regional director issues to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding is closed.

4. Disposition of Objections and Determinative Challenges

The initial procedures for handling objections to the conduct of the election or to conduct affecting the results of the election, as well as determinative challenges, are the same regardless of whether the election was directed by a regional director or held pursuant to the parties' agreement. The regional director has discretion to conduct an investigation or set the matters for a hearing without an investigation.

If timely objections are filed and the regional director determines that the party's supporting evidence would not constitute grounds for overturning the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues, the regional director issues a decision disposing of the objections and challenges and a certification of the results of the election, including certification of representative where appropriate.

If timely objections are filed to the conduct of the election or to conduct affecting the results of the election and the regional director determines that the party's supporting evidence could be grounds for overturning the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election and raise substantial and material factual issues, the regional director issues a notice of hearing before a hearing officer, unless the regional director consolidates the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge.

If the regional director issues a notice of hearing before a hearing officer, the hearing officer issues a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues following the hearing. Within 14 days after issuance of the hearing officer's report, any party may file exceptions to it with the regional director. A party opposing the exceptions may file an answering brief within the time periods and in the manner specified in the Board's Rules and Regulations.

The regional director then decides the matter and issues a certification of the results of the election, including certification of representatives where appropriate. The parties' appeal rights with respect to the regional director's decision on challenged ballots or objections depend upon whether the parties agreed to waive any appeal prior to the election. If the election has been held pursuant to a stipulated election agreement or a direction of election, a party may, within 14 days from the date of issuance of the regional director's decision, file with the Board a request for review of such decision, which may be combined with a request for review of the regional director's decision to direct the election. Any party may file with the Board a statement in opposition to the request for review. The procedures for filing such requests for review and any statements in opposition thereto are contained in the Board's Rules and Regulations. If no request for review is filed, the decision is final and has the same effect as if issued by the Board. The parties may, at any time, waive their right to request review. Failure to request review precludes such parties from relitigating, in any subsequent related unfair labor practice proceeding, any issue that was, or could have been, raised in the representation proceeding. Denial of a request for review constitutes an affirmance of the regional director's action that also precludes relitigating any such issues in any subsequent related unfair labor practice proceeding.

In cases where the election was conducted pursuant to either of the two types of consent election agreements, the regional director's decision regarding the election objections and determinative challenges is final, and includes a certification of the results of the election, including certification of representative where appropriate.

If the regional director consolidates the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge and the election was conducted pursuant to one of the two types of consent agreements, the administrative law judge, upon issuing his decision, severs the representation case and transfers it to the regional director for further processing. If, however, the regional director consolidates the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge and the election was conducted pursuant to a stipulated election agreement or a decision and direction of election, the provisions of § 102.46 of the Board's Rules and Regulations govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision.

G. Runoff Elections

If the election involves two or more labor organizations and if the election results are inconclusive because no choice on the ballot received the majority of valid votes cast, a runoff election is held as provided in the Board's Rules and Regulations.

List of Subjects

29 CFR Part 101

Administrative practice and procedure, Labor management relations.

29 CFR Part 102

Administrative practice and procedure, Labor management relations.

In consideration of the foregoing, the National Labor Relations Board amends Chapter I of title 29, Code of Federal Regulations, as follows:

PART 101—STATEMENTS OF PROCEDURES

■ 1. The authority citation for part 101 continues to read as follows:

Authority: Sec. 6 of the National Labor Relations Act, as amended (29 U.S.C. 151, 156), and sec. 552(a) of the Administrative Procedure Act (5 U.S.C. 552(a)). Section 101.14 also issued under sec. 2112(a)(1) of Pub. L. 100–236, 28 U.S.C. 2112(a)(1).

Subpart C— [Removed and Reserved]

■ 2. Remove and reserve subpart C, consisting of §§ 101.17 through 101.21.

Subpart D—Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

■ 3. Revise § 101.23 to read as follows:

§ 101.23 Initiation and investigation of a petition in connection with a case under section 8(b)(7).

(a) A representation petition [1] involving the employees of the employer named in the charge is handled under an expedited procedure when the investigation of the charge has revealed that:

(1) The employer's operations affect commerce within the meaning of the Act;

(2) Picketing of the employer is being conducted for an object proscribed by section 8(b)(7) of the Act;

(3) Subparagraph (C) of that section of the Act is applicable to the picketing; and

(4) The petition has been filed within a reasonable period of time not to exceed 30 days from the commencement of the picketing. In these circumstances, the member of the Regional Director's staff to whom the matter has been assigned investigates the petition to ascertain further: the unit appropriate for collective bargaining; and whether an election in that unit would effectuate the policies of the Act.

(b) If, based on such investigation, the Regional Director determines that an election is warranted, the Director may, without a prior hearing, direct that an election be held in an appropriate unit of employees. Any party aggrieved may, after the election, file a request for review of a regional director's decision to direct the election within the time periods specified and as described in 29 CFR 102.69. If it is determined that an election is not warranted, the Director dismisses the petition or makes other disposition of the matter. Should the Regional Director conclude that an election is warranted, the Director fixes the basis of eligibility of voters and the place, date, and hours of balloting. The mechanics of arranging the balloting, the other procedures for the conduct of the election, and the postelection proceedings are the same, insofar as appropriate, as those described in 29 CFR102.69.

(c) If the Regional Director believes, after preliminary investigation of the petition, that there are substantial issues which require determination before an election may be held, the Director may order a hearing on the issues. This hearing is followed by Regional Director or Board decision and direction of election, or other disposition. The procedures to be used in connection with such hearing and posthearing proceedings are the same, insofar as they are applicable, as those described in 29 CFR 102.64, 102.65, 102.66, 102.67, 102.68, and 102.69, and the statement of the general course.

(d) Should the parties so desire, they may, with the approval of the Regional Director, resolve the issues as to the unit, the conduct of the balloting, and related matters pursuant to informal consent procedures, as described in 29 CFR 102.62(a) and the statement of the general course.

(e) If a petition has been filed which does not meet the requirements for processing under the expedited procedures, the Regional Director may process it under the procedures set forth in subpart C of 29 CFR Part 102 and the statement of the general course.

■ 4. Revise § 101.25 to read as follows:

§ 101.25 Appeal from the dismissal of a petition, or from the refusal to process it under the expedited procedure

If it is determined after investigation of the representation petition that further proceedings based thereon are not warranted, the Regional Director, absent withdrawal of the petition, dismisses it, stating the grounds therefor. If it is determined that the petition does not meet the requirements for processing under the expedited procedure, the Regional Director advises the petitioner of the determination to process the petition under the procedures described in subpart C of 29 CFR Part 102 and the statement of the general course. In either event, the Regional Director informs all the parties of such action, and such action is final, although the Board may grant an aggrieved party permission to appeal from the Regional Director's action. Such party must request such review promptly, in writing, and state briefly the grounds relied on. Such party must also immediately serve a copy on the other parties, including the Regional Director. Neither the request for review by the Board, nor the Board's grant of such review, operates as a stay of the action taken by the Regional Director,

[1] The manner of filing of such petition and the contents thereof are the same as described in 29 CFR 102.60 and 102.61 and the statement of the general course of proceedings under Section 9(c) of the Act published in the **Federal Register**, except that the petitioner is not required to allege that a claim was made on the employer for recognition or that the union represents a substantial number of employees.

unless specifically so ordered by the Board.

Subpart E—Referendum Cases Under Section 9(e) (1) and (2) of the Act

■ 5. Revise § 101.28 to read as follows:

§ 101.28 Consent agreements providing for election.

(a) The Board makes available to the parties three types of informal consent procedures through which authorization issues can be resolved without resort to formal procedures. These informal agreements are commonly referred to as consent-election agreement with final regional director determinations of post-election disputes, stipulated election agreement with discretionary Board review, and full consent-election agreement with final regional director determinations of pre- and post-election disputes. Forms for use in these informal procedures are available in the Regional Offices.

(b) The procedures to be used in connection with a consent-election agreement with final regional director determinations of post-election disputes, a stipulated election agreement with discretionary Board review, and a full consent-election agreement with final regional director determinations of pre- and post-election disputes are the same as those described in subpart C of 29 CFR part 102 and the statement of the general course in connection with similar agreements in representation cases under section 9(c) of the Act, except that no provision is made for runoff elections.

■ 6. Revise § 101.29 to read as follows:

§ 101.29 Procedure respecting election conducted without hearing.

If the Regional Director determines that the case is an appropriate one for election without formal hearing, an election is conducted as quickly as possible among the employees and upon the conclusion of the election the Regional Director makes available to the parties a tally of ballots. The parties, however, have an opportunity to make appropriate challenges and objections to the conduct of the election and they have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots, as is described in subpart C of 29 CFR Part 102 and the statement of the general course in connection with the postelection procedures in representation cases under section 9(c) of the Act, except that no provision is made for a runoff election. If no such objections are filed within 7 days and if the challenged ballots are insufficient in number to affect the results of the election, the Regional Director issues to the parties a certification of the results of the election, with the same force and effect as if issued by the Board.

■ 7. Revise § 101.30 to read as follows:

§ 101.30 Formal hearing and procedure respecting election conducted after hearing.

(a) The procedures are the same as those described in subpart C of 29 CFR Part 102 and the statement of the general course respecting representation cases arising under section 9(c) of the Act. If the preliminary investigation indicates that there are substantial issues which require determination before an appropriate election may be held, the Regional Director will institute formal proceedings by issuance of a notice of hearing on the issues which, after hearing, is followed by Regional Director or Board decision and direction of election or dismissal. The notice of hearing together with a copy of the petition is served on the petitioner, the employer, and any other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(b) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the Regional Office but may be another qualified Agency official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions that are relevant to the issue of whether the Board should conduct an election to determine whether the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) of the Act, desire that such authority be rescinded. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

(c) Upon the close of the hearing, the entire record in the case is then forwarded to the Regional Director or the Board, together with an informal analysis by the hearing officer of the issues and the evidence but without recommendations. Post-hearing briefs are filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer. If the case is transferred to the Board after the close of the hearing, the parties may, within such time after service of the order transferring the case as is fixed by the regional director, file with the Board any post-hearing brief previously filed with the regional director. The parties may also request to be heard orally. Because of the nature of the proceeding, however, permission to argue orally is rarely granted. After review of the entire case, the Board issues a decision either dismissing the petition or directing that an election be held. In the latter event, the election is conducted under the supervision of the Regional Director in the manner described in 29 CFR 102.69 and the statement of the general course.

(d) The parties have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots as is described in connection with the postelection procedures in representation cases under section 9(c) of the Act.

PART 102—RULES AND REGULATIONS, SERIES 8

■ 8. The authority citation for part 102 continues to read as follows:

Authority: Secs. 1, 6, National Labor Relations Act (29 U.S.C. 151, 156). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)), and Section 102.117a also issued under sec. 552a(j) and (k) of the Privacy Act of 1974 (5 U.S.C. 552a(j) and (k)). Sections 102.143 through 102.155 also issued under sec. 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

Subpart C—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

■ 9. Revise § 102.62 to read as follows:

§ 102.62 Election agreements.

(a) Consent election agreements with final regional director determinations of post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post-election disputes will be resolved by the regional director. Such agreement, referred to as

a consent election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70 except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Stipulated election agreements with discretionary board review. Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election as described in paragraph (a) of this section and further providing that the parties may request Board review of the regional director's resolution of post-election disputes. Such agreement, referred to as a stipulated election agreement, shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70.

(c) Full consent election agreements with final regional director determinations of pre- and post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and post-election disputes will be resolved by the regional director. Such agreement provides for a hearing pursuant to §§ 102.63, 102.64, 102.65, 102.66 and 102.67 to determine if a question concerning representation exists. Upon the conclusion of such a hearing, the regional director shall issue a decision. The rulings and determinations by the regional director thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the regional director shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70, except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

■ 10. Revise § 102.63 to read as follows:

§ 102.63 Investigation of petition by regional director; notice of hearing; service of notice; withdrawal of notice.

(a) After a petition has been filed under § 102.61(a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the Regional Director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

(b) After a petition has been filed under § 102.61(d) or (e), the regional director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion. All hearing and posthearing procedure under this paragraph (b) shall be in conformance with §§ 102.64 through 102.69 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

■ 11. Revise § 102.64 to read as follows:

§ 102.64 Conduct of hearing.

(a) The purpose of a hearing conducted under section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a petition as described in section 9(c) of the Act has been filed concerning a unit appropriate for the purpose of collective bargaining or, in the case of a petition filed under section 9(c)(1)(A)(ii), concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the regional director finds that a question of representation exists and there is no bar to an election, he shall direct an election to resolve the question.

(b) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the Act.

(c) The hearing officer may, in his discretion, continue the hearing from

day to day, or adjourn it to a later date or to a different place, by announcement thereof at the hearing or by other appropriate notice.

■ 12. Revise § 102.65 to read as follows:

§ 102.65 Motions; interventions.

(a) All motions, including motions for intervention pursuant to paragraphs (b) and (e) of this section, shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. An original and two copies of written motions shall be filed and a copy thereof immediately shall be served on the other parties to the proceeding. Motions made prior to the transfer of the case to the Board shall be filed with the regional director, except that motions made during the hearing shall be filed with the hearing officer. After the transfer of the case to the Board, all motions shall be filed with the Board. Such motions shall be printed or otherwise legibly duplicated. *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Eight copies of such motions shall be filed with the Board. The regional director may rule upon all motions filed with him, causing a copy of said ruling to be served on the parties, or he may refer the motion to the hearing officer: *Provided,* That if the regional director prior to the close of the hearing grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in § 102.71. The hearing officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to him as hereinabove provided, except that all motions to dismiss petitions shall be referred for appropriate action at such time as the entire record is considered by the regional director or the Board, as the case may be.

(b) Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The regional director or the hearing officer, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper, and such intervenor shall thereupon become a party to the proceeding.

(c) All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in § 102.66(c). Unless expressly authorized by the Rules and Regulations, rulings by the regional director or by the hearing officer shall not be appealed directly to the Board, but shall be considered by the Board on appropriate request for review pursuant to §§ 102.67 (b), (c), (d), and 102.69 or whenever the case is transferred to it for decision: *Provided, however,* That if the regional director has issued an order transferring the case to the Board for decision such rulings may be appealed directly to the Board by special permission of the Board. Nor shall rulings by the hearing officer be appealed directly to the regional director unless expressly authorized by the Rules and Regulations, except by special permission of the regional director, but shall be considered by the regional director when he reviews the entire record. Requests to the regional director, or to the Board in appropriate cases, for special permission to appeal from a ruling of the hearing officer or the regional director, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state the reasons special permission should be granted and the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and on the regional director. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the regional director. The Board will not grant a request for special permission to appeal except in extraordinary circumstances where it appears that the issue will otherwise evade review. No party shall be precluded from raising an issue at a later time based on its failure to seek special permission to appeal. If the Board or the regional director, as the case may be, grants the request for special permission to appeal, the Board or the regional director may proceed forthwith to rule on the appeal. Neither the filing nor the grant of such a request shall, unless otherwise ordered by the Board, operate as a stay of an election or any action taken or directed by the regional director or require the impounding of ballots.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

(e)(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules: *Provided, however,* That the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing *de novo,* the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion for reconsideration or for rehearing pursuant to this paragraph (e) shall be filed within 14 days, or such further period as may be allowed, after the service of the decision or report. Any request for an extension of time to file such a motion shall be served promptly on the other parties. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

(3) The filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed to be taken nor will a regional director or the Board delay any decision or action during the period specified in paragraph (e)(2) of this section, except that, if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to permit the moving party to challenge the ballots of such employees even if they are specifically included in the

direction of election in any election conducted while such motion is pending. A motion for reconsideration, for rehearing, or to reopen the record need not be filed to exhaust administrative remedies.

■ 13. Revise § 102.66 to read as follows:

§ 102.66 Introduction of evidence: Rights of parties at hearing; subpoenas.

(a) *Rights of parties at hearing.* Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary and other evidence so long as such examination, cross-examination, and other evidence supports its contentions and is relevant to the existence of a question of representation or a bar to an election. The hearing officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

(b) *Objections.* Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

(c) *Subpoenas.* The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the Regional Director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpoenas may be made ex parte. The Regional Director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpoena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(d) *Oral argument and briefs.* Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Post-hearing briefs shall be filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the regional director together with the brief. No reply brief may be filed except upon special leave of the regional director.

(e) *Hearing officer analysis.* The hearing officer may submit an analysis of the record to the regional director or the Board but he shall make no recommendations.

(f) *Witness fees.* Witness fees and mileage shall be paid by the party at whose instance the witness appears.

■ 14. Revise § 102.67 to read as follows:

§ 102.67 Proceedings before the regional director; further hearing; action by the regional director; review of action by the regional director; statement in opposition; transfer of case to the Board; Board action.

(a) *Proceedings before regional director.* The regional director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as he may deem proper, to determine whether a question concerning representation exists in a unit appropriate for purposes of collective bargaining, and to direct an election, dismiss the petition, or make other disposition of the matter.

(b) *Directions of elections; dismissals; requests for review.* A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 14 days after service of a decision dismissing a petition any party may file a request for review of such a dismissal with the Board in Washington, DC: *Provided, further,* That any party may, after the election, file a request for review of a regional director's decision to direct an election within the time periods specified and as described in § 102.69.

(c) *Grounds for review.* The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) *Contents of request.* Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity or recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (c)(2) of this section, and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page

citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

(e) *Opposition to request.* Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board a statement in opposition thereto, which shall be served in accordance with the requirements of paragraph (k) of this section. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) *Waiver; denial of request.* The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(g) *Grant of review; briefs.* The granting of a request for review shall not stay the regional director's decision unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 14 days after issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board will consider the entire record in the light of the grounds relied on for review. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(h) *Transfer.* In any case in which it appears to the regional director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing.

(i) *Briefs.* If any case is transferred to the Board for decision after the parties have filed briefs with the regional director, the parties may, within such time after service of the order transferring the case as is fixed by the regional director, file with the Board the brief previously filed with the regional director. No further briefs shall be permitted except by special permission of the Board.

(j) *Board action.* Upon transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the regional director and shall direct a secret ballot of the employees or the appropriate action to be taken on impounded ballots of an election already conducted, dismiss the petition, affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

(k)(1) *Format of request.* All documents filed with the Board under the provisions of this section shall be filed in eight copies, double spaced, on 81/2- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Carbon copies of typewritten materials will not be accepted. Requests for review, including briefs in support thereof; statements in opposition thereto; and briefs on review shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the document is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page authorities cited.

(2) *Service of copies of request.* The party filing with the Board a request for review, a statement in opposition to a request for review, or a brief on review shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of such service shall be filed with the Board together with the document.

(3*) Extensions.* Requests for extensions of time to file requests for review, statements in opposition to a request for review, or briefs, as permitted by this section, shall be filed with the Board or the regional director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the regional director. A statement of such service shall be filed with the document.

■ 15. Revise § 102.69 to read as follows:

§ 102.69 Election procedure; tally of ballots; objections; certification by the regional director; requests for review of directions of elections; hearings; hearing officer reports on objections and challenges; exceptions to hearing officer reports; requests for review of regional director decisions in stipulated or directed elections.

(a) *Election procedure; tally; objections.* Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: *Provided, however,* That in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming any representation interest among the employees in the unit. A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit. When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the regional director an original and five copies of objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. A person filing objections by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile pursuant to

§ 102.114(f). The Regional Director will cause a copy of the objections to be served on each of the other parties to the proceeding. Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections.

(b) *Requests for review of directions of elections.* If the election has been conducted pursuant to § 102.67, any party may file a request for review of the decision and direction of election with the Board in Washington, DC. In the absence of election objections or potentially determinative challenges, the request for review of the decision and direction of election shall be filed within 14 days after the tally of ballots has been prepared. In a case involving election objections or potentially determinative challenges, the request for review shall be filed within 14 days after the regional director's decision on challenged ballots, on objections, or on both, and may be combined with a request for review of that decision as provided in paragraph (d)(3) of this section. *Provided, however,* That if the hearing on objections and determinative challenges has been consolidated with an unfair labor practice proceeding before an administrative law judge, the request for review of the decision and direction of election shall be filed within 14 days after issuance of the administrative law judge's decision. The procedures for such request for review shall be the same as set forth in § 102.67(c) through (g), and (k), insofar as applicable. If no request for review is filed, the decision and direction of election is final and shall have the same effect as if issued by the Board. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(c) *Certification in the absence of objections, determinative challenges and requests for review.* If no objections are filed within the time set forth in paragraph (a) of this section, if the challenged ballots are insufficient in number to affect the results of the election, if no runoff election is to be held pursuant to § 102.70, and if no request for review is filed pursuant to paragraph (b) of this section, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

(d)(1)(i) *Decisions without a hearing.* If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the regional director determines that the party's supporting evidence would not constitute grounds for overturning the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues, the regional director shall issue a decision disposing of objections and determinative challenges, and a certification of the results of the election, including certification of representative where appropriate.

(ii) *Notices of hearing.* If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the regional director determines that the party's supporting evidence could be grounds for overturning the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election and raise substantial and material factual issues, the regional director shall prepare and caused to be served on the parties a notice of hearing at a place and time fixed therein: *Provided, however,* that the regional director may consolidate the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge. In any proceeding wherein the election has been held pursuant to § 102.62(a) or (c) and the representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing, the administrative law judge shall, after issuing his decision, sever the representation case and transfer it to the regional director for further processing.

(iii) *Hearings; hearing officer reports; exceptions to regional director.* Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable, except that, upon the close of such hearing, the hearing officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 14 days from the date of issuance of such report, file with the regional director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the regional director. The regional director shall thereupon decide the matter upon the record or make other disposition of the case. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(2) *Regional director decisions in consent or full consent elections.* If the election has been held pursuant to § 102.62(a) or (c), the decision of the regional director shall be final and shall include a certification of the results of the election, including certification of representative where appropriate.

(3) *Requests for review of regional director decisions in stipulated or directed elections.* If the election has been held pursuant to §§ 102.62(b) or 102.67, the decision of the regional director shall include a certification of the results of the election, including certification of representative where appropriate. Within 14 days from the date of issuance of the regional director's decision on challenged ballots or on objections, or on both, any party may file with the Board in Washington, DC, a request for review of such decision which may be combined with a request for review of the regional director's decision to direct an election as provided in §§ 102.67(b) and 102.69(b). The procedures for post-election requests for review shall be the same as set forth in § 102.67(c) through (g), and (k), insofar as applicable. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding.

Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding. *Provided, however,* That in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to § 102.62(b) or § 102.67, the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision.

(e)(1)(i) *Record in case with hearing.* In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, any briefs or other legal memoranda submitted by the parties, any report on such objections and/or on challenged ballots, exceptions, the decision of the regional director, any requests for review, and the record previously made as defined in § 102.68. Materials other than those set out above shall not be a part of the record.

(ii) *Record in case with no hearing.* In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any decision on objections or on challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the regional director in his decision, any briefs or other legal memoranda submitted by the parties, any other motions, rulings or orders of the regional director, as well as any decision and direction of election and the record previously made as defined in § 102.68 Materials other than those set out above shall not be a part of the record, except as provided in paragraph (e)(3) of this section.

(2) Immediately upon issuance of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the regional director shall transmit to the Board the record of the proceeding as defined in paragraph (e)(1) of this section.

(3) In a proceeding pursuant to this section in which no hearing is held, a party filing a request for review of a regional director's decision on objections or challenges, or any opposition thereto, may support its submission to the Board by appending thereto copies of documentary evidence, including copies of any affidavits it has timely submitted to the regional director and which were not included in the decision. Documentary evidence so appended shall thereupon become part of the record in the proceeding. Failure to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent unfair labor proceeding.

(f) *Revised tally of ballots.* In any case under this section in which the regional director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 7 days after the revised tally of ballots has been made available, the regional director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

(g) *Format of filings with regional director.* All documents filed with the regional director under the provisions of this section shall be filed double spaced, on 8½ by 11-inch paper, and shall be printed or otherwise legibly duplicated. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the regional director by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(h) *Extensions of time.* Requests for extensions of time to file exceptions, requests for review, supporting briefs, or answering briefs, as permitted by this section, shall be filed with the Board or the regional director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the regional director. A statement of such service shall be filed with the document.

Subpart D—Procedure for Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

■ 16. Amend § 102.77 by revising paragraph (b) to read as follows:

§ 102.77 Investigation of petition by regional director; directed election.

* * * * *

(b) If after the investigation of such petition or any petition filed under subpart C of this part, and after the investigation of the charge filed pursuant to § 102.73, it appears to the regional director that an expedited election under section 8(b)(7)(C) of the Act is warranted, and that the policies of the Act would be effectuated thereby, he shall forthwith proceed to conduct an election by secret ballot of the employees in an appropriate unit, or make other disposition of the matter: *Provided, however,* That in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, he may issue and cause to be served on the parties, individuals, and labor organizations involved a notice of hearing before a hearing officer at a time and place fixed therein. In this event, the method of conducting the hearing and the procedure following, including transfer of the case to the Board, shall be governed insofar as applicable by §§ 102.63 through 102.69 inclusive.

Subpart E—Procedure for Referendum Under Section 9(e) of the Act

■ 17. Revise § 102.85 to read as follows:

§ 102.85 Investigation of petition by regional director; consent referendum; directed referendum.

Where a petition has been filed pursuant to § 102.83 and it appears to the regional director that the petitioner has made an appropriate showing, in such form as the regional director may determine, that 30 percent or more of the employees within a unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization desire to rescind the authority of such labor organization to make such an agreement, he shall proceed to conduct a secret ballot of the employees involved on the question whether they desire to rescind the authority of the labor organization to make such an agreement with their employer: *Provided, however,* That in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, he may issue and cause to be

served on the parties a notice of hearing before a hearing officer at a time and place fixed therein. The regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements of the balloting, but the parties may enter into an agreement, subject to the approval of the regional director, fixing such arrangements. In any such consent agreements, provision may be made for final determination of all questions arising with respect to the balloting by the regional director or, upon grant of a request for review, by the Board.

■ 18. Revise § 102.86 to read as follows:

§ 102.86 Hearing; posthearing procedure.

The method of conducting the hearing and the procedure following the hearing, including transfer of the case to the Board, shall be governed, insofar as applicable, by §§ 102.63 through 102.69 inclusive.

Signed in Washington, DC on December 16, 2011.

Mark Gaston Pearce,

Chairman.

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